

3/16/2011 THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
CIVIL MISC. APPLICATION NO. 282 OF 2010

MUGISHA M. ABRAHAM & OTHERS ::::::::::::::: APPLICANTS

VERSUS

G4 SECURITY SERVICES (U) LTD ::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE ELDAD MWANGUSYA

RULING

By a Chamber Summons filed in this Court on the 7th July 2010, the applicants are seeking orders of this Court that:

- (a) The defendants Written Statement of Defence in respect of HCCS No. 269 of 2007 and HCCS No. 113 of 2008 be struck out.
- (b) Costs of the Application be provided for

The application which is supported by the affidavit of SIRAJ ALI is based on the grounds that:-

1. The Applicants filed HCCS No. 269 of 2007 and HCCS 113 of 2008 in this Court which is yet to be heard and determined.
2. The Respondent filed a defence claiming that all entitlements and or claims to the Applicants were discharged
3. Thereafter the Applicants applied for an order of discovery and production of all the documents in possession of the Respondent in support of their defences among others

and the same was granted on 10th March 2010.

4. That the respondent has refused to and or failed to produce the documents as directed by the order of Court despite repeated demands and reminders.

5. That it is therefore proper and just that this application be granted as sought.

The affidavit of Siraj Ali is reproduced hereunder because as will be shown in this ruling a dispute has arisen as to the correctness of his assertion that the Court order was not complied with.

“I SIRAJ ALI of C/o MUWEMA & MUGERWA Advocates and Solicitors First floor Rwenzori Courts, Plot 2 and 4a Nakasero Road P.O Box 6074, Kampala do solemnly make oath and state as follows:-

1. That I am a male Adult Uganda of sound mind and an Advocate of the Courts of record as well as all Subordinate Courts thereto in the above firm also handling this case in which capacity I depone thereto.

2. That the Applicant filed HCCS No. 269 of 2007 and HCCS 113 of 2008 and the same is still pending determination in this Court. Copies of both the original and amended complaints are attached hereto marked B1-4.

3. That the Respondent filed their Written Statement of Defence and stated among others that the Applicants’ claims had been discharged and included in their listed documents to support their defence

4. That consequently the Applicants applied for and obtained orders for discovery and production of among others the said documents in three above which order was served on the Respondent who have not obliged todate. Copies of application vide Misc. Application No. 550 of 2010, the orders of Court and proof of service are attached hereto marked “D1 – 4”.

5. That owing to the Respondent’s refusal and or failure to produce the documents as directed by Court, the Respondent’s Defences in HCCS No. 269 of 2007 and HCCS No. 113 of 2008 are liable to be struck out under the law.

6. ***That it is therefore proper and just that this application be granted as sought.***
7. ***That whatever is stated hereunder is true to the best of my knowledge, belief and training as an advocate.***

In an affidavit in reply EMILY DORCAS AKORA BUTIME (MRS) a Company Secretary of the Respondent admits the contents of Siraj Ali's affidavit as far as the order for discovery is concerned. She however denies that the Respondent refused to produce the documents specified in the Court Order. It is a lengthy affidavit but paragraphs 19 and 20 