THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLENEOUS APPLICATION NO. 251 OF 2020

(ARISNG OUT OF CIVIL SUIT NO. 216 OF 2020)

ELECTRO-MAXX UGANDA LIMITED :: APPLICANT

VERSUS

ORYX OIL UGANDA LIMITED :: RESPONDENT

BEFORE: HON. MR. JUSTICE BONIFACE WAMALA

RULING

Introduction

This application was brought by Notice of Motion under Order 36 Rules 3 & 4 of the Civil Procedure Rules (CPR) and Section 98 of the Civil Procedure Act (CPA) for orders that:

1. The Applicant/Defendant be granted leave to appear and defend Civil Suit No. 216 of 2020.
2. Costs of the application be provided for.

The application was supported by an affidavit deposed by **Kagoya Allen**, an advocate working for gain with the firm representing the Applicant which, together with the Notice of Motion, sets out the grounds of the application. Briefly, the grounds are that between 2018 and 2019, the Applicant entered into an agreement with the Respondent for supply of petroleum products on credit. On 19th December 2019 the Respondent issued to the Applicant a statement of account demanding for payment of USD 338,000. The Applicant in mistaken belief that it owed the Respondent the above sum made an undertaking to pay USD 354,562 to the Respondent company. However, upon analysis of the said statement of account, the Applicant discovered discrepancies in the amount being demanded, the quantities supplied and also

realized that there were orders posted to accounts that did not belong to the Applicant. The deponent also averred that the purchase orders were not signed by two duly authorized signatories of the Applicant and neither were invoices issued by the Respondent as proof of delivery.

The deponent further stated that there is need to conduct a reconciliation of the Respondent's statement of account to determine the quantities of fuel supplied to the Applicant. She further stated that the Applicant has a good and tenable defence to the whole of the Respondent's claim and it is in the interest of justice that the Applicant be granted unconditional leave to appear and defend the suit in order for the Applicant to get an opportunity to present its defence so that all issues in controversy between the parties are determined on merit.

The Respondent opposed the application through an affidavit in reply deponed to by **Peter Businge**, the Managing Director of the Respondent Company, in which he stated that the application by the Applicant is bad in law and the affidavit in support of the application ought to be struck off the record as defective for being deponed to by the Applicant's Lawyer without proof of authority. The deponent further stated that the depositions in the affidavit in support were on contentious matters over which the advocate had no knowledge and was not privy to and the same should be struck off as hearsay.

The deponent maintained that the Applicant admitted the debt in issue and made a commitment to pay the outstanding balance of USD 338,000 in a letter dated 19th December 2019. He stated that the statement of account is true and correct and the Applicant has not provided its internal accounts, purchase orders and other evidence to dispute it. He further stated that while transacting with the Applicant, the Respondent company had no legal obligation to inquire into the Applicant's internal policies and procedures. The Respondent

contended that the application was brought in bad faith with an intention to frustrate the Respondent's efforts to recover monies due. The Respondent averred that if the court was inclined to grant the Applicant leave to appear and defend the suit, the Applicant should be ordered to deposit into court the sum of USD 354,562.

The Applicant filed an affidavit in rejoinder still deposed by **Kagoya Allen** whose contents I have also taken into consideration.

Brief Background

Between 2018 and 2019, the Plaintiff/Respondent company entered into an oral contract to supply petroleum products on credit to the Defendant/Applicant company. The Respondent claims that the Applicant defaulted in paying the outstanding amounts arising out of the supplies. The Respondent made several demands for payment. The Applicant responded in a letter dated 19th December 2019 acknowledging its indebtedness to a tune of USD 338,000 and proposed to repay the same in 6 monthly instalments starting from January 2020 to June 2020 at an interest rate of 17% per annum (being 1.4% per month). The Applicant however failed to honor its proposal. The Respondent issued a demand note to the Applicant on 11th February 2020 to which they got no positive response; thus the summary suit and this application for leave to appear and defend the suit.

Representation and Hearing

At the hearing, the Applicant was represented by Mr. Kirunda Mathew from M/s Muwema & Co. Advocates while the Respondent was represented by Mr. Opurong Leonard from M/s KSMO Advocates. It was agreed that the matter proceeds by way of written submissions, which were duly filed by both Counsel. I have considered the submissions of Counsel in the course of resolution of the issues before the Court.

In the response to the application, the Respondent raised some preliminary points of law regarding the propriety of the application. I have opted to handle the objections as one of the issues for determination by the Court.

