

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
MISCELLANEOUS APPLICATION NO. 0273 OF 2023
ARISING FROM CIVIL SUIT NO. 0098 OF 2023
PEARL DIARY FARMS LIMITED ::::::::::::::::::::::::::::::::::: APPLICANT
VERSUS
SCANAD UGANDA LIMITED ::::::::::::::::::::::::::::::::::: RESPONDENT

Before Hon. Lady Justice Harriet Grace Magala

RULING

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- Application for leave to appear and defend
 - Applicable laws – Order 36 rules 4 and 5; and Order 52 rules 1 and 3 of the Civil Procedure Rules as amended
 - Sections 17(2) and 33 of the Judicature Act
 - Sections 27(1) and 98 of the Civil Procedure Act
 - Section 101 of the Evidence Act
 - Section 5 and 6 of the Oaths Act
 - Rule 7 of the Commissioner for Oaths Rules
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Background

This is an application for leave to appear and defend Civil Suit No. 0098 of 2023. The background to the claim in the said suit is that the Applicant/Defendant contracted the Respondent/Plaintiff to provide creative advertising concepts for the Applicant's products of "Lato Powder" and "Yogo yogo" at a total consideration of Ugx. 69,856,000/=. According to the Respondent, she performed her part of the Contract by providing the Applicant with the creative concepts in respect of the two products. The Respondent issued tax invoices for the work done which the Applicant refused and or neglected to pay despite several reminders and demands. The tax invoices are referenced PD-043424 (Lato



Powder) and PD-043425 (Yogo yogo). They are dated 4/09/2020 and 22/09/2020 respectively.

The affidavit in support of the application and rejoinder were deposed by Vijay Patil, the Assistant Manager Finance and Accounts. He averred that the tax invoices and demands for payment from the Respondent were only brought to the attention of the Applicant on the 11th January 2022. He stated that the invoices could not be paid because the Respondent did not deliver on the assignments within the agreed timelines or in accordance with the terms and conditions set in the Local Purchase Orders (LPO). The terms and conditions set out in both of the Local Purchase Orders were that: a) the PO is valid for 30 days from the date of order; b) payment to be made after each job description; c) goods and services must be delivered within 30 days from the date of issue of the PO; d) if job not completed, PO stands null and void; and e) invoice should contain LPO number addressed to the account department.

The affidavit opposing the application was deposed by Tom Windows, the Country Manager of the Respondent. He stated that the advertising concepts were delivered to the Applicant within the stipulated timelines. The concept for "Lato Powder" was delivered on the 23rd September 2020 and the concept for "Yogo yogo" was delivered on the 10th November 2020. He adduced evidence in the form of various email communications between the representatives of the parties regarding the execution of the assignments.

Appearance and Representation

The Applicant was represented by M/s D.K Makubuya Advocates while the Respondent was represented by M/s AF Mpanga Advocates. Parties filed written submissions and the court has relied on the Parties' pleadings and written submissions in deciding this matter.

Preliminary Objection

The Applicant in her submissions in rejoinder raised a preliminary objection to the effect that the Respondent's Affidavit in Reply should be struck out for being incurably defective on the grounds that Deponent's signature was either scanned or photocopied and therefore it was not sworn before a commissioner of oaths; and that the annexures attached to the affidavit relate to an affidavit sworn by a



one Andrew Katumba and not Tom Windows who deposed the Affidavit in Reply. The Applicant relied on sections 5 and 6 of the Oaths Act and the case of **Mohammed Magyambere vs Khadil, HCMA No. 0727 of 2012.**

Issues

- a) Whether the Respondent's affidavit in reply is incurably defective
- b) Whether the Applicant should be granted leave to appear and defend CS 0098 of 2023.
- c) What other remedies are available to the Parties?

Determination

- a) Whether the Respondent's affidavit in reply is incurably defective

Order 6 rule 28 of the Civil Procedure Rules states that:

"Any party shall be entitled to raise by his or her pleading any point of law; and any point so raised shall be disposed of by the court at or after the hearing; except that by consent of the parties, or by order of the court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing".

Is the use of the **"word"** shall when it comes to the interpretation of statutes an imperative command, thereby indicating that certain actions are mandatory, and not permissive? This contrasts with the word **"may"** which is generally used to indicate a permissive provision, ordinarily implying some degree of discretion. My view is that the use of the word **"shall"** in this instance connotes an imperative command. This then leads me to what is a pleading? A pleading is a formal document in which a party to legal proceedings sets forth or responds to allegations, claims, denials or defences.

Whereas the above provision of the Rules suggests that a preliminary point of law can only be brought to the attention of court through pleadings and or before pleadings are closed, direction and guidance was given in the case of **Ochwa David vs. Ogwari Polycarp & Electoral Commission, HC EP No. 00410 of 2021 (Mable High Court)** when court held that:

*"that the legality or competence of an election petition is a question of law which can be raised at any time. Further relying on **Makula International Ltd vs. His Eminence Cardinal Nsubuga & Another [1982] HCB 11 (SC)** that*

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held that illegality once brought to the attention of court cannot be ignored and it supersedes everything including pleadings and admissions thereon”.

In the same case (**Ochwa David**) court further held that:

“that there is no particular or single prescribed manner or format of bringing illegality to the attention of court. It may be by a formal application or summarily raised by counsel before court at any time or by a court itself taking notice of the matter and making a finding on the record or taking judicial notice of relevant material bearing on the issue. It may be in any other manner, provided the court is notified or made aware of the illegality”.

Sections 5 and 6 of the Oaths Act are instructive on the form and manner in which an oath may be taken. In addition to the Oaths Act, **Rule 7 of Schedule (Section 7) of the Commissioner for Oath Rules and Commissioner for Oaths (Advocates) Act** states that:

“A commissioner before taking an oath must satisfy himself or herself that the person named as the deponent and the person before him or her are the same and that the person is outwardly in a fit state to understand what he or she is doing”.

It was the submission of the Applicant that Tom Windows did not sign the Affidavit in Reply in the presence of a commissioner for oaths. I have taken a keen look at Affidavit in Reply and it is highly likely that the signature on the affidavit is an electronic signature of the deponent that was affixed on the document by the deponent and the commissioner of oaths signed it thereafter. The court also agrees with the observation made by the Applicant that the annexures to the affidavit in reply bore the name of Andrew Katumba as opposed to Tom Windows. These are two different people.

In light of the above observations and analysis, court finds that the affidavit in reply was incurably defective and is hereby struck out. In the circumstances, the Application is unopposed and issue two is resolved in the affirmative.



b) What other remedies are available to the Parties?

The Applicant is granted leave to appear and defend. She must file her written statement of defence within fifteen (15) days from the date of delivery of this ruling.

The costs of the application shall abide the outcome of the main cause.

Delivered electronically this 31 day of JULY 2023 and uploaded on ECCMIS.


Harriet Grace MAGALA

Judge

31st July 2023