

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

MISCELLANEOUS APPLICATION NO 73 OF 2017

ARISING FROM CIVIL SUIT NO 20 OF 2017

- 1. NATIONAL RESISTANCE MOVEMENT}**
- 2. JUSTINE KASULE LUMUMBA}.....APPLICANTS**

VERSUS

- 1. NBS TELEVISION LTD}**
- 2. SALAAM TELEVISION}.....RESPONDENT**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

This ruling arises from an application by the Applicants for unconditional leave to appear and defend Civil Suit No. 20 of 2017 and for costs to be provided for.

The grounds of the application are:

The Applicants/defendants are not indebted to the Respondents as alleged in the plaint or at all. Secondly, the Applicants were not party to the contracts between the Respondents/plaintiffs and the so called “NRM National Task Force”. Thirdly, the 2nd Applicant cannot in any event be liable for the corporate and commercial contracts of any corporate body or association without piercing the veil of incorporation which cannot be done in a summary suit. Fourthly, there are triable issues of law and fact that give the Applicants/defendants an absolute defence to the suit. Fifthly the Applicants have a good defence to the suit. Lastly the Applicants aver that it is in the best interests of justice that the Applicants/defendants be granted unconditional leave to appear and defend the suit.

The application is supported by the affidavit of **Justine Kasule Lumumba** the Secretary General of National Resistance Movement who deposed as follows:

She had read and understood the summary suit, Civil Suit NO. 20 of 2017 and she is not aware of the contract marked as annexure “A” to the affidavit of Kintu Joseph filed in support of the summary plaint. She knows that it is not a contract between the 1st Applicant and the Respondents. On the basis of the advice of her lawyers Messrs Karuhanga, Kasajja and Company Advocates, she deposed that even if it were to be a contract between the parties, the veil of

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incorporation cannot be lifted in a summary suit and therefore she cannot be added in her personal capacity to the suit. She did not execute the contract as alleged and is not aware of the contract and she did not sign it nor did she participate in the execution or alleged performance. The summary suit does not disclose any cause of action against her individually or as alleged or at all.

In further support of the application **Oscar Kihika** the Director Legal Services of National Resistance Movement deposed to the contents of an affidavit in which he states as follows:

He had perused annexure “A” to the affidavit of Kintu Joseph in support of the summary suit and the alleged contract was entered into by a group calling itself the ‘NRM National Risk Force’ and the Respondents. There is no organ or structure in the NRM party or an office in the NRM party known as the ‘NRM National Task Force’. The NRM is a body corporate established by law with capacity to contract, to sue and be sued. NRM party itself must contract and cannot be bound by contracts made by individuals who are not part of the party structure. The organs of the NRM party are the policy organs, administrative organs, special organs and caucuses. Even the party organs cannot contract on behalf of the party as that is the duty of the National Secretariat. The National Secretariat comprises of the Secretary General, Deputy Secretary General, National Treasurer, Deputy National Treasurer, Director of Finance and Administration, Director for mobilization and recruitment and Cadre Development, Director for Legal Services and Director for information, Publicity and Public Relations. There are many volunteers who work for the good of the political vision of NRM and some of them use the abbreviation ‘NRM’ in their organizational names and can neither bind the party nor act on behalf of the party or even make policy pronouncements on behalf of the party. The 1st Applicant was never party to the contract in issue and did not authorize any person through any organ to enter into the contract and the contract is not signed by any of the staff of the NRM.

The Respondents are fully aware of the NRM structure having covered the amendment of the constitution of the party, the delegate’s conference, the appointment of party officials and having used their channel to inform the public of the NRM structures.

The Applicants have a good defence to the suit as averred in the draft written statement of defence. It is in the best interest of justice that the Applicants/defendants be granted unconditional leave to appear and defend the suit.

In reply **Kintu Joseph** the Marketing Manager of the 1st Respondent deposed to two affidavits in reply to the 1st and 2nd Applicant’s affidavits and the affidavits contain more or less the same grounds and facts. The deposition is as follows:

Kintu Joseph is well versed with all the facts and particulars pertaining to the advertising contracts between the Applicants and the Respondents. The Applicants are highly indebted to the Respondents to a tune of Uganda shillings 190,000,000/= the defendants herein having paid

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Uganda shillings 205,000,000/= for the services contracted. The Applicants were party to the contract between the Respondents/plaintiffs and the Applicants/defendants. The wording ‘NRM National Task Force’ is manifestly used to denote and symbolize the event towards which the advertisements were made. He was advised by his lawyers that the 2nd Applicant being a Secretary General is responsible and liable for the general day to day activities benefiting the 1st Applicant and since all her activities emanate from and run through her office and there is no need to pierce the corporate veil since she is being sued in her capacity as the office bearer. The lawyers also advised him that the Applicants’ application does not disclose any plausible defence to the plaintiff’s claim in the plaint or triable issues and the defences raised in the application are intended to delay justice and waste court’s time.