Issues for determination by the Court

Two issues are up for determination by the Court, namely;

1. **Whether the application is properly before the Court.**
2. **Whether the application discloses bonafide triable issues as to justify the grant of leave to appear and defend the main suit**.

Resolution by the Court

Issue 1: Whether the application is properly before the Court.

It was submitted by Counsel for the Respondent that the application was not properly before the court because it was supported by a defective affidavit for three reasons;

(i) The affidavit in support was deposed in contravention of Regulation 9 of the Advocates (Professional Conduct) Regulations for having been deponed to on contentious matters by an advocate representing the Applicant in the instant application who will be called upon by the Respondent for cross-examination when the matter comes up for hearing.

(ii) The affidavit was made by the said advocate without proof of authority.

(iii) The statements made by the said deponent in paragraphs 2, 4, 5, 6, 7, 8, 9, 10 and 12 of the affidavit in support of the application amount to hearsay, are argumentative and, as such, the affidavit offends the provisions of Order 19 Rule 3 of the CPR.

Counsel for the Respondent prayed that the court strikes out the said affidavit and dismisses the application for lack of a valid affidavit in support.

In reply, Counsel for the Applicant stated that Kagoya Allen (the deponent) stated in paragraph 1 of her affidavit in support that she is a lawyer working for gain with M/s Muwema & Co. Advocates, the firm retained by the Applicant to handle the application. Counsel stated that the said advocate is not in personal conduct of the matter and as such regulation 9 of the Advocates (Professional Conduct) Regulations would not apply since she is not a witness and neither is she likely to be called as a witness in the matter.

Counsel further submitted that the said Kagoya Allen had clearly indicated the means by which she gained knowledge and authorization to depose to the facts. Counsel submitted that the cardinal test for the competence of an affidavit is that it must be deponed on the basis of information within the knowledge of the deponent. The deponent herein had sworn the affidavit on the basis of her knowledge of the law which she applied to the facts she read on the file. Counsel submitted that the depositions were therefore supported by the provisions of Order 19 Rule 3 of the CPR. Counsel relied on the case of ***Samuel Kamau Mwanji (deceased) Vs Boniface Nthenge Civil Appeal No. 327 of 2020*** to submit that there is no principal law that bars an advocate from swearing an affidavit on behalf of a client even if he or she has had personal conduct of the matter if it serves the ends of justice.

I will handle the objections under the indicated sub-headings.

Contravention of Regulation 9 of the Advocates (Professional Conduct) Regulations S.I 267 – 2

Regulation 9 thereof provides as follows –

> ***"Personal involvement in a client's case.***
>
> *No advocate may appear before any court or tribunal in any matter in which he or she has reason to believe that he or she will be required as a*

witness to give evidence, whether verbally or by affidavit; and if, while appearing in any matter, it becomes apparent that he or she will be required as a witness to give evidence whether verbally or by affidavit, he or she shall not continue to appear; except that this regulation shall not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on a formal or non-contentious matter or fact in any matter in which he or she acts or appears."

It is clear to me that the above regulation is not meant to bar an advocate from giving evidence on behalf of a client. It is meant to bar an advocate from appearing before a court on behalf of a client when the advocate is a witness or a potential witness in a contentious matter. According to the guidance in the decision of ***Uganda Development Bank vs. Kasirye Byaruhanga & Co. Advocates, SCCA No. 35/1994***, an advocate who finds him/herself in such a situation has to choose whether to act as a witness or as Counsel. As such, where an advocate depones to an affidavit in support of an application in a contentious matter, his/her professional duty is not to, at the same time, appear in personal conduct of the matter. Where such an advocate does not act in personal conduct of the matter, there is no contravention of the provision in the cited regulation.

In the instant case, the deponent, Kagoya Allen, did not personally represent the Applicant. Her deposition even on contentious matters was therefore not in breach of the said regulation. The Respondent would have been within their right to apply to the Court to summon her for cross-examination upon her deposition and she would have had the obligation to answer any questions put to her in that respect.

In my finding therefore, the deposition of the affidavit in support by the advocate, Kagoya Allen, did not contravene the provisions of regulation 9 of the

Advocates (Professional Conduct) Regulations. This part of the preliminary objection has no merit and is rejected.

