

THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO 76 OF 2016

(ARISING FROM H.C.C.S. NO. 78 OF 2016)

MIAO HUAXIAN}.....APPLICANT

VERSUS

1. CRANE BANK LTD}

2. NAMAGANDA LTD}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant applied for an injunction to restrain the Respondents/Defendants, their agents and (or) servants from evicting the Applicant from all the land comprised in Plot 47 LRV 2744 Folio 25 Nabugabo Road, Kampala till the hearing and final determination of HCCS 78/2016. The Applicant also seeks an order that she continues to enjoy quiet and peaceful possession of the suit premises till the hearing and final determination of HCCS 78/2016. Finally the Applicant seeks an order for costs of the application to be provided for.

Before the application could be heard on the merits, the first Respondents Counsel raised a preliminary objection to the application on the ground that the application is supported by an incurably defective affidavit and therefore the affidavit should be struck out and the application which is unsupported by affidavit should be dismissed with costs.

The Applicant's application is supported by the affidavit of the Applicant sworn to on 8 February 2016 before a Commissioner for oaths. The affidavit is in the English language. The application is further supported by a supplementary affidavit of the Applicant dated 10th of March 2016 and filed on court record on 11 March 2016. This was filed together with her affidavit in rejoinder to

the affidavit in reply of the first Respondents Head of Credit Mr S Ramachandran. The affidavit of Mr S Ramachandran had been filed on the 1st of March 2016.

At the hearing of the application, the Applicant was represented by Counsel John Musiime while first Respondent was represented by Counsel Earnest Sembatya and the second Respondent by Counsel Innocent Taremwa.

Counsel Earnest Sembatya submitted that the application is supported by an incurably defective affidavit and prayed that it is struck out and the application unsupported by affidavit evidence should be dismissed on that basis. He relied on the affidavit in reply of Ramachandran deposed on behalf of the first Respondent. In Paragraphs 15, 16, 17, and 18 thereof reference is made to H.C.C.S. No. 743 of 2015 **Miao vs. Crane Bank & Another**. In that suit the Applicant sought for declaration that the loan agreement between her and the first Respondent is null and void for want of compliance with the Illiterates Protection Act. She filed two applications namely HCMA 935 of 2015 and HCMA 936 of 2015. In the affidavits in support of those two applications which are attached as O1 and P1 to Ramachandran's affidavit in reply, she deposed that she is an illiterate person in the English language. In paragraph 13 of her affidavit marked as O1 she deposed that that she neither speaks, reads or understands the English language. In paragraph 14 she contends that this offends the Illiterates Protection Act. That position is reiterated in her affidavit attached as P2 to Ramachandran's affidavit. An affidavit is a statement on oath and as a matter of fact her deposition is translated.

On the other hand the first Respondents Counsel contended that the affidavit in support of the application under consideration in the objection does not comply with the illiterates Protection Act. Upon that issue being raised before the Registrar, the Applicant in the affidavit in reply deposed to and filed a supplementary affidavit in support with a translation certificate attached. This proves that it is her contention that she is an illiterate. Firstly the supplementary affidavit was served without leave of court. The issue is that a litigant cannot chose to represent herself as and when she chooses as an illiterate or literate according to the demands of the occasion.

The first Respondent's Counsel further submitted that an affidavit by a party who contends that she is illiterate and which does not comply with the Act is defective. Counsel relied on section 1 of the Illiterates Protection Act which defines a document to mean any print or writing capable of

being used in evidence. Under section 2 and 3 provision is made for verification of the signature of illiterates. Sections 2 and 3 of the Illiterates Protection Act are mandatory provisions. Failure to comply with these mandatory provisions would render the documents executed null and void. Section 4 of the Illiterates Protection Act creates an offence for failure to comply with the Act. The offence is committed by the writer or the witness of the document executed with an illiterate.

