THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

MISC APPLICATION NO. 999 OF 2021

(ARISING FROM MISC APPLICATION NO. 18 OF 2019) and

(CIVIL SUIT NO. 199 OF 2012)

DR. JAMES AKAMPUMUZA::APPLICANT

VERSUS

1. **ABSA BANK UGANDA LIMITED**
   (Formerly Barclays Bank Uganda Limited)
2. **NADINE BYARUGABA**
3. **MUMBA KALIFUNGWA ::RESPONDENTS**

BEFORE HON. JUSTICE RICHARD WEJULI WABWIRE

RULING

A. INTRODUCTION

1. The Applicant brought this Application by Notice of Motion for orders that the 1st Respondent be substituted for Barclays Bank Limited, the Respondents be found in contempt of Court, that the Respondents pay punitive and aggravated damages, compensation, refund and the costs of this Application.

2. The grounds in support of the Application are contained in the Affidavit of the Applicant Dr. James Akampumuza. The Respondents opposed the Application and filed an Affidavit in reply sworn by Gerald Emuron. The Applicant deponed and filed an Affidavit in rejoinder.

B. REPRESENTATION

3. The Applicant was represented by M/s Simon Tendo Kabenge Advocates while the Respondents were represented by M/s MMAKS Advocates. The parties, through their Lawyers, made oral submissions.

C. DETERMINATION BY COURT

Preliminary objections

(a). Respondents' failure to file replies within the time allowed by law

3. The Applicant's Counsel submitted that the 2nd and 3rd Respondents, who were served with this Application per Affidavit of service of Bateesa Esther dated and filed in this Court on 14/1/2022 never filed Affidavits in reply, leaving the Application entirely unopposed. That the Affidavit in reply by the 1st Respondent was filed and served on 14/2/2022, which was exactly one month after the Respondents were served.

   That the Respondents by their actions of failure to file and serve their Affidavits within the 15 days allowed by law under Order 12 rule 3(2) of the CPR puts them outside the jurisdiction of Court.

4. In reply, the Respondents' Counsel submitted that the Application is incompetent as it was served outside the time prescribed by Order 12 Rule 3 (2) of the CPR. That the Application was filed on 4th August 2021 and according to Order 12 Rule 3(2) of the CPR, the Applicant should have served it on the Respondents on or by the 19th August 2021. That the Application having been served on 14th January 2022 (over 6 months later) should be dismissed with costs, for falling foul of Order 12 Rule 3(2) of the CPR.

5. **Order 12 Rule 3 (2) of the CPR** provides that;

> *"Service of an interlocutory Application to the opposite party shall be made within fifteen days from the filing of the Application, and a reply to the Application by the opposite party shall be filed within fifteen days from the date of service of the Application and be served on the Applicant within fifteen days from the date of filing of the reply."*

7. According to the evidence on record, this Application was filed in this Court on 4th August 2021. The Applicant submits that the Application was served on the Respondent on 14/1/2022 who then filed an Affidavit in reply on 14/2/2022. It is the same day when they served it on the Applicant. The Applicant's objection arises from the fact that the Respondents filed an Affidavit in reply a month later.

8. The record shows that the Applicant served the Application upon the Respondents six months after they had filed it in this Court. The law stipulates 15 days within which the Application ought to have been served upon the Respondents. The fact that the same was served upon the Respondents six months later is a violation of O.12 R.3 (2) of the CPR.

9. On the other hand, the Respondents also filed their reply on 14/2/2022 having been served by the Applicant on 14/1/2022 which also offends O.12 R.3 (2) of the CPR which provides that a reply to the Application shall be filed within fifteen days from the date of service of the Application. Both parties violated O.12 R.3 (2) of the CPR.

This state of affairs notwithstanding, in the case of **Dr. Lam-Lagoro James vs Muni University**, MC No. 07/2016, Justice Stephen Mubiru held as follows;

> *"An Affidavit in reply, being evidence rather than a pleading in strict() sensu, should be filed and served on the adverse party, within a reasonable time before the date fixed for hearing, time sufficient to allow that adverse party a fair opportunity to respond. For that reason, an Affidavit in reply filed and served in circumstances which necessitate an*

adjournment to enable the adverse party a fair opportunity to respond, should not be disregarded or struck off but rather the guilty party ought to be penalized in costs for the consequential adjournment. I think in appropriate cases, if the interests of justice require it, the Court is entitled to refuse to take heed of a technical irregularity in a procedure which does not cause prejudice to the opposite party. The letter and spirit of Article 126(2)e of The Constitution of the Republic of Uganda, 1995 is that technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits. In modern times, Courts do not encourage formalism in the Application of the rules. The rules are not an end in themselves to be observed for their own sake."

