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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION No. 1212 OF 2021
(ARISING FROM CIVIL SUIT No. 724 OF 2019)

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HOMEART (U) LIMITED APPLICANT

VERSUS

MODINO FURNITURE COMPANY LIMITED RESPONDENT

15

BEFORE: HON. LADY JUSTICE SUSAN ABINYO

RULING

Introduction

20 This application was brought by Notice of Motion under the provisions of sections 82 and 98 of the Civil Procedure Act Cap 71, section 33 of the Judicature Act, Cap 13, and Order 46 Rules 1 (1) and 8, and Order 52 Rules 1 and 2 of the Civil Procedure Rules SI 71-1, where the Applicant seeks for orders that:

1. This Honorable Court be pleased to recall its ruling and orders given on the 20th May, 2021, for purposes of reviewing, setting aside or otherwise varying the same;
- 25 a) Reviewing and, or varying or setting aside its order that the Defendant delivers its books of accounts including invoices, receipts, financial statements, and returns with Uganda Revenue Authority to the Plaintiff for inspection.
2. The costs of this application be provided for.

30 Facts:

This Application is supported by the affidavit of Mohamed Ghedi Santur, a Director of the Applicant Company, deposed in paragraphs 1-13, in which the grounds are summarized as follows: -

- 5 i. That the Applicant is dissatisfied and aggrieved by the Ruling and Orders of this Honorable Court, which ordered that the Defendant delivers its books of accounts including invoices, receipts, financial statements, returns with Uganda Revenue Authority to the Plaintiff for inspection.
- 10 ii. That there is an error apparent on the face of the record, which amounts to sufficient ground to warrant the review, and setting aside or varying orders of this Court.
- iii. That the Applicant will suffer grave prejudice if the ruling, and orders of the Court are not reviewed as the Plaintiff (Respondent herein) is on a phishing expedition.
- 15 iv. That this honorable Court has inherent powers to recall, review, and set aside or vary its orders to prevent a miscarriage of justice to the parties, and also has power to stay proceedings in HCCS No. 724 of 2019 until the determination of this application.
- 20 v. That it is in the interest of justice that the ruling of this honorable Court be recalled and the orders reviewed and set aside accordingly.

The Respondent filed an affidavit in reply deposed in paragraphs 1-10 by Semanda Khuzaima Ganyana, one of the Directors of the Respondent Company, and summarized as below:

25 That with the advice of the Respondent's Lawyers M/s Tara Advocates, which he verily believes to be true, he responds to the averments in the Applicant's affidavit in support of the application as follows: -

- 30 i. That on 20th May, 2021, the matter came up for scheduling of the consolidated suits in the presence of both parties during which time upon inquiry by the Court as to whether there was any need for specific disclosure of the documents, the Respondent's Counsel informed the Court that the Respondent had prayed for an account for profits as a remedy, and as such prayed for an order to be made against the Applicant to furnish the Respondent with the relevant documents including financial statements, books of account, receipts, invoices to the Respondent for inspection.
- 35 ii. That the Lawyers of the Applicant objected to the disclosure on ground that the disclosure should come after the trial. That the Court in its ruling clearly addressed this objection and overruled counsel for the Applicant, and that the Applicant is therefore estopped from raising it again. That the Applicant's allegations in this case therefore, amount to approbating and reprobating in its case.
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- 5 iii. That the Applicant's Lawyers did not object to the request for disclosure of
information on grounds of want of a formal application by the Respondent,
and that this issue never arose at all and that they cannot therefore raise it
at this point. That the Court therefore having addressed both parties on the
10 application for disclosure, and issued an order requiring the Applicant to
furnish the relevant information, that the Applicant is obliged to hid to the
same; That the Applicant cannot after acting in contempt of the same now
seek the Court's indulgence to review and set aside an Order in contempt.
- 15 iv. That the Applicant has not come to Court with clean hands since it also
made an oral application for consolidation of suits well aware that it should
have been by way of Chamber Summons, and that it now wants the Court
to decide differently for the Respondent than it decided for the Applicant
in its earlier similar application. That the Applicant is apparently guilty of
dilatory conduct, and does not come with clean hands having been in
contempt of the Court Order despite several reminders by the Respondent.
- 20 v. That the Trademarks Act grants the Court the discretion to give such orders
as are necessary to enable the Respondent to obtain evidence intended
to be adduced at trial. That accordingly the order by the Court to permit
the Respondent access to information by the Applicant was rightly given in
the interest of permitting the Respondent to obtain evidence before trial.
- 25 That where there is a general law and the specific law, that the specific law
takes precedence, and hence the application for disclosure was not
premature, and the Court did not error in making the Order.
- 30 vi. That the Applicant is not excused from complying with the Court Order
because of the alleged exposure of the documents. That the law on
privileged information does not protect the Applicant in this matter.
- 35 vii. That the grounds stated by the Applicant in the application and the
affidavit in support thereof do not neither demonstrate the requisite
grounds to warrant the grant of the Order to review, and to set aside the
order nor is there justifiable sufficient ground to warrant the grant of the
application.
- 40 viii. That it is the Respondent, and not the Applicant that will be prejudiced if
this application is granted.
- ix. That the application is misconceived and an abuse of the court process
and should be dismissed.

