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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO. 2788 OF 2023
(ARISING OUT OF CIVIL SUIT NO. 864 OF 2021)

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BLACK MARKET RECORDS APPLICANT
VERSUS

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- 1. MALINGA SULAIMAN aka (UGABOY COINS)**
2. MUSINGUZI MUHAMMAD aka (UGABOY ZEE)
3. UMAR KAFEERO aka (OMA AFRICANA)
4. KHABUYA VANESSA MARION aka (KVAN) RESPONDENTS

BEFORE: HON. LADY JUSTICE PATIENCE T.E. RUBAGUMYA
RULING

20 Introduction

This application was brought by way of Notice of Motion under **Section 98 of the Civil Procedure Act, Cap. 71, Section 33 of the Judicature Act, Cap. 13, Order 9 Rules 21 and 27 and Order 52 Rules 1, 2 and 3 of the Civil Procedure Rules SI 71-1** seeking orders that:

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1. The order to proceed ex parte be set aside.
2. The costs of the application be in the cause.

The grounds of this application are contained in the affidavit in support of the application deposed by Mr. Cedric Singleton, an officer of the Applicant company and are summarized below:

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1. That on the 30th day of October 2023, this Honorable Court granted an ex parte Order to the Respondents to be heard in the Applicant's absence.
2. That at the time of the hearing of the matter, Mr. Mutayomba Geoffrey, Counsel in personal conduct was admitted and could not attend Court.
3. That the Court Order prejudices the Applicant as it was Counsel's mistake for not attending and not the Applicant's.
4. That the Applicant prays that the Court Order is set aside as the same prejudices the Applicant.

In reply to the application, the 4th Respondent opposed the application contending that:

1. The deponent to the affidavit in support of the application (Mr. Cedric Singleton) neither disclosed the capacity under which he represented the Applicant nor attached any evidence to show that he is an official of the Applicant or that he has authorization from the Applicant to depone the said affidavit or represent it in the present proceedings.
2. Paragraphs 3 and 4 of the affidavit in support of the application are riddled with hearsay and thus are inadmissible.
3. Neither the Applicant nor its lawyers communicated the alleged sickness or inability to attend Court to the 4th Respondent's lawyers or the Honorable Court.
4. The lawyer of the Applicant was duly served with a hearing notice dated 25th October 2023 which hearing notice was issued vide ECCMIS.

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5. If indeed Mr. Mutayomba Geoffrey was sick, he had the options of notifying Court and the 4th Respondent's lawyers by letter or sending a lawyer from his firm to hold brief.

6. The duty to attend Court is not only with Counsel but also with the Applicant, both of whom never attended Court which shows that they were not interested in opposing Civil Suit No. 864 of 2021.

7. The Applicant's representative never attended Court or followed Court directives to file the Applicant's trial bundle and witness statements without any justification which shows that they were not interested in opposing Civil Suit No. 864 of 2021.

Representation

The Applicant was represented by M/s Litmus Advocates while the 4th Respondent was represented by Learned Counsel Babirye Miriam Kaggwa of M/s Onyango & Co. Advocates.

The Applicant and 4th Respondent filed their written submissions and the same have been considered by Court in this Ruling.

Issues for determination

In accordance with **Order 15 Rule 5 (1) of the Civil Procedure Rules as amended**, this Honorable Court amended the raised issues to read as follows:

1. Whether the Order to proceed ex parte can be set aside?
2. What are the available remedies?

Counsel for the 4th Respondent raised preliminary points of law which this Honorable Court is duty bound to resolve prior to the determination of the issues so raised.

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5 Determination of the preliminary points of law

Counsel for the 4th Respondent raised the following two preliminary points of law:

- 10 i. That the deponent of the affidavit in support of the application (Mr. Cedric Singleton) neither disclosed the capacity under which he represented the Applicant nor attached any evidence to show that he is an official of the Applicant.
- ii. That Paragraphs 3 and 4 of the affidavit in support of the application are riddled with hearsay and thus are inadmissible.

Order 6 Rule 28 of the Civil Procedure Rules stipulates that:

15 *“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.”*

20 In the case of **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors [1969] EA 696 at 701, Justice Sir Charles Newbold** stated that:

25 *“A preliminary objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is extrinsic evidence of judicial direction.”*

Given the above, I shall proceed with the determination of the preliminary points of law as raised by Counsel for the 4th Respondent.

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5 The first preliminary point of law raised is that;

The deponent of the affidavit in support of the application (Mr. Cedric Singleton) neither disclosed the capacity under which he represented the Applicant nor attached any evidence to show that he is an official of the Applicant.

10 Counsel for the 4th Respondent submitted that Mr. Cedric Singleton, the deponent of the affidavit in support of the application, did not disclose the capacity under which he represented the Applicant nor did he attach any evidence to show that he is an official of the Applicant. Counsel further relied on the case of ***Najjuma Jesca and Others Vs Moses Joloba & Anor***
15 ***Misc. App. No. 770 of 2015*** wherein Court held that:

*“In cases where an affidavit is sworn on one’s behalf and on behalf of others, there is need to prove that the others authorized the deponent to swear on their behalf. Proof of such authorization is by written document attached to the affidavit. (See: ***Kalgana Vs Dabo Boubou****
20 ***[1986] HCB 59***).”