11. The timelines prescribed by Order 12 Rule 3 of the CPR are meant to facilitate expeditious disposal of interlocutory Applications and not to close them out.

    I am in agreement with the Respondents' submissions that no prejudice has been caused by the alleged late filing. The Applicant's late service of six months from the date when the Application was filed did not prejudice the Respondents because they were able to file their Affidavit in reply. In the same vein, the Respondents' late filing of the Affidavit in reply by one month did not prejudice the Applicant who was able to file their Affidavit in rejoinder. Both parties also had sufficient time to file their written submissions. Since no prejudice has been pointed out by either party, I find no reason to uphold the preliminary objection nor reason for this Application not to be heard on the merits.

    The preliminary objection is accordingly overruled.

(b). Respondents' Affidavit in reply deponed by Gerald Emuron without a representative order and written authority from parties

12. The Applicant's Counsel submitted that the deponent, Gerald Emuron, does not state anywhere that he is a member of staff of the 1st Respondent but loosely and

without supportive evidence refers to himself as Legal Counsel of the 1st Respondent and also claims to swear on behalf of the 2nd and 3rd Respondents. That it is trite law that the only way a litigant can authorize another to swear an Affidavit on his behalf is by a Power of Attorney. That a Power of Attorney where individuals are specifically sued had to be filed with Uganda Registration Services Bureau as an official document and fees paid before being used in Court. That an appointment to act on behalf of the client must be in writing. That there is no proof that the Respondents' reply under consideration was brought under a Power of Attorney and there is no Court order to defend as a representative suit and no authority of the Respondents as principals was attached to the Affidavit in reply. That the Affidavit in reply that sought to plead for third parties without first securing a representative order should be struck out with costs.

13. In reply the Respondents' Counsel further submitted that the title Legal Counsel is an in-house position in the 1st Respondent's legal department. That it is a fact on record that Gerald Emuron has attended Court in this matter on several occasions and has always been introduced as the Respondent's representative and MMAKS Advocates as external Counsel appearing for the 1st Respondent. That the Applicant's submission that the there is need for a representative order is misplaced as neither Gerald Emuron nor any of the Respondents purports to represent the other Respondents in this Application. That as posited by His Lordship Justice Mubiru in **Namutebi Matilda vs Ssemanda Simon and 2 Others**, **MA No. 430/2021** (infra), there is no need for written authority from a party to an Application to validate the Affidavit of a deponent. That Gerald Emuron also states that he has authority to swear the Affidavit on behalf of the Respondents and that the Applicant's objection should be disregarded.

14. In the case of **Namutebi Matilda vs Ssemanda Simon and 2 Others**, **MA No. 430/2021,** Justice Stephen Mubiru held as follows;

"From the above discourse it then becomes clear that throughout the web of legal provisions relating to Affidavits, one golden thread is always to be seen; that what is required in Affidavits is the knowledge or belief of the deponent, rather

than authorization by a party to the litigation…I have considered the available decisions positing the principle that a person is not to swear an Affidavit in a representative capacity unless he or she is an advocate or holder of power of attorney or duly authorized...Those decisions posit the view that where there is no written authority to swear on behalf of the others, the Affidavit is defective. I have not found any basis for that principle in the rules of evidence nor those of procedure. The principle appears to have developed from the analogy of representative suits, which analogy I find to be misplaced."

15. The import of the foregoing authority is that the knowledge or belief of the deponent is of greater importance than the mandate of representation or authorization by a party to the litigation. I agree with my learned brother and in any case, as averred under paragraph 1 of the Affidavit in reply Gerald Emuron stated that as legal Counsel of the 1st Respondent he was fully conversant with this case.

16. The 2nd and 3rd Respondents being the Board Chairperson and Managing Director of the 1st Respondent, Gerald Emuron would therefore, had it been necessary but which now it is not (per **Namutebi Matilda vs Ssemanda Simon and 2 others** (supra)) not require a representative order or authority to give evidence on facts that he is fully conversant about.