Absence of proof of authority to swear the affidavit

Order 3 of the CPR provides for appearances and actions by recognised agents and advocates. *Order 3 Rule 1 CPR* provides –

> *"Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his or her recognised agent, or by an advocate duly appointed to act on his or her behalf; except that any such appearance shall, if the court so directs, be made by the party in person."*

It is clear to me that deponing to an affidavit is one of the acts authorized by law that can be done either by the party themselves or by a recognised agent or by an advocate. Just like a party appearing for themselves, there is no requirement for a recognised agent or an advocate to furnish proof of authority to plead on behalf of their principal. The advocate only has to prove the fact of instructions by the named client. The requirement to furnish proof of authority to appear or plead on behalf of another is based on the provision under Order 1 Rule 12 of the CPR which is not applicable to the present circumstances. *Order 1 Rule 12 CPR* provides as follows:

> ***"Appearance of one of several plaintiffs or defendants for others.***
> *(1) Where there are more plaintiffs than one, any one or more of them may be authorised by any other of them to appear, plead or act for that other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorised by any other of them to appear, plead or act for that other in any proceeding.*

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case."

The above provision is the basis for the requirement to furnish proof of authority before appearing or pleading on behalf of another. It clearly does not apply to the present facts or, even in principal, to appearance or pleading by an advocate on behalf of their client. The second leg of the objection is also devoid of merit and is dismissed.

The affidavit in support offends the provisions of Order 19 Rule 3 of the CPR

Order 19 Rule 3 of the CPR provides as follows:

"Matters to which affidavits shall be confined.

(1) Affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted, provided that the grounds thereof are stated.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents shall, unless the court otherwise directs, be paid by the party filing the affidavit."

On the case before me, it is contended by the Respondent that the facts deponed to by the deponent of the affidavit in support were not in the personal knowledge of the deponent and, as such, her deposition amounts to hear say and the same should be struck out. The Applicant insists that the deponent deposed to facts that were in her personal knowledge.

This contention requires an examination of the impugned averments in the affidavit in support. In paragraph 4 of the affidavit, the deponent stated that

"… between 2018 and 2019, the Applicant entered into an agreement with the Respondent for supply of petroleum products on credit by the Respondent allegedly worth USD 388,000 …" The deponent attached no such agreement. Other evidence on record indicates that the agreement was, indeed, oral. This begs the question as to how the deponent came to learn of that agreement. The deponent clearly states she is an advocate with the law firm representing the Applicant. She is not an officer of the Applicant. The only way she could have obtained knowledge of the said agreement was by being told or informed by an officer of the Respondent or by looking at a document where such an agreement was referred to. In either case, the deponent had to disclose the source of such information if the averment was to get outside the realm of hearsay. The deponent disclosed no such source of information or her grounds of belief of the information. As such, the averment amounts to hearsay and is offensive to the provisions of Order 19 Rule 3 of the CPR.

Under paragraph 5, the deponent states that *"… on 19th December, 2019, the Applicant in the mistaken belief that it owed the Respondent the above sum, made an undertaking to pay a sum of USD 354,562 … to the Respondent (A copy of the Applicant's communication to this effect is attached …).* The attached copy is the letter dated 19th December 2019 in which the Applicant was acknowledging and confirming being indebted to the Respondent in the sum of USD 338,000. This part of the averment is therefore based upon a document and is not hearsay. But this same averment contains a claim by the deponent that *"… the Applicant in the mistaken belief that it owed the Respondent the above sum …"* The deponent does not reveal the source of her information regarding this allegation that the Applicant had made the undertaking under mistaken belief. Neither does the deponent indicate the ground of her belief of such information. This part of the averment is, definitely, not a matter within the deponent's personal knowledge; she not being an officer of the Applicant.

This part of the averment therefore offends the above cited provision and has to be expunged from the affidavit.

Paragraph 6 is based on a statement of account that was attached to the affidavit. It is therefore in order. But under paragraph 7, the deponent states that *"... however, upon analysis of the said statement of account, the Applicant discovered discrepancies in the amount being demanded by the Respondent, the quantities supplied and also that there were some orders that were posted to the Accounts that did not belong to the Applicant."* The content of this averment has to originate from personal knowledge of an officer of the Applicant; an officer of such a category as can be referred to as being the eye, ear or mind of the Applicant company. At the very least, it could be based upon a document seen by any other person involved with the Applicant's business. As already stated, the deponent was neither an officer of the Applicant company nor did she indicate any document from which she derived such information. This averment is also offensive to the above cited provision and has to be struck out.

Under paragraph 8, the deponent stated that *"... furthermore, neither were the Purchase Orders signed by two duly authorized signatories of the Applicant nor were there any invoices and/or delivery notes issued by the Respondent as proof of having duly supplied the petroleum products."* The deponent does not indicate to the Court where this requirement is derived. There was no written contract with the above requirement as a term of the contract. If at all such a term was discussed by the officers of the Applicant and Respondent during the conclusion of the oral contract, the deponent was definitely not part of that discussion. If, on the other hand, she was part of the discussion as the Applicant's advocate, she ought to have indicated that as the source of her knowledge or information. Either way, therefore, this averment is offensive to the cited provision of the law and has to be expunged from the affidavit.

