

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]

M.A No. 49 of 2021

[Arising out of Civil Suit No. 699 of 2020]

COMFOAM (U) LTD :::::::::::::::::::::::::::::::::::APPLICANT

VERSUS

ROYIKEMS INDUSTRIES LIMITED:::::::::::::::::::::::::RESPONDENT

BEFORE: HON. JUSTICE DUNCAN GASWAGA

RULING

- [1] This is a ruling on an oral application brought under Order 19 rules 1 & 2 CPR by the respondent to have the General Manager of the applicant Company cross examined on his affidavit in support of the application.
- [2] The grounds of this application were that the respondent needed to cross examine the deponent of the affidavit in support of the application specifically on paragraphs 3, 4-7 of the affidavit in support of the application. That this court is given discretion under Order 19 rule 1 & 2 to grant such an application as this.
- [3] Counsel for the applicant opposed the application stating that the respondent had shown no sufficient reasons as to why they needed to cross examine the applicant on its affidavit. That the said Order did not necessarily mandate the court to exercise discretion in the said matter

but that the applicant would have to show sufficient cause for the same. Counsel further stated that no clear reasons had been given as to why these paragraphs must be cross examined upon. See Henry Tumukunde Vs Attorney General & Anor, M.A No. 489 of 2020. It was Counsel's assertion that this is an application for amendment of pleadings and that it would be a rare situation for court to grant such an application yet the applicant would be coming to this court to testify. Counsel concluded by praying that court declines this application and proceed with the case on its merits.

[4] In a brief rejoinder, Counsel for the respondent stated that Order 19 rule 2 envisaged two scenarios. Either a deponent of an affidavit is called upon to be cross examined or not. That the case of Kamba Saleh is distinguishable from the facts at hand. Counsel prayed that the application be granted.

[5] Order 19 rule 1 & 2 state thus;

1. Power to order any point to be proved by affidavit.

Any court may at any time for sufficient reason order that any particular fact may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable; except that where it appears to the court that either party bonafide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorizing the evidence of that witness to be given by affidavit.

2. Power to order attendance of deponent for cross examination.

(1) Upon any application evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross examination of the deponent.

(2) The attendance shall be in court, unless the deponent is exempted from personal appearance in court or the court otherwise directs.

[6] In the case of **Lt. Gen.(Rtd) Henry Tumukunde Vs Attorney General and Anor (supra)**, Ssekaana, J, held that;

“The main basis for cross examination will arise, if a conflict in the evidence is found, the Judge may exercise their discretion to allow cross examination depending on particular factors of each case;

- (i) the importance of the issue;*
- (ii) whether the cross examination will unduly delay the trial or expeditious disposal;*
- (iii) whether the cross examination is likely to elucidate the relevant issues in controversy.*

It was further held that; “the applicant for cross examination must demonstrate that the cross examination will assist in resolving the issue before the court and that it will not result in any injustice or delay of the trial”.

[7] In the instant application, counsel wishes to cross examine the applicant on the affidavit in support of the application, specifically on paragraphs 3, 4-7 which are reproduced below;

3. That I know that the applicant commenced Civil Suit 699 of 2020 against the respondent for infringement of Trademark of its trademark number 57629,

4. That whilst the proceedings were on going, the applicant realized that the respondent had applied for and been registered as the owner of Industrial design No. UG/D/2019/000091 and UG/D/2019/00098, which in all material respects resembles the applicant's get up and trademark;

5. That the applicant contests the respondent's registration of an industrial design which resembles in material particulars its get up and trademark;

6. That the said information was not available to the applicant at the time it filed the suit against the respondent;

7. That I am advised by the applicant's advocates, M/s Arcadia Advocates and I verily believe it to be true that it is necessary to amend the plaint to include the said facts and to seek an order of revocation of the said industrial design.

[8] I have had the opportunity to peruse the pleadings and specifically the affidavit in support of the application. The paragraphs sought to be examined upon appear straight forward. The matters raised in the said paragraphs are matters also to be dealt with at a later stage of the trial and delving into the same now would unnecessarily cause a delay of the disposal of the case, lock out what may be vital information for the case and ultimately cause injustice. For what is sought in this application is leave to amend the pleadings. This could be by way of addition or removal of certain information (evidence). That amendment of the pleadings as they stand now may therefore assist in resolving the issue before Court. Moreover, counsel in his application merely states that he requires to cross examine the applicant's General

Manager but gives no justification for the same. Important to note also is the fact that the respondent responded to the same in its affidavit in reply.

[9] Accordingly, I find that this application is devoid of merit and it is hereby dismissed. The parties should proceed with the application for amendment of the plaint on its merits on 20/04/2021 at 9:00am.

I so order

Dated, signed and delivered this 03rd day of March 2021



Duncan Gaswaga

JUDGE