THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
MISC. APPLICATION NO. 423 OF 2020
(Arising from Civil Suit No. 653 of 2019)

CENTENARY RURAL DEVELOPMENT BANK LIMITED.............. APPLICANT

VERSUS

WAKABI MARTIN .... RESPONDENT

BEFORE: HON. JUSTICE JEANNE RWAKAKOOKO

RULING

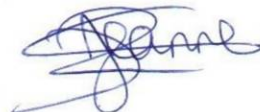
Introduction

This application was brought by Notice of Motion under Section 98 of the Civil Procedure Act, Cap 71, Order 1 Rules 3 & 10(2), and Order 50 Rules 1 & 3 of the Civil Procedure Rules, SI 71-1 for the following orders:

1. That Matovu Timothy and Zziwa Livingstone be joined as Defendants in Civil Suit No. 653 of 2020.
2. The Respondent be directed to amend his plaint to add Matovu Timothy and Zziwa Livingstone as Defendants in the suit and effect service of summons on them.
3. The Applicant be granted costs of this application.

Background

The Respondent sued the Applicant vide Civil Suit No. 653 of 2019 (the main suit) for recovery of Ugx. 153,780,000/= arising from foreclosure on a mortgage on property comprised in Block 547 Plot 5, Senyi, Kyaggwe (the suit property.) The history to this is that the Applicant bank extended a Ugx. 24,000,000/= loan facility to Zziwa Livingstone over a period of 4 months with 25% interest per annum. The loan was secured by a mortgage created over the suit property whose registered proprietor was Matovu Timothy. Matovu Timothy had allegedly granted powers of attorney to Zziwa Livingstone to create a mortgage over the suit property as security for the loan and signed as surety. Zziwa Livingstone defaulted on the loan and it was resolved that the suit property should be sold off to recover the sums under the loan facility. Both Zziwa Livingstone and Matovu Timothy consented to the Applicant selling the suit property. The suit property was advertised and the Respondent purchased it.



The Applicant contends that it is not possible to resolve all questions pertaining to the main suit without joining Zziwa Livingstone (the debtor) and Matovu Timothy (mortgagor) to the suit. That Zziwa Livingstone is best placed to account for the lawfulness of his title at the time of sale. That only Zziwa Livingstone can account for whether or not he defaulted on the mortgage agreement thereby entitling the Applicant to sell the suit property. The Applicant contends that should this court find it liable in the main suit, it would be entitled to indemnify against the would be second Respondent and it would result in a multiplicity of suits.

The Respondent's case is that the question in Civil Suit No. 653 of 2019 is whether the Applicant bank breached its agreement with the Respondent. That this question can be sufficiently resolved without joining the mortgagor and debtor as parties to the suit. That the Respondent has no cause of action against the intended defendants (that is Zziwa Livingstone and Matovu Timothy). Also that the Applicant bank having acquired a legal interest over the suit property through a mortgage, it possesses the ability to speak for the indefeasibility of the title in question. The Respondent stated that this application is intended to defeat justice and should be dismissed with costs.

The Applicant in rejoinder raised an objection to the Affidavit in reply that it was sworn by someone not vested with authority to swear one on behalf of the Respondent. The Applicant prayed that the affidavit is struck off.

Representation

At the hearing, the Applicant was represented by Zeere James, while Jeremiah Karugaba appeared for the Respondent. Parties were given timelines within which to file written submissions which they complied with, with the exception of the Applicant's Submissions in Rejoinder. The Applicant as of 31st May had not filed submissions in rejoinder. The set deadline was 30th May, 20222.

Issues for Determination

1. Whether the Affidavit in Reply is defective and should therefore be struck off
2. Whether Zziwa Livingstone (debtor) and Matovu Timothy (mortgagor) should be added as Defendants to Civil Suit No. 653 of 2019.

Resolution

Issue One: Whether the Affidavit in Reply is defective and should be struck off

The Applicant vide paragraph 3 of its Affidavit in Rejoinder by Sekidde Ronald averred that: "the affidavit [in reply] is fatally and incurably defective in as far as it is not sworn by the Respondent and is sworn by someone with no authority to sear the same on behalf of the Respondent." He went on to aver in paragraph 4 that the affidavit in reply traverses matters of fact which would not under any circumstances be in the knowledge of the deponent.

