

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

**HCT-00-CC-CS-0075-2013
ARISING FROM CIVIL SUIT NO 0020 OF 2013**

IVAN SAMUEL SEBADUKAPLAINTIFF/APPLICANT

VERSUS

WARID TELECOM LIMITEDRESPONDENT/ DEFENDANT

BEFORE: HON MR. JUSTICE W.M. MUSENE

RULING:

This was an application by chamber summons under section 33 of the Judicature Act, S. 98 of the Civil Procedure Act and O. 10 r. 12 & 24 of the Civil Procedure rules, it seeks order that:-

1. The respondent makes a discovery on oath of its financial records of Audited books of accounts for the financial years 2009/2010, 2010/2011 and 2011/ 2012.
2. That the Respondents make a discovery on oath of its financial records and in particular a statement of account of the monies it has earned on its “**Beerako**” Airtime Advance Credit service platform, and
3. That the Respondent makes a discovery of its financial records and specifically a statement of accounts of the monies it has earned from a “**Be millionaire**” SMS quiz promotion carried out between the dates of 11.3.2010 to 11.6. 2011 and the monies awarded to winners.
4. That the respondent makes a discovery on oath of a statement on accounts of the monies it has earned from the “**Win School Fees**” and all other like sales promotions and monies awarded to winners.

The application was supported by an affidavit of the applicant, Ivan Sebaduka, who under paragraph (3) the Respondent has established and offered services to the public in the form of airtime advance credit service platforms dubbed “**Beerako**” and illegal sales promotions dubbed “**be a millionaire; “win school fees”** and the like, out of which the respondent has illegally and unjustly enriched itself without control and contrary to the law and license granted by the Uganda communications commission.

The applicant further deponed under paragraph (4) of the affidavit that he has sued the Respondent for declaration to the effect and for orders that the respondent accounts for and refunds the public of the monies it has illegally earned and for a technical audit of the said platforms. Mr. Samuel Sebaduka also swore that in their defence, Warid Telecom Limited have chosen not to disclose fact and documents fundamental to the resolution of the main suit.

The Applicant was represented by Mr. Tendo Kabenge, while the Respondent, Warid Telecom was represented by Mr. John Bosco Mude and Mr Samuel Serwanga.

In an affidavit in reply, Mr. Paul Mwebesa, a Company Secretary in the Respondent company stated that the discovery is not necessary at this stage since the same documents referred to constitute the declarations sought by the Applicant in the main suit, and that the grant of an order of discovery would have the effect of disposing of the main suit. Both counsels for the Applicants and for the Respondents filed written submissions, to supplement the affidavits in reply and in support.

Counsel of the Applicant submitted that whereas the Respondent has filed a defence under which they claimed to be acting legally and earning monies within the law, that the respondent has not disclosed documents directly relevant to the main action, hence the application for disclosure of respondents audited books of accounts for the financial year mentioned. It was submitted that three conditions must be met in an application for discovery, notably existence of the document which the other party has not disclosed, and that the document related to the matter in issue in the case. Mr. Kabenge’s submissions were that the documents exist and that the

Applicant is not using discovery as a fishing expedition but he is a subscriber who has been exposed to the loss occasioned by the illegal actions of the defendant/Respondent.

He also added that the said records are necessary and relevant for this court to determine whether the charges to the subscribers are misinformed or discriminatory and preferential and whether the respondent pays taxes on the monies earned. He concluded that the production of documents would enable the case to be resolved with finality and to avoid multiplicity of suits.

In reply, counsel for the Respondent submitted that under paragraph 4(b) (c) and (f) of the plaint, the applicant seeks among other orders, the accountability of all income of the Respondent, the technical audit, which are, the same documents which the applicant is seeking in a discovery application. And that the premise of the Applicants case is that the respondent is carrying out the operations complained of in the contravention of its license granted by the Uganda Communication Commission, which was not correct.