The Applicant’s application ought to be dismissed since the Applicants have failed to prove that they have plausible defences to the plaintiff’s claim in the plaint.

The Applicants should be denied unconditional leave to appear and defend the suit “and where deemed the Applicants be granted leave to appear and defend the suit”.

At the hearing of the Application, **Counsel Ellison Karuhanga** represented the Applicants while the Respondents were not represented. The Applicants filed written submissions but the Respondents did not. When the application came for hearing on the 17th of May 2017, Counsel Ellison Karuhanga appeared for the Applicant and relied on the affidavit of Nagasha Ruth which proved that the notice of motion commencing this application was served on Messrs Nsamba & Co. Advocates on the 16th of March 2017 and they acknowledged service. They said advocates also drafted the affidavit in reply further confirming that they had been served. The notice of motion on which they acknowledged service clearly fixed the motion for hearing on the 17th of May 2017 at 9.00 am. The Respondents lawyers were absent when the suit came for hearing and a scheduled of filing written submissions was given for both parties to address court and the Applicant was required to serve the Respondents advocates with written submissions and the schedule for filing submissions directed on the 17th of May 2017. By the time of this ruling no submissions had been received from the Respondents and I see no prejudice occasioned to the Respondents if this ruling is made without their written submissions in the circumstances stated below.

The Applicant’s Counsel submitted that the application is brought under **Order 36 Rules 3 and 4 of the Civil Procedure Rules** and is for unconditional leave to appear and defend Civil Suit No. 20 of 2017 and for costs. Three issues were raised namely:

1. Whether the Respondent’s affidavit in reply is time barred?
2. Whether the Applicant’s defence raises triable issues of fact or law?
3. What remedies are available to the parties?

In resolution of issue one on whether the Respondent's affidavit in reply is time barred. Counsel submitted that the affidavit in reply by the Respondent was filed out of time and without leave of court to in violation of **Order 12 Rule3 (2) of the CPR** which requires a reply to the application by the opposite party upon being served to be filed within fifteen days from the date of service of the application and to be served on the Applicant within fifteen days from the date of filing of the reply. In **The Ramgarhia Sikh Society & Others vs. the Ramgarhia Education Society Limited & Others HCMA No. 352 of 2015**, Hon. Justice Stephen Musota held that a reply to an application must be filed within 15 days from the date of service of the application. Failure to file that affidavit in reply within 15 days puts the reply out of time prescribed by the rules. Once a party is out of time, he or she must seek leave of court to file the affidavits in reply outside the prescribed time. In the circumstances the Respondents' affidavit in reply ought to be struck off the court record for being filed out of time. This would render the Applicants application unopposed and as such should be allowed and the Applicants be granted unconditional leave to appear and defend the suit.

In resolution of issue two on whether the Applicant's defence raises triable issues of fact or law, Counsel submitted that the Applicants have attached a written statement of defence the gist of which is that the Applicants are not indebted to the Respondents as alleged or at all and the defence raises triable issues of fact and law. In an application for leave to appear and defend the Applicant has to show that he has a good defence to the suit according to the case of **Geoffrey Gatete & Angela Maria Nakigonya vs. William Kyobe S.C.C.A. No. 5 of 2005** where Justice Mulenga JSC held that in an application for leave to appear and defend a summary suit, the court is not required to determine the merits of the suit. The purpose of the application is not to prove the Applicant's defence to the suit but to ask for opportunity to prove it through a trial. What the court has to determine is whether the defendant has shown good cause to be given leave to defend the suit.