The Affidavit in reply is sworn by Mr. Kawalya Stephen, an advocate working with M/S Kaggwa & Kaggwa Advocates, the Respondent's lawyers. He confirms this in paragraph 1 of the Affidavit in reply and goes on to state that he is conversant with the facts in this matter and swears the affidavit in that capacity. Mr. Kawalya does not claim to swear the affidavit on behalf of the Respondent, but in support of the Respondent's case in this application in his capacity as one of the Respondent's lawyers.

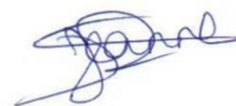
Order 19 Rule 2(1) of the Civil Procedure Rules demonstrates that evidence in applications is given by way of affidavits. What this means is that in an application, an affidavit in reply by the Respondent serves as both a pleading and evidence in the application. In fact, the deponent of any affidavit may be cross-examined on its contents under Order 19 Rule 2 of the Civil Procedure Rules. Therefore, it is permissible for a person, not the Respondent (or Applicant), to swear an affidavit in support of the Respondent's (or Applicant's) case, provided that he or she bears knowledge of what is stated in the affidavit.

Order 19 Rule 3(1) of the Civil Procedure Rules provides:

> (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.

Counsel for the Respondent submitted on the authority of Order 19 Rule 3(1) of the Civil Procedure Rules, that the deponent of the affidavit in question can speak to the facts averred.

I have read the facts deponed to by Mr. Kawalya in the affidavit in reply. I find that Mr. Kawalya only speaks to questions of law revealed in pleadings in the main suit, and based on his interpretation of the application rebuts to the Applicant's claims. Majority, if not all of his averments are based on his



knowledge as an advocate and part of the Respondent's legal team. His assertions are therefore justified by this, and are not hearsay as the Applicant claims.

Order 3 Rule 1 of the Civil Procedure Rules allows for a party's advocate to act on his or her behalf. Advocates are cautioned against swearing affidavits in support of their client's matters, because they run the risk of being cross examined on their averments. This would present an embarrassing scenario where an advocate is both counsel and witness, especially in contentious matters. See **M/S Simon Tendo Kabenge Advocates –v- M/S Mineral Access Systems (U) Ltd, Misc. Application No. 565 of 2011,** and Oder, JSC in **Banco Arabe Espanol –v- Bank of Uganda, SCCA No 8 of 1998.**

However, in this case, this potential embarrassment is mitigated by the fact that Mr. Kawalya is not counsel appearing in the matter, although he is part of the legal team. It is also not ground enough to determine Mr. Kawalya's affidavit as fatal and strike it off, because it speaks to only those facts within Mr. Kawalya's knowledge as an advocate.

Therefore, the Applicant's preliminary objection is dismissed.

Issue one is answered in the negative.

Issue Two: Whether Zziwa Livingstone (debtor) and Matovu Timothy (mortgagor) should be added as Defendants to Civil Suit No. 653 of 2019.

Counsel for the Applicant submitted that it is necessary to add the debtor and mortgagor to as Defendants to the main suit so as to resolve the question of whether the suit property was subject of sale at the time the Applicant sold it to the Respondent. That to answer this question, the court will have to inquire into how the certificate of title to the suit property was created and how the Applicant came to acquire powers to sell the property. According to counsel, the mortgagor is the only person with knowledge as to how the certificate of title to the suit land was created, and the debtor is can account for the circumstances under which the Applicant bank acquired the right to sell the suit property.

The Applicant in its affidavit in support of the application sworn by Sekidde Ronald, Legal Manager, Centenary Rural Development Bank Limited, reiterates the above submissions and supports them in paragraph 6 and 7.1-7.9 of the affidavit in support.