Counsel prayed that the affidavit in support of the application should not be admitted on grounds that the deponent did not attach any proof of the position he holds in the Applicant company.

Decision

25 **Order 3 Rule 1 of the Civil Procedure Rules** provides that:

“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
30 *or her recognized agent, or by an advocate duly appointed to act on*

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5 *his or her behalf; except that any such appearance shall, if the Court so directs, be made by the party in person.”*

Order 29 Rule 1 of the Civil Procedure Rules stipulates that:

10 *“In a suit by or against a corporation, any pleading may be signed on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to dispose to the facts of the case.”*

In the instant case, Counsel for the 4th Respondent contended that Mr. Cedric Singleton, the deponent of the affidavit in support of the application, did not disclose the capacity under which he represented the Applicant nor did he attach any evidence to show that he is an official of the Applicant.

Paragraph 1 of the affidavit in support of the application, deposed by Mr. Cedric Singleton on behalf of the Applicant reads as follows:

20 *“That I am an adult male Ugandan of sound mind and an officer of the Applicant company and I swear this affidavit in that capacity.”*

While relating the swearing of affidavits to **Order 3 Rule 1 of the Civil Procedure Rules, Hon. Justice Boniface Wamala** in the case of ***MHK Engineering Services (U) Ltd Vs Macdowell Ltd HCMA No. 825 of 2018***, held that:

25 *“...the swearing of an affidavit can be categorized as an act in any Court required by the law to be made or done by a party in such Court and such an act may be made or done by the party in person or by his or her recognized agent, or by an advocate duly appointed to act on his or her behalf.”*

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5 In the instant case, Mr. Cedric Singleton is not an advocate and no such
assertion has been made by the Applicant. On whether he is a recognized
agent, **Order 3 Rule 2 of the Civil Procedure Rules** defines a recognized
agent as one either with powers of attorney or is representing a person
carrying out trade or business for and in the names of non-residents
10 within the local limits of the jurisdiction of the Court.

All that the deponent states as regards to the Applicant is that he is an
officer of the Applicant. There is no proof to show the actual capacity or
that he is an officer of the Applicant company indeed.

Furthermore, the Applicant did not file an affidavit in rejoinder to respond
15 to the points of law raised in the affidavit of Ms. Khabuya Vanessa Marion
dated 30th November 2023, specifically under paragraphs 3 and 4 of the
affidavit nor did the Applicant make any submission in relation to the
points of law raised.

Since the Applicant is a record label company, the persons authorized to
20 swear an affidavit on its behalf would be its director, secretary or principal
officer or any other senior officer authorized in writing to represent the
company. Furthermore, Counsel for the Applicant did not provide any
information in the written submissions regarding the capacity of the officer
nor did he attach any form of an identification document to show that Mr.
25 Cedric Singleton is an officer of the Applicant company.

Determination of the deponent's capacity to swear an affidavit on behalf of
a company usually depends on attachment of proof to the same affidavit.
In the matter at hand, the deponent did not attach any evidence to prove
the capacity under which he swore an affidavit on behalf of the Applicant.

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5 In the case of ***MHK Engineering Services (U) Ltd Vs Macdowell Ltd (supra)***, Court after holding that indeed there was no proof attached to the affidavit to show that the deponent had capacity to depone such an affidavit on behalf of the company, went on to hold that an affidavit sworn by a person without the requisite capacity is incompetent, fatally defective
10 and cannot be cured by any stretch of the application of the principles of substantive justice.

In the circumstances therefore, since the deponent of the affidavit in support of application did not attach any evidence to prove his capacity to swear an affidavit on behalf of the Applicant, the said affidavit is
15 incompetent and fatally defective.

It is also trite that an application has to be supported by affidavit evidence. Where there is one affidavit in support of an application and the affidavit is found to be invalid, Courts have observed that in such a case, the application is not supported by an affidavit and such an application
20 cannot stand and it ought to be dismissed. (See: ***Ssali Samuel Vs Gladys K. Rwamwamba, HCMA.No.514 of 2014***).

Further, in the case of ***Isingoma Michael Vs Law Development Centre HCMA No. 234 of 2019, Hon. Justice Bashaija K. Andrew*** held that a
25 fatally defective affidavit cannot support an application.

In the premises, for the reasons stated above, the first preliminary point of law raised by Counsel for the 4th Respondent succeeds.

30 It is a matter of law that an application is supported by evidence by way of affidavit. In the absence of such evidence, the application is unsupported.

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5 I will therefore not delve into addressing the second point of law raised by
Counsel for the 4th Respondent or the merits of the application.

Accordingly, I find the Applicant's affidavit in support of this application
fatally defective and since the application is not supported by any other
10 affidavit, it cannot stand. This application is therefore dismissed with costs
to the 4th Respondent.

I so order.

15 Dated, signed and delivered electronically this **19th** day of **January, 2024.**



Patience T. E. Rubagumya

JUDGE

19/01/2024

8:00am