The Respondent's submissions were that the same orders the Applicant is seeking can be granted after proving that the services rendered by the Respondent are illegal and/or contravenes its license and mandate. Counsel for the Respondent further submitted that for the court to grant the order of discovery at this stage would render the main suit nugatory as the Applicant would attain the same orders being sought in the main suit. They added that the documents sought for in the discovery for the Applicant to prove whether the promotion carried out by the Respondent contravenes the law and operated outside its license.

I have carefully considered all the submissions from both sides and studied the pleadings filed. For avoidance doubt, O. 10 r. 12 (i) provides:-

“12 (i) Any party , may without filing any affidavit, apply to the court for an order directing any other party tot the suit to make discovery on oath of the documents, which are or have been in his or her possession or power relating to any matter in question in the suit.”

Then under O.10 r. 12 (2), the court can grant the order of discovery if it is satisfied that it is necessary either for disposing of the suit fairly or for saving of costs. Under the paragraph 4 of the plaint, it is stated that the plaintiff's claim against the Defendant is for:-

(b) An order for a technical Audit of the Defendants Airtime Advance credit service to its subscribers dubbed "**Beerako**"

(c) An Order directing the Defendant to account for and refund all monies made by the defendant from its subscribers in contravention of its license issue under **Uganda Communications Act**.

In the present application for discovery, paragraph (1) That the Respondent makes a discovery on oath of its Financial records of its audited books of accounts for the Financial years 2009/2010, 2010/2011 and 2011/2012. According to this court, producing of the Audited books of account is the same as an order for a technical audit for the "**Beerako**" Airtime Advance Credit Scheme.

So what the Applicants are seeking for in the discovery is contained in their prayers in the main suit. That amounts to "**putting the cat before the mouse.**" I therefore agree with counsel for the Respondent that to grant an order of discovery at this stage would render the main suit nugatory. In the case of **Gale Vs Demman Picture Houses Ltd, (1930) I K B 588**, an application for discovery was considered. It was held that a plaintiff who issues a Writ must be taken to know what his case is. That if the merely issues a writ on the chance of making a case, then that is called a "fishing bill" to try and find out whether he has a case or not.

In view of the above holding, the application for discovery should not be used a fishing expedition to build ones case. I have read the case **John Kato Vs Muhlbour and another, Miscellaneous Applicant No. 175 of 2011 before my learned sister Judge, Hellen Obura, aoated** by Mr. Tendo Kabenge. My finding are that he circumstances of that case are distinguishable from the present one.

In that case, the application for discovery was made after filing of all pleadings and after the Joint Scheduling Memorandum was on record. In the present case, the scheduling of the main case has not yet taken place and the issues in contention have not been decided. Secondly, in

that case of John Kato (Supra), the discovery of the contract was relevant because if court decided to award the plaintiff some money, it was relevant for assessment of his claim of 10% of the contract sum. The other consideration in this case raised by counsel for the Respondent is that this application is based on the assumption that the Respondent's activities complained of, that is the promotions, and operations are in contravention of the license granted by Uganda Communications Commission. And yet have not reached that stage.

This court will determined whether the "Beerako" and "Be a millionaire" activities are in contravention of the law and license granted after hearing the main suit on the merits. And if court at the conclusion of the main suit find that the respondents have breached the law in their operations, then they be order to produce their financial records and statements of accounts of the monies earned from "Beerako Airtime Advance Credit, "Be a millionaire" SMS quiz promotion and "Win School Fees" promotions, for purposes of determining the amount to be refunded to the plaintiff/Applicant. That will be after they have lost the case in the event their activities complained of are unlawful or illegal. And the contention of the Respondent/Defendant in their Written Statement of Defence is that those operations complained of are lawful and have been authorized by the Uganda Communications Commission. This court cannot therefore pre-judge such services and contentious matters under the cover of discovery before hearing evidence or witnesses from both sides as is required under the laws of this country.

I therefore decline to allow the application which is hereby dismissed. Since the main case is still pending, I order that costs be in the cause.

Judge

27. 3. 2013 at 2.30 p.m.

Mr John Bosco Mudde for the Respondent

Applicant present

Tendo Kabenge for the applicant absent

Ojambo court Clerk present

Court: Ruling read out in chambers

Hon. Justice W. M. Musene

JUDGE