In Paragraph 9, the deponent states that *"... I know from my training as a Lawyer that because of the above anomalies in the Applicant's statement of account, there is a need to conduct a reconciliation of the said statement to determine the quantities of fuel supplied to the Applicant and monies owed to the Respondent, if any."* This averment would appropriately be based on the deponent's personal knowledge only if the *"anomalies in the Applicant's statement of account"* were disclosed by acceptable evidence. The said anomalies are not indicated anywhere on record and the deponent's reference to them has been found offensive to the law and has been expunged from the record. As such, in as far as the alleged anomalies have not been appropriately disclosed to the court or the source of the deponent's knowledge of them not having been disclosed, the averment based on them is equally offensive of the above cited legal provision. This averment also has to be expunged from the record.

Paragraph 10 states that *"... the Applicant has a good and tenable defence to the whole of the Plaintiff/Respondent's claim ..."* This averment is in order since it is a simple pleading arising from the deponent's knowledge as an advocate.

In view of the foregoing, most of the averments in the affidavit in support of the application have been found offensive to the cited provision of the law and have been expunged off the record. The law is that where an affidavit contains averments that are offensive and others that are not, the offensive averments may be expunged from the affidavit and, if the remaining averments are capable of sustaining the party's claim, the same may be relied upon by the Court. See: ***Rtd. Col. Dr. Kizza Besigye vs The Electoral Commission & Another, Presidential Petition No. 1 of 2001***.

In the instant case I will uphold this leg of the objection and strike out the offending paragraphs of the affidavit, namely paragraphs 4, 5 (in part), 7, 8, and 9.

Having expunged the above stated parts of the affidavit in support, I now have to consider the sustainability of the remaining parts of the affidavit in support of the application. Paragraphs 1 and 2 state the particulars of the deponent, the capacity and authority to depone to the affidavit. Paragraph 3 avers to the deponent's perusal and understanding of the contents of the plaint in the summary suit. Part of paragraph 5 depones to the letter in which the Applicant made an undertaking to pay the sum of USD 354,562 and attaches a copy of the said letter. Paragraph 6 depones to the statement of account issued by the Respondent demanding for the outstanding amount of USD 338,000. Paragraph 10 states that the Applicant has a good and tenable defence to the whole of the Respondent's claim. In paragraph 11, the deponent swears the affidavit in support of the application for leave to appear and defend.

It is clear from the foregoing that the remaining parts of the affidavit are not capable of sustaining any case by the Applicant. None of the remaining parts of the affidavit effectively denies indebtedness on the part of the Applicant; and none sets out any line of defence, let alone a credible one. Under Order 36 Rule 4 of the CPR, an application by the defendant for leave to appear and defend a summary suit shall be supported by an affidavit which shall state whether the defence alleged goes to the whole or to part only, and if so, to what part of the Plaintiff's claim. In this case, the affidavit on record is not capable of raising any defence and has no facts capable of disclosing any triable issue, whether of law or fact. I am therefore in agreement with Counsel for the Respondent that this application was improperly brought before the Court. It is accordingly declared incompetent and is accordingly struck out.

That being the case, the second issue becomes inconsequential. In the premises, I will proceed to enter judgment on the summary suit under Order 36 Rules 3 and 5 of the CPR. The sum claimed in the summary plaint shall carry interest since there is an acknowledgement by the Defendant/Applicant of the cost impact of the delay in payment and an agreement to the payment of interest at the rate of 17% p.a. This agreement is found in the letter dated 19th December 2019. This agreement was acknowledged by the Respondent in their subsequent demand letter dated 11th February 2020 in which the Respondent indicated that although they had agreed to the Applicant's payment proposal, the Applicant had still breached that commitment. In my view, this suffices as an agreement for payment of interest upon default and, as such, interest is awardable on the outstanding sum under Order 36 Rule 2 of the CPR.

In the circumstances, I accordingly enter judgment for the Plaintiff/Respondent against the Defendant/Applicant under Order 36 Rules 3 and 5 of the CPR for:

1. Payment of the sum of USD 342,732 being the outstanding sum as at 11th February 2020.
2. Interest on (1) above at the rate of 17% p.a. from the 11th February 2020 till payment in full.
3. The costs of the suit and of this application.

It is so ordered.

Dated, Signed and Delivered by email this 28th day of May, 2021.

Boniface Wamala

JUDGE