With regard to the facts, the advertising contract on which the Respondent's claim is based is between the Respondents and a group which calls itself the 'NRM National Task Force 2016' and is signed by one Herbert on behalf of the said 'NRM National Task Force 2016'. This is not clear if this is an incorporated organisation; a loose association or an unregistered partnership. What is clear is that this is not an organ or body of the 1st Applicant. Its trite law that a party can only be sued on a contract to which it is privy. Counsel relied on the Supreme Court case of **NSSF vs. Alcon International Limited, SCCA No. 15 of 2009** where the Supreme Court inter alia both parties to be aware of the party they are contracting with and the principle upholds the doctrine of the privity of contract. The doctrine is that 'a contract cannot confer rights or impose obligations on strangers to it.'

The Applicant's Counsel submitted that the case of the Applicants is that they are strangers to this contract as it does not purport to be between NRM and NBS TV or AZAM TV. It was with a

clearly named and defined organisation “the NRM National Task Force 2016” and the identity of this group and its relationship with the Applicants which is denied has not even been established in the plaint.

The court should not condemn in a summary manner a party who is a stranger to the contract on which the claim is itself premised as this would offend the timeless principle of privity of contract. The Respondents aver that NRM National Task Force simply symbolizes the event to which the advertisements were made. It’s not clear how the Respondent’s signed contracts with an event called a “Task Force” and the Respondent’s claim is one that cannot be determined summarily.

Counsel submitted that the Respondents have even named as a party to the action the Secretary General of the 1st Applicant. The 2nd Applicant is not even party to the contract as she did not sign it. She is being made vicariously liable for contracts entered into by 3rd parties. Had the contract been executed with the 1st Applicant (which is denied) it certainly would not have made the 2nd Applicant personally liable for the commercial dealings of the 1st Applicant. In the instant case, the 2nd Applicant completely denied knowledge of the transaction.

Furthermore, section 6 (3) of the **Political Parties and Organisation Act, 2005** which provides that apolitical party or organisation registered under the Act shall be a body corporate and shall have perpetual succession and shall sue or be sued in its corporate name. Counsel further relied on the definition of a corporation in the **Black’s Law Dictionary 7th Edition at page 341** to mean a group or association of persons established in accordance with legal rules with a legal personality distinct from the natural persons who make it up, exists indefinitely apart from them and has legal powers that its constitution gives it and is called a ‘body corporate’. Further authorities cited are **Namusoke vs. Electoral Commission Election Petition No. 004 of 2011** and **Salmon vs. Salmon & Co. [1897] AC 22 (HL)**.

There can be no suit against the 2nd Applicant as an individual or even as an office bearer. She is entitled to be given an opportunity to present this defence unconditionally. Secondly, the Applicants have a good and plausible defence that they have stated with sufficient particularity and he prayed that court be pleased to allow this application with costs to the Applicants.

Ruling

I have carefully considered the written submission of the Applicant and the first issue relates to the affidavit in reply of Kintu Joseph filed on court record on the 5th of May 2017. The issue is whether the affidavit was filed out of time without leave and should be disregarded. According to the affidavit of Nagasha Ruth of Messrs Kampala Associated Advocates the Applicant’s notice of motion was served on the Plaintiff/Respondent lawyers Messrs Nsamba & Co Advocates on the 15th March, 2017. Under Order 12 rule 3 (2) a reply to an interlocutory application shall be filed within 15 days of service of the application on the Respondent.

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In this case the affidavit in reply to the application was filed on the 5th of May 2017 and clearly out of time. No application for leave to file the reply out of time was made and the Respondent did not even appear by Counsel to argue the application neither did the Respondents file written arguments as directed by the court.

Where the Respondent appears ordinarily extension of time would be granted under Order 51 rule 6 of the Civil Procedure Rules provided costs are borne by the Respondent. Since no such application has been made, the affidavit in reply need not be taken into account. In any case the last paragraph of the affidavit in reply in any case deposes that if the court deems it fit leave can be granted to the Applicants to file a defence. The Respondent left the matter in the hands of the court. In the case of **Sengendo vs. Attorney-General [1972] 1 EA 140** Phadke J cited judicial precedence on the issue of failure to file a defence namely in the case of **Kanji Devji vs. Damodar Jinabhai & Co. (1934) 1 E.A.C.A. 87** the East African Court of Appeal held that a defendant who fails to file a defence puts himself out of court and no longer has any locus standi and cannot be heard. The doctrine would apply to a Respondent who files a reply out of time and does not seek leave of court to validate the reply through extension of time because the affidavit cannot be considered and it is as if the Respondent filed no reply.