On the question of what the effect on the document itself is? The first Respondent's Counsel relied on the case of **Violate Nakiwala and 2 others vs. Ezekiel Rwekibira and Another HCCS 280 of 2006** in which Hon. Justice Andrew Bashaijja cited the case of **Tickens Francis and another vs. Electoral Commission and 2 other Election Petition No. 1 of 2012** (High court) where it was held that the requirements of the Illiterates Protection Act are mandatory and substantive law. In the premises the documents affected cannot be relied upon by anybody seeking to enforce a right. Counsel further submitted that the court cannot rely on the affidavit in support of this application. Lastly he relied on the case of **Kasala Growers Coop Society and another vs. Kalemera Edison SCCA No. 19 of 2010** and the ruling of Hon Mr. Justice Okello where he held that a distinction should be drawn between a defective affidavit and failure to comply with a statutory requirement. A defective affidavit is where for instance the deponent did not sign. Failure to comply with statutory requirement is where the statutory requirement is not complied with. The latter is fatal. Section 3 of the Illiterates Protection Act enjoins any person who writes a document on behalf of the illiterate person to write his or her full address. This implies that he or she was instructed to write the document and it fully reflects his or her instructions and he or she appears to have understood it. In that case the preliminary objection was upheld.

Finally the First Respondent's Counsel prayed that the court finds that the affidavit in support does not comply with the illiterate's protection Act yet evidence on oath shows that the Applicant contends that she is illiterate. In the premises he prayed that the affidavit is struck out and the application dismissed with costs.

In reply Counsel John Musiime, Counsel for the Applicant informed court that he had seven points in reply. Firstly the preliminary objection is on the interpretation of the Illiterates

Protection Act. The long title thereof shows that it is for the protection of illiterate persons. In section 1 (b) the Act defines an illiterate person to mean in relation to a document a person who is unable to read or interpret a document. There has to be a definite finding of fact that a person is an illiterate person for the court to be engaged on the issue. The issue of whether she is an illiterate person remains unresolved in HCCS NO 743 of 2015 which is pending before this court. The Applicant's Counsel submitted that if this court were to rule over this matter the Applicant must comply, there would be estoppels by record which would apply to prevent the court from holding her not to be an illiterate in the other pending suit. The rationale is that the court must be consistent. It cannot hold the Applicant is a literate person for purposes of one suit and not in another. The Applicant raises estoppels as a shield. In that suit the first Respondent averred that the Applicant routinely applies for loans in English so they should be consistent.

Secondly the Applicant's Counsel submitted that this is a matter of interpretation and the literal rule holds. Where the words used are clear and unambiguous they should be given their ordinary and clear meaning. The thrust of the preliminary objection is in section 3 of the Illiterates Protection Act. It provides that the person who writes must write his or her name and address. Those are the requirements. The requirement is on the drawer of the document. Secondly the writer is required to write his or her true and full name. Thirdly they write the true and full address and nothing more. The statute makes a presumption that the writer was instructed to write the document. In page 8 of affidavit, in support it is written that it is drawn and filed by Kampala Associated Advocates. Counsel for the Applicant submitted that the said firm of Advocates is a legal person under the Advocates Act. They wrote their full address and unless the argument is that a law firm is not a legal person the Act was fully complied with. Lastly he contended that the requirement is on the drawer and not on the 3rd party. The documents attached to the affidavit in reply of Ramachandran's as O1 and P1 has translations by 3rd parties. Counsel for the Respondent submitted that these documents complied with the Act. However the translations are not by the drawer of the document when the obligation imposed by statute is on the drawer. Words should not be read into a statute.

Thirdly the Applicant's Counsel submitted in the alternative that the section relied on in the preliminary objection does not apply to pleadings drawn by a law firm. The text of section 3 makes reference to 'any person' in the singular. This excludes a law firm. It does not apply to

affidavits drawn by a law firm. The law presumes that if a law firm is properly licensed it would ensure that the illiterate is protected. In the case of **Kasala Growers co-operative society vs. Kakooza (supra)**, the facts referred to an affidavit drawn by a lay person for another lay person and the provisions of the illiterates persons Act applied. Counsel quoted that last paragraph of ruling to the effect that the affidavit was drawn by another lay person who did not comply with section 3 of the Illiterates Protection Act. The case of Nakiwala vs. Ezekiel (supra) concerned documents which were not affidavits. They concerned a power of attorney and a deed of surrender drawn by an Advocate. The Advocate witnessed the document himself and in his own name. In the premises the Applicant's Counsel submitted that these authorities do not apply to the matter before the court.

Fourthly the Applicant's Counsel submitted that the Illiterates Protection Act was enacted for the protection of illiterates. The provision was not designed to stop the illiterate from coming to court. The illiterate is not complaining about the affidavit. The Act is for her protection and not for the benefit of the Respondent. The mischief was to help the illiterate and not close them out.