In response to this, Kawalya Stephen, an advocate practicing with the Respondent's lawyers at M/S Kaggwa & Kaggwa Advocates stated in paragraph

4 that the question before this court in the main suit can be sufficiently resolved without joining the mortgagor and debtor as parties to the suit. That the question before the court in the main suit is whether the Applicant breached its agreement with the Respondent, and not whether the Applicant had authority to sell the mortgaged property. Furthermore, that the Respondent was not part of the transactions between the Applicant, the mortgagor and debtor and so the remedies he seeks in the main suit cannot be realized against the mortgagor and debtor, but only against the Applicant. Mr. Kawalya also stated that there is no question relating to the lawfulness of the Matovu Timothy's title. But in any case, the Applicant being a bank acquired a legal interest over the land in question through a mortgage and the said mortgage was registered in its favour. Therefore, the Applicant acquired the ability to speak to the indefeasibility of the title of the suit land. See paragraphs 7-12 of the Affidavit in reply.

I agree with the Respondent. The question in the main suit is whether the Applicant bank breached its contract with the Respondent. Paragraph 3 of the plaint in the main suit states the cause of action as one for breach of contract for which the Respondent seeks to recover Ugx. 153,780,000/= as special damages, general damages, interest and costs of the suit. The narration of facts constituting the cause of action as detailed in paragraph 4 of the plaint remains true to this cause of action, and raises nothing about Matovu Timothy's title. The particulars of the breach as detailed in paragraph 5 of the plaint are that the Applicant bank sold land to the Respondent that was not subject to sale.

The gist of the Plaintiff's (Respondent) claim in the main suit is that the Applicant bank sold to it land which the National Forestry Authority (NFA) claims is part of a forest reserve. A forest reserve is public land that cannot be sold by private treaty. Paragraphs 5 and 4(k)-(m) of the plaint read together reveal this.

To adjudicate upon this claim, the court will only need to investigate the title, particularly the survey map. There is no need to investigate how the mortgagor came to possess title alleged to be part of a forest reserve. Such a question goes outside the scope of the Respondent's cause of action for breach of contract. Such a question is only relevant for a suit between the Applicant bank and the mortgagor in relation to the mortgage facility, and does not concern the Respondent per se.

Counsel Zeere referred this court to Mulenga, JSC's decision in **Departed Asians Property Custodian Board –v- Jaffer Brothers Limited, SCCA No. 9 of 1998** for the position that for a person to be joined in a suit on grounds that his presence is necessary for the effective and complete settlement of all question in the suit, it ought to be shown that the Defendant cannot effectually and completely set up his defense unless such person is joined. Counsel also

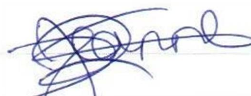
submitted that should this court dismiss this application, the Applicant will be compelled to bring a separate suit against the borrower and the mortgagor to compensate the Applicant for any loss it may be directed to incur in compensation to the Respondent for his losses.

Counsel for the Applicant also submitted that there is no need for the Plaintiff/Respondent to have a cause of action against the party sought to be added as a Defendant to the suit. He relied on **Departed Asians Property Custodian Board -v- Jaffer Brothers Limited supra** in particular, Justice Kanyeihamba's judgment wherein his lordship distinguished between a party who is joined as a Defendant on the basis that the Plaintiff may have a cause of action against them, and a party who is joined as Defendant on the basis that they are necessary parties for the court to effectually and completely adjudicate upon and settle all questions.

Indeed, Justice Kanyeihamba, JSC in **Departed Asians Property Custodian Board -v- Jaffer Brothers Limited supra** distinguished between joining a party who ought to have been joined as a Defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. However, the history, background and context of **Departed Asians Property Custodian Board (DAPCB) -v- Jaffer Brothers Limited** above is different from the one of the case at hand.

In **Departed Asians Property Custodian Board (DAPCB) -v- Jaffer Brothers Limited** above, in the High Court, Jaffer Brothers Limited originally sued Mohammed Magid Bagalaaliwo and Ronald Muwenda Mutebi. Ronald Muwenda Mutebi was later dropped as a Defendant. Then, at the instance of Mohammed Magid Bagalaaliwo, and with the consent of the DAPCB and Attorney General, the two (DAPCB and Attorney General) were added under Order 1 Rule 10 of the Civil Procedure Rules as 2nd and 3rd Defendants. After joining these two as parties, counsel for DAPCB then raised three preliminary objections that: (i) the suit was time barred, (ii) the plaintiff (Jaffer Brothers Limited) had no locus standi, and (iii) the plaintiff had no cause of action against all the Defendants. The trial judge upheld all the objections and dismissed the suit.