5 Representation

The Applicant was represented by Counsel Nasser Sserunjogi of Magna Advocates while the Respondent was represented by Counsel Damalie Tibugwisa jointly with Counsel Bright Natumanya of M/S Tara Advocates.

Counsel for the parties herein, made oral submissions as directed by this Court.

10 Issues for determination

This Court in accordance with Order 15 Rule 3 of the Civil Procedure Rules SI 71-1, framed the issues for determination as below:

1. Whether the application discloses grounds for review?
2. What remedies are available?

15 Decision

Issue No.1: Whether the application discloses grounds for review?

I have considered the evidence adduced by the parties in their respective affidavits, the submissions of Counsel for the parties herein, and the cases cited to find as follows: -

- 20 To begin with, I am unable to agree with the submission of Counsel for the Respondent on the objection that the contents of the affidavit in reply were not rebutted by the Applicant, as they did not file an affidavit in rejoinder and therefore deemed to have been accepted by the Applicant. This is because an affidavit in rejoinder is not a reply, and is optional where a party only seeks to
- 25 clarify on what has been rebutted in reply but not to necessarily respond to what has been stated in the pleading.

- The case of **Prof. Oloka Onyango & Others Vs Attorney General, Constitutional Petition No. 6 of 2014**, cited by Counsel for the Respondent is distinguishable from the instant case. In that case, the Respondent did not make a reply. In the instant
- 30 case, the Respondent made a reply however, the Applicant did not make an affidavit in rejoinder. The Court stated in that case that failure to rebut a fact specifically traversed in an affidavit amounts to an admission of that fact. This cannot not relate to a rejoinder, as Counsel for the Respondent wants this Court to believe.

- 35 The contention by Counsel for the Applicant on the procedure adopted by this Court in allowing an oral application for orders of inspection, and the counter argument by Counsel for the Respondent that this Court allowed Counsel for the

5 Applicant to also make an oral application for consolidation of suits is not of any relevance at this stage, since it was not raised during the scheduling proceedings.

Be that as it may, for either party, the procedure adopted by this Court in allowing oral applications instead of filing formal applications, did not occasion any miscarriage of justice to the parties.

10 Section 82 of the Civil Procedure Act, Cap 71 provides that:

82. Review

"Any person considering himself or herself aggrieved— (Emphasis is mine)

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

15 (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order on the decree or order as it thinks fit."

Order 46 Rules (1) and (3) of the Civil Procedure Rules, SI 71-1 provides that:

1. Application for review of judgment

20 "(1) Any person considering himself or herself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced
25 by him or her at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him or her, may apply for a review of judgment to the Court which
30 passed the decree or made the order.(Emphasis is mine)

3. Grant or dismissal of application.

(1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.

(2) Where the Court is of opinion that the application for review should be
35 granted, it shall grant it; except that no such application shall be granted on the

5 ground of discovery of new matter or evidence which the applicant alleges was not within his or her knowledge, or could not be adduced by him or her when the decree or order was passed or made without strict proof of the allegation. (Emphasis is mine)

10 The grounds for review of a Judgment or Order has been decided in a plethora of cases as hereunder: -

- (i) That there is discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him or her at the time when the Decree was passed or the Order made;
- 15 (ii) That there is some mistake or error apparent on the face of the record, and
- (iii) That any other sufficient reason exists. (**See Re Nakivubo Chemists (U) Limited [1979] HCB 12; Yusuf Vs Nokrach [1971] EA 104; FX Mubuuke Vs Uganda Electricity Board HCMA No. 98 of 2005 (unreported), and Attorney General & Uganda Land Commission Vs James Mark Kamoga & James Kamala SC Civil Appeal No.8 of 2004**, on what amounts to sufficient reason)
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25 It is worth noting that a party who claims any of the grounds above for review, should be an aggrieved person within the meaning of section 82 of the Civil Procedure Act Cap 71 and Order 46 Rule (1) of the Civil Procedure Rules SI 71-1.