Fifthly the Applicant's Counsel submitted that the Applicant filed a supplementary affidavit in support and an affidavit in rejoinder. On the submission that the affidavit should have been filed with leave he contended that if the court finds the affidavit defective, it is cured by the supplementary affidavit. Leave can be sought after the fact. The supplementary affidavit and affidavit in rejoinder give background information which cures the defect. The lack of translation of the first affidavit was a result of advice of the advocates to the Applicant. She was held as an illiterate person and the Registrar his worship Thaddeus Opesen required her to have a translator. At the very least it is mistake of Counsel which should not be visited on the Applicant.

Sixthly the Applicant's Counsel submitted that the court can decide the matter in any case based on the pleadings before it. He relied on the Court of Appeal decision which he supplied later. The case of **Richard Henry Kaijuka vs. Kananura Andrew Kamusiime CACA 42 of 2014** where it was held that a court of law can only decide a matter based on pleadings before it. It cannot scout all other cases in courts of the Applicant. He prayed that the objection to the affidavit is overruled with costs to the Applicant.

In reply the first Respondent's Counsel Mr. Sembatya Earnest submitted that his learned friend made reference to a supplementary affidavit filed to cure the defect in affidavit in support. The defect is non compliance with the Illiterates Protection Act. Clearly the Applicant acknowledges the defect and it is clear that the Applicant has not complied with the Illiterates Protection Act.

Secondly his learned friend had submitted that advice was rendered by his firm to the Applicant and she should not be penalised for that. What is in issue is evidence and an affidavit is evidence on oath. An oath should count for something. Once advice is rendered one has two options. The person advised can either accept it or decline to follow the advice. In this case the Applicant accepted the advice and cannot distance herself from it. Further the issue was raised by the Applicant's Counsel from the bar but is not based on affidavit evidence or documents before the court.

On whether the defect in the affidavit was cured by the supplementary affidavit, the Applicant having conceded that she was non compliant with the law, there is nothing to supplement. Thirdly the Applicant's Counsel had submitted that the firm of Kampala Associates Advocates were the drawers of the affidavit which complies with the Illiterates Protection Act. Advocates are licensed to provide legal services and not translation services. The intention of the Illiterates Protection Act is to get persons fully conversant with the language to be able to draw the document and read it over to the illiterate for the person to confirm what she said. It would have been different if one of the colleagues indicated that they were literate in Cantonese or Mandarin and that they read the affidavit over to the Applicant and she understood it. Concerning the written address of the advocates, this is a requirement under the Civil Procedure Rules and section 67 of the Advocates Act for any documents drawn by an advocate to indicate which firm did it. It would have been sufficient if only whoever the drawer was went ahead and indicated that they had read the document to the Applicant and in turn she would have indicated that it reflected her instructions. The drawer should have certified it.

The Applicants Counsel submitted that the provisions of the Illiterates Protection Act do not apply to advocates but this is far from the truth. In the case of **Violet Nakiwala and others vs. Ezekiel HCCS No. 280 of 2006**, the document was not only drawn by but also witnessed by Advocates. In case of a firm of advocates, all the partners under that entity would have had to

endorse the document but an interpreter can only be one person who should indicate on the document that they read it over to the illiterate.

In the premises the first Respondent's Counsel reiterated submissions that the affidavit is struck off the record and no supplementary affidavit would suffice and the application should be dismissed with costs.

Ruling

The first Respondent's Counsel objected to the affidavit in support of the Applicant's application on the ground that it offends the provisions of the Illiterates Protection Act Cap 78 laws of Uganda. The Applicant's application for a temporary injunction against the Respondents, their agents, and servants from evicting her from the suit premises described in the application is supported by the affidavit of the Applicant Miao Huaxian written in the English language. It was sworn to at Kampala on 8 February 2016 and witnessed by a Commissioner for oaths. The affidavit is drawn and filed by Kampala Associated Advocates of KAA House, Plot 41, Nakasero Road, and P.O. Box 9566, Kampala.