In the Supreme Court, counsel for the Jaffer Brothers Ltd argued that it was because the DAPCB and Attorney General were added as parties to the suit in the High Court that the Respondent had to amend its pleadings giving rise to the preliminary objections. In this case, the DAPCB and Attorney General were added under Order 1 Rule 10(2) of the Civil Procedure Rules as parties "whose presence before the court may be necessary in order to enable the court



effectually and completely to adjudicate upon and settle all questions involved in the suit."

Order 1 Rule 10(2) of the Civil Procedure Rules provides:

> (2) The court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added. (Underlined for emphasis.)

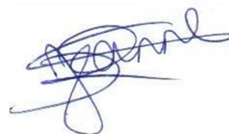
This rule relates to an application to strike out an improper party to a suit and replacement of such party with one who ought to have been joined to the suit or whose presence is essential to the complete adjudication of all the questions involved in a dispute. This application does not seek such a remedy. The Applicant does not seek to strike out any one party in replacement of another under the law. It only seeks for Zziwa Livingstone and Timothy Matovu to be added as Defendants to the suit.

Therefore, counsel for the Applicant bank erroneously relied upon Order 1 Rule 10(2) of the Civil Procedure Rules. The mistake at drafting though is not fatal, as mistake of counsel must not be visited upon the litigant. The correct provision under which counsel for the Applicant ought to have proceeded is Order 1 Rule 3 of the Civil Procedure Rules.

Therefore, on that basis, the facts of this application differ from those giving rise to the appeal in **Departed Asians Property Custodian Board (DAPCB) -v- Jaffer Brothers Limited.** That case is therefore distinguishable and therefore inapplicable from the one at hand.

Order 1 Rule 3 of the Civil Procedure Rules provides:

> 3. Who may be joined as defendants.
>
> All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against those persons, any common question of law or fact would arise.



Under this provision and in the context of this case, there are two questions to ask. First is whether the Plaintiff/Respondent has a right to relief against the debtor and mortgagor arising out of the same or a series of transactions. In the alternative, whether if separate suits are brought against the debtor and mortgagor [by the Plaintiff/Respondent], there will be a common question of law or fact.

Concerning the first issue, the Respondent seeks remedies only enforceable against the Applicant. From reading the plaint comprehensively, the Respondent/Plaintiff's claim raises a question as to whether the Applicant and its agents Moses Nsabimana t/a Real African Associates sold to the Respondent land that was not subject to sale; that is, land that was part of Luleka Commercial Forest Reserve.

The Applicant in its defense to the main suit avers that it sold the suit property in exercise of its statutory rights as a mortgagee and did not guarantee indefeasibility of title. See paragraph 6.2 of the Written Statement of Defence in the main suit. This defense refocuses the basis of the Respondent's claim back to the sale conducted and agreement entered into. The claim does not seek for the court to investigate the background of ownership of the suit land or indefeasibility of the mortgagor's title.

The gist of the Applicant's defense is that it had a right to sale of the suit property as mortgagee upon default by the mortgagor. That it went on to execute the sale with the mortgagor's consent. That in this capacity, the Applicant bank as mortgagee did not give warranty as to the indefeasibility of the mortgagor's title. That it is therefore not responsible for any loss or inconvenience that the Respondent has suffered. See paragraphs 6 and 8 of the Written Statement of Defence in the main suit. It then states in paragraph 9 of the WSD that it shall apply for the addition of the mortgagor as a party to the suit so as to account for the circumstances under which he acquired the title.

The Applicant's defense it seems wishes to throw the liability onto the mortgagor and it is for this reason that it seeks for him to be added as a defendant. Essentially the Applicant bank seeks to assert in its WSD and in this application that it sold to the Respondent what it believed to be lawful title to land subject to sale. And that if the Respondent has any issue with this title, he should then ask and seek relief against the person from whom the bank acquired the right to sale; that is the mortgagor. The problem with this however is the fact that the Respondent has no right to relief, arising out of the sale of the suit property to him, against the mortgagor, or even debtor for that matter.