The preliminary objection is accordingly overruled.

(c). Affidavit on contentious matters, full of hearsay and falsehoods

17. The Applicant's Counsel further submitted that the Affidavit in reply is incurably defective for replying on contentious matters, full of hearsay and falsehoods which renders the Application unopposed. That the documentation attached to his Affidavit as A1-A3 itself does not have the Applicant's signature or a letter written to the Applicant requesting this. That his entire Affidavit is incurably defective and renders his evidence inadmissible. That it offends order 19 rules 3(1) (2) of the CPR which provide that Affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove.

18. Noteworthy, in paragraph 1 of the Affidavit in reply Gerald Emuron stated that as legal Counsel of the 1st Respondent he was fully conversant with this case. The question as to whether the Respondents' Affidavit in reply contains contentious matters, hearsay evidence and falsehoods is therefore a question of fact which requires evidence to be proved and cannot be raised as a preliminary objection.

19. The preliminary objection is accordingly overruled.

Contempt of Court

20. The Plaintiff's Counsel submitted that the Respondents are in contempt of Court and are abusing the process of Court and should be denied the opportunity to do it once again.

21. In reply, the Respondents' Counsel submitted that the 2nd and 3rd Respondents were not party to MA No. 18/2019 in which the order alleged to have been breached was granted and should be struck off the Application as it discloses no cause of action against them. Regarding the 1st Respondent, Counsel further submitted that the 1st Respondent had and continues to have unfettered access to his bank account on the same basis as all bank customers. He further submitted that this continues to be the case, in keeping with the Court's exhortation to the parties, when the Court expressly refused to issue an order but instead guided the parties on the rules of engagement that should govern their relationship pending final disposal of the suit. That as a matter of fact the Applicant can access the account in question. That what he cannot do is continue otherwise operating the account without updating his customer information. That the Applicant remains subject to the laws and regulations of Uganda and the Court's exhortation did not and cannot be read as exempting the Applicant from complying with the requirements of the financial institutions (Anti-Money Laundering) Regulations, specifically Regulation.7 dealing with Bank "*know your customer*" (KYC) Rules and Procedures and S.66 (1) d and R.28 (1) c of the Registration of Persons Act and Regulations, respectively.

22. That if the 1st Respondent does not abide with these KYC requirements, it exposes itself to regulatory censure, substantial fines, and criminal liability under, inter alia, the Anti-Money Laundering Act and Regulations and the Registration of Persons Act' and Regulations. That the 1st Respondent is not in contempt of any Court order or exhortation, and it is the Applicant's conduct which is an abuse of Court process for which he should be censured.

23. Annexture A and B to the Application shows that the Application in question was between the Applicant and the 1st Respondent. It is farfetched that the 2nd and 3rd Respondent are personally held in contempt of a Court order that they were not party to.

24. According to annexture B to the Application, the Court ordered that there should be clarity on the "*rules of engagement*" between the parties going forward and pending disposal of the main suit. It was also ordered that the Respondent should guarantee the Applicant continuous and unfettered access to A/C No. 0285130573 until the disposal of the main suit. Unfettered access does not however amount to a waiver from compliance with regulatory requirements that govern the provision and consumption of banking services. The guidelines and regulatory requirements, which Counsel for the Respondents alluded to in their submissions, would fall under the "*rules of engagement*" envisaged in the Court order from which the alleged cause in this Application arises.

25. The order of this Court was not meant to violate the law but rather to complement it. If access to the Applicant's account as ordered by the Court requires the Applicant to provide certain information as a legal prerequisite, as was the case in the instance, then the Applicant ought to have complied.

26. I therefore find that the Respondents are not in contempt of the Court order and the Application fails in that respect.

27. In their Application the Application sought an order that the 1st Respondent be substituted for Barclays Bank Limited but never submitted on the same. That notwithstanding, Court takes judicial notice of the change of names of the 1st

Respondent from Barclays Bank (U) Limited, to ABSA Bank Uganda limited. The 1st Respondent is accordingly substituted for Barclays Bank Limited, in this and the main matter, reference to Barclays Bank shall accordingly be deemed to be reference to ABSA Bank Uganda Limited.

29. Costs shall abide the outcome of the main suit.

I so order.

Delivered at Kampala this 24th day of May 2022.

Richard Wejuli Wabwire

JUDGE