In the Supreme Court case of **Mohamed Allibhai Vs W.E Bukenya Mukasa & Departed Asians Property Custodian Board, Civil Appeal No. 56 of 1996**, Karokora JSC (as he then was) held that:

30 "An aggrieved party within the meaning of section 83 of the Civil Procedure Act and Order 42 Rule 1 means a person who has suffered a legal grievance."

The term "legal grievance" in that case, was expounded by Odoki JSC (as he then was), that a person suffers legal grievance if the judgment given is against
35 him or her or affects his interest.

The Orders of this Court sought to be reviewed was that the Defendant delivers its books of accounts including invoices, receipts, financial statements, and returns with Uganda Revenue Authority to the Plaintiff for inspection.

5 In the case of **Edison Kanyabwera Versus Pastori Tumwebaze, SC. Civil Appeal No. 6 of 2004**, cited by Counsel for the Applicant, the phrase an error apparent on the face of the record was well explained that;

10 *"In order that an error may be a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no Court would permit such an error to remain on record. The "error" may be one of fact, but it is not limited to matters of fact, and includes also error of law." (Emphasis is mine")*

15 The Applicant contends under paragraph 8 i) - (vi) of the affidavit in support of this application that the errors apparent on the face of record are as follows: -

- (i) That the application for inspection was wrongfully made in error without following the proper procedures of the law governing such applications for inspection of documents;
- 20 (ii) That this honorable Court erroneously ordered that the Defendant delivers its books of accounts including invoices, receipts, financial statements, returns with Uganda Revenue Authority to the Plaintiff for inspection on grounds that the Plaintiff (Respondent herein), had made a prayer for an Order of account of profits made by the Defendant (Applicant herein), as a result of the trade mark infringement, whereas the rights of the parties are not yet determined by this Honorable Court;
- 25 (iii) That this order is premature and cannot be given at this stage, as it can only be a consequential order that is given upon hearing, and determination of the rights of the parties to the suit;
- (iv) That the Plaintiff is shifting the burden of proving its case for loss of profits and general damages by inspecting the Defendant's books of accounts;
- 30 (v) That this will expose the Defendant's financial statements and records to a direct competitor before the hearing, and determination of the suit, which damage cannot be reversed if the Defendant becomes the successful party.
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In the circumstances of the case before me, it is my understanding that the above Order recognizes that the Plaintiff (Respondent herein), is seeking to inspect books of accounts of the Defendant (Applicant herein) in relation to any trade or business on the alleged trademark infringement, and not to shift the burden of

5 proof of loss of profits, and general damages as submitted by Counsel for the Applicant.

I am in agreement with the decision in ***Vision Impex Limited Vs Sansa Ambrose & Anor HCCS No. 303 of 2013***, cited by Counsel for the Applicant, where the Learned Judge observed that:

10 "The Trademarks Act is silent on how to account for profits but the Court can be guided by decided cases on the appropriate means of compiling the Defendant's profits ... The Plaintiff bears the burden to proving the Defendant's sale revenues. The Defendant bears the burden to demonstrate its expenses, which may be logically divided into variable and fixed costs..." (Emphasis is mine)

15 It is my considered view therefore, that it would superfluous for this Court to hold that the application for inspection was wrongfully made in error of the law, as the purpose of the law under Order 10 of the Civil Procedure Rules SI 71-1 on interrogatories, discovery and inspection would be rendered futile.

In addition, it was only proper for the Plaintiff (Respondent herein), in whose favour
20 the Order was made, to give notice to the Defendant (Applicant herein) as required under Order 10 Rule 15 of the Civil Procedure Rules, to produce the said documents that relate to any matter in question in the suit for inspection, which was not the case here.

I therefore find that the Applicant is not in contempt of Court in the given
25 circumstances. (***See the case of Jingo Livingstone Mukasa Vs Hope Rwaguma, CA Civil Appeal No. 190 of 2015***, on the explanation of contempt of Court, cited by Counsel for the Respondent)

For reasons above, this Court finds that the Applicant failed to prove that the said Order was an error of law, apparent on the face of the record.

30 Issue No.2: What remedies are available?

This Court having found issue (1) above in the negative, further finds that this application lacks merit.

The application is dismissed with costs in the cause.

5 Dated, signed and delivered electronically this 11th day of January, 2023.


SUSAN ABINYO
JUDGE
11/01/2023

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