A defendant by description is a person who carries a liability. For one to be joined as a defendant, a liability must attach to them on the basis of the Plaintiff's claim arising out of the same transaction or a series of related transactions. The Applicant has not demonstrated Zziwa Livingstone and Timothy Matovu's liability to the Respondent/Plaintiff so as to justify their addition as Defendants to the main suit. If the Applicant wishes, it may bring the debtor and mortgagor as witnesses to further prove its case.

Alternatively, the Applicant could have stated the orders it seeks for the Respondent to obtain from court directed at the mortgagor and debtor. It has not. This court has failed to find liability of the mortgagor and debtor, or order that the Plaintiff may desire from the mortgagor and debtor.

This court shall not be used to force a plaintiff's hand into suing a person he or she has no claim against. To do so would run counter to the principle of *dominus litis* and the person to whom the suit belongs. A plaintiff can therefore sue whoever he or she believes he or she can obtain relief from, and cannot be forced to do otherwise. See **Samson Sempasa –v- P.K. Sengendo, Misc. Application No. 577 of 2013.** In cases where under Order 1 Rules 3 and 10(2) of the Civil Procedure Rules he or she is forced to do so, then it must be done mindful of this principle and with the aim of making sure it does not occasion prejudice against the Plaintiff, or amount to abuse of court process. Addition of defendants must also be done strictly on the basis of the grounds stated in the law.

On that basis, this application is denied.

The second question to determine under Order 1 Rule 3 above is whether in the alternative if separate suits are brought against the debtor and mortgagor [by the Plaintiff/Respondent], there will be a common question of law or fact. It is under here that the question of possible multiplicity of suits may be addressed.

The Applicant contends that if Zziwa Livingstone and Matovu Timothy are not added as Defendants to the main suit, it will result in a multiplicity of suits. This according to the Applicant is because if court finds the Applicant liable for breach of contract, it would be entitled to indemnity against the mortgagor. See paragraph 7.9 of the affidavit in support.

Counsel for the Respondent submitted that if this application is denied it will not result in a multiplicity of suits because the Applicant has the best remedy in law. That the Applicant could have issued third party notices to the party they sought to claim from under Order 1 Rule 14 of the Civil Procedure Rules. Counsel also relied on **Winnie Okidi & 2 Others –v- FINA Bank (U) Ltd, Misc. Application No. 90 of 2013** for this position. Counsel also submitted that

undue complexities shall arise by adding the debtor and mortgagor to the main suit as Defendants. This, according to counsel, will take the form of the Respondent being compelled to serve and adduce evidence against the debtor and mortgagor, among other acts. That the Respondent does not have knowledge to constitute a case against these intended Defendants. It would therefore occasion an injustice against the Respondent, yet the Applicant has an alternate remedy in law not at the Respondent's expense.

I find that this application if denied will not result in a multiplicity of suits. Order 1 Rule 3 of the Civil Procedure Rules in the alternative seeks to protect against a scenario where if separate suits were brought against those persons (the ones to be joined as Defendants), any common question of law or fact would arise, thus a multiplicity of suits. This rule anticipates another unnecessary suit brought by the same plaintiff against these other parties, that were not added as defendants to the suit.

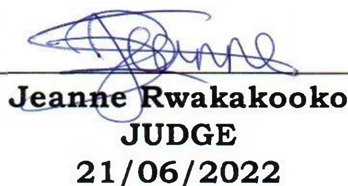
In the context of this case, the second half of the rule only applies where there is a possibility of the Plaintiff/Respondent bringing a suit against the debtor (Zziwa Livingstone) and the mortgagor (Timothy Matovu). I see no such scenario. Per the Applicant's case, the subsequent unnecessary suit would be one between the Applicant bank and the debtor & mortgagor. The Applicant bank, and not the Respondent, would be the Plaintiff in such a case, which is different from the type of subsequent suit anticipated in the law. For that reason, this application cannot be granted.

Conclusion:

The Applicant has failed to justify addition of Zziwa Livingstone and Timothy Matovu as defendants to the main suit.

This application is dismissed with costs to the Respondent.

I so order.



Jeanne Rwakakooko
JUDGE
21/06/2022

This Ruling was delivered on the 21st day of June, 2022.