On the merits of the application the practice is that an Applicant who files an application for leave to defend a summary suit must disclose through the application and affidavit in support that he or she has a plausible defence to the claim in the summary suit and that the action is not frivolous or vexatious. Under Order 36 rule 3 (1) of the Civil Procedure Rules, a Defendant cannot be heard in defence except after applying for and obtaining leave of court to do so. The jurisdiction to refuse leave should be exercised in apparent cases where the Applicant obviously has no plausible defence to the action. This was stated Parker L.J in **Home and Overseas Insurance Co Ltd vs. Mentor Insurance Co (UK) Ltd (In Liquidation) [1989] 3 All ER 74 at 77** when he said:

“If the Defendant’s only suggested defence is a point of law and the court can see at once that the point is misconceived the Plaintiff is entitled to judgment. If at first sight the point appears to be arguable but with a relatively short argument can be shown to be plainly unsustainable the Plaintiff is also entitled to judgment. But Ord 14 proceedings should not in my view be allowed to become a means for obtaining, in effect, an immediate trial of an action, which will be the case if the court lends itself to determining on Ord 14 applications points of law which may take hours or even days and the citation of many authorities before the court is in a position to arrive at a final decision.”

The determination of the court is made on the basis of affidavit evidence together with any documentary proof attached. Where a point of law advanced as a proposed defence would, if it succeeds, have the effect of being an effective defence against the suit if leave is granted,

unconditional leave should be granted on the prima facie implications of the point of law and not on the merits.

According to **Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice 22nd Edition** at pages 75 – 76 whenever a genuine defence, either in fact or law, sufficiently appears, the Defendant is entitled to unconditional leave to defend. The Defendant is not bound to show a good defence on the merits. The defence should be made in good faith and must be stated with sufficient particularity, as appear to be genuine. In the case of **Zola and another vs. Ralli Brothers Limited and another [1969] 1 EA 691** the Court of Appeal of East Africa sitting at Nairobi and in the judgment of Sir Charles Newbold P at page 694 held that summary procedure is intended to enable:

“...a plaintiff with a liquidated claim, to which there is clearly no good defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the delaying tactics of the defendant. If the judge to whom the application is made considers that there is any reasonable ground of defence to the claim the plaintiff is not entitled to summary judgment. ... Normally a defendant who wishes to resist the entry of summary judgment should place evidence by way of affidavit before the judge showing some reasonable ground of defence.

See also **Souza Figuerido & Co Ltd versus Moorings Hotel Co Ltd (1959) EA 426**. The main matter for determination is therefore whether the application of the Applicants discloses a reasonable defence.

There are two plausible defences advanced by the Applicants in this application. The first is that the Respondent alleges that they entered into a contract with a client called ‘NRM National Task Force 2016’. The defence is that the first Defendant is a registered Political Party and under section 6 (3) of the Political Parties and Organisations Act 2005 it is a body corporate and can sue or be sued. Section 6 (3) (supra) inter alia that:

“A political party or organisation registered under this Act shall be a body corporate and shall have perpetual succession and may sue and be sued in its corporate name....”

It is a contention that the contract ought to be executed in the name of the Political Party to make the first Applicant liable. Secondly it has to be made by the body corporate and not a non entity called ‘NRM National Task Force 2016’. The averments and evidence disclose, on the face of it, a plausible defence which is not frivolous or vexatious defence and therefore ought to be tried on the merits. At this stage the defence need not be considered on its merits.

The second defence is that the second Applicant has been sued in her personal capacity when she has not executed any contract with anybody as alleged in the plaintiff. It is also a contention that

she is not vicariously and personally liable and that she cannot be sued as a representative of the political party even in her Capacity as Secretary General.

The two above main defences are arguable and not frivolous or vexatious. If they succeed, they present a complete legal defence to the claim in the plaint which is for payment of Uganda shillings 190,000,000/= and which claim is grounded on alleged breach of contract. The alleged contract is for advertising campaign slots for the first Applicant's Presidential Campaign. The Respondent will have an opportunity to present a suit on the merits if the defendant/Applicants are given leave to defend the suit.

In the premises the Applicant has unconditional leave to file a defence and shall file a written statement of defence within 15 days from the date of this order. The costs of this application shall abide the outcome of the main suit.

Ruling signed by me for delivery on the 6th of June 2017 by the Registrar

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Thaddeus Opesen

Registrar

6th June 2017