The thrust of the objection is that the application is supported by an incurably defective affidavit because in prior pleadings namely **High Court Civil Suit Number 743 of 2015 between Miao Huaxian vs. Crane Bank Ltd and Another**, the Applicant seeks a declaration that the lending/borrowing transaction which led to a claim against her for enforcement of the mortgage is null and void for want of compliance with the Illiterates Protection Act cap 78 laws of Uganda. Furthermore in two applications in the prior suit namely in **High Court Miscellaneous Application Number 935 of 2015** and **High Court Miscellaneous Application Number 936 of 2015** she deposed that she does not speak, read or understand the English language. The affidavits in those applications are statements on oath and were translated but in this application her affidavit is not.

At the commencement of the hearing, I wanted to understand how the court would make any pronouncement on the question of whether the Applicant is an illiterate person without having a bearing on the suit. This is because the question of whether she is an illiterate person is a ground for the suit to declare the transaction illegal, null and void and for the Applicant to avoid the contract in **High Court Civil Suit Number 743 of 2015 between the Miao Huaxian vs. Crane**

Bank Ltd and Another. The first Respondent's Counsel's reply to the concern was that it is the Applicant's assertion that she is illiterate and therefore she can be taken at her own word on oath in the previous affidavits on record.

I do not agree. A point of law should not be taken for academic purposes but should be used to resolve the dispute between the parties. The question of whether the Applicant is an illiterate person is a question of fact and which fact ought to be proved to the satisfaction of the court. That fact ought not to be ruled upon without evidence being adduced to prove or disprove it. The court should not assume the fact. A point of law which ordinarily has the potential of disposing of the suit cannot depend on contested facts or hypothetical facts. There is in fact no pleading to support the point of law except in previous pleadings and in the affidavit in reply in this application. The point of law with such a drastic effect on the rights of parties and concerning property worth billions of Uganda shillings should not be decided on assumptions of fact but should be premised on facts which are not in dispute or facts which have been proved.

Points of law may be raised by the pleadings of any of the parties under Order 6 rule 28 of the Civil Procedure Rules which provides that:

"Any party shall be entitled to raise by his or her pleading any point of law, and any point so raised shall be disposed of by the court at or after the hearing; except that by consent of the parties, or by order of the court on the application of either party, a point of law may be set down for hearing and disposed off at any time before the hearing."

The question is whether the issue whether the Applicant is illiterate in the English language is contentious anymore. The first Respondent's Counsel relies on the affidavit of S. Ramachandran, the Head of Credit of the first Respondent who states that he is familiar with the facts of the dispute. He deposes that the Applicant is a customer of the first Respondent bank and overtime the Applicant applied for and had been granted various loan/overdraft facilities as illustrated in paragraph 3 of his deposition. In paragraph 15 of the affidavit in opposition to the application Mr Ramachandran deposes that on 9 November 2015, the Applicant filed in this court, **Civil Suit Number 723 of 2015 Miao Huaxian vs. Crane Bank Ltd and another** alleging that the loan agreement and the mortgage deeds were, void and unenforceable for being in contravention of the Illiterates Protection Act because she neither understood nor spoke the English language

which was used in those documents. Secondly in paragraph 16 he deposes that the Applicant filed an application for injunction namely application number 935 of 2016. He attached copies of the application together with the affidavit in support thereto. Thirdly in paragraph 17 he deposes that the Applicant applied for and obtained an interim order in Miscellaneous Application Number 936 of 2015 which was granted restraining the bank from disposing of the securities.

Mr Ramachandran does not admit anywhere in his affidavit that the Applicant is an illiterate person.

The objection of the first Respondent's Counsel could amount to a concession from the bar that the Applicant being an illiterate person did not comply with the Illiterates Protection Act Cap 78 laws of Uganda. Points of law have to be decided on the basis of facts agreed or not in dispute. This was the holding of the East African Court of Appeal sitting at Nairobi in the case of **NAS Airport Services Limited v The Attorney-General of Kenya [1959] 1 EA 53** where the Court of Appeal of Kenya interpreted the equivalent of rule 28 of the Ugandan Civil Procedure Rules and Windham JA held that:

“This rule reproduces in all essentials the English O. 25, r. 2 of the Rules of the Supreme Court, as it stood before its amendment in 1958. Its general object and scope are summarized in the following words by Romer, L.J., in *Everett v. Ribbands* (4), [1952] 2 Q.B. 198 at p. 206:

“I think where you have a point of law which, if decided in one way, is going to be decisive of litigation, and then advantage ought to be taken of the facilities afforded by the Rules of Court to have it disposed of at the close of pleadings or very shortly after the close of pleadings.”

Clearly the object of the rule is expedition. But to achieve that end the point of law must be one which can be decided fairly and squarely, one way or the other, on facts agreed or not in issue on the pleadings, and not one which will not arise if some fact or facts in issue should be proved; for in such a case the short-cut, as is so often the way with short-cuts, would prove longer in the end.”

The court can only rule on the point of law where the fact of whether the Applicant is an illiterate person is established and not when it is to be proved or when it is in controversy. The authorities relied upon by both Counsels, which law is not in dispute are to the effect that an illiterate person cannot own the contents of documents when it is not shown that the contents were explained to him or her and that he or she understood them. In the case of **Violet Nakiwala, Sondolo James and Rwakibwende Francis vs. Ezekiel Rwekibira and Joyce Kaihagwe Kwekibira HCCS No. 280 of 2006** Honourable Justice Bashaija K Andrew considered the provisions of section 3 of the Illiterates Protection Act. The question is whether such a document is admissible in evidence.

Before concluding the matter I have carefully considered the interpretation of the word "document" under section 1 (a) of the Illiterates Protection Act Cap 78 laws of Uganda. It provides that the word:

"document" means any print or writing *capable of being used as evidence of any fact or thing as against the person* by, for or at the request, or on behalf or in the name of whom the same purports to be written or signed in anyway;" (emphasis added)

The word "document" is used under sections 2, 3, 4, and 5 of the Illiterates Protection Act has the object of the enactment. In other words it is a document capable of being used as evidence of a fact or thing against the person of the illiterate. Is the affidavit a document that is sought to be used against the illiterate person?

The question of whether someone is an illiterate person has such a profound effect on contracts and undertakings that it ought not to be decided without establishing the matter of fact.

For the reasons given above, the issue is stayed pending determination of the question of whether the Applicant Miao Huaxian is an illiterate person in the English language. Under order 15 rule 2 of the Civil Procedure Rules where issues both of law and fact arise in the same suit, and the court is of the opinion that the case or any part of it may be disposed of on issues of law only, it shall try those issues first and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

The issue of law cannot be tried without settlement of issues of fact. The problem encountered in having the preliminary point of objection considered at this stage is that it requires a conclusion of the matter yet it has impact on the rights of the parties. At the same time the application for a temporary injunction is urgent and ought to be determined first. For that reason the question of whether the Applicant is an illiterate person in the English language ought to be and shall be tried preliminarily in light of the Applicant's application as well as the preliminary points of law that have been raised. Thereafter the point of law can be disposed of upon evidence having been adduced in the matter. The court shall hear evidence on the matter forthwith before concluding the application and the point of law raised.

Ordinarily under Order 19 rule 2 of the Civil Procedure Rules, the court may at the instance of either party order the attendance of a deponent for his or her cross examination on the affidavit. In this application however none of the parties have applied for cross examination of the deponent. Exercising the inherent powers of court under section 98 of the Civil Procedure Act to make such orders as are necessary for achieving the ends of justice, and for there to be progress in the matter and for the application to be resolved, the Applicant shall adduce evidence on the question of her literacy or illiteracy in English and the Respondent shall likewise adduce any evidence necessary for the issue to be resolved. One cannot blow hot and cold at the same time. One cannot have his cake and eat it. Let the issue of the Applicants literacy in English first be determined then all other matters can be considered thereafter. The application shall be fixed for hearing to adduce evidence on the issue.

Ruling delivered on the 15th of April 2016 in open court

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Counsel Innocent Taremwa Counsel for the second Respondent

Counsel Bwogi Kalibala holding brief for Earnest Sembatya for the first Respondent

Counsel John Bulungu appears for the Applicant

The Applicant Miao Huaxian is in court

Secondly Respondents official not in court

Alan Ongima Legal Officer of Crane Bank in court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

15th April 2016

Court

This application shall be heard on the 5th of May 2016 at 2.30 pm when the applicant and Mr. Ramachandran may adduce evidence and be cross examined on the issue disclosed in the ruling. In the meantime the status quo shall be maintained pending the hearing and final determination of this Application.

Christopher Madrama Izama

Judge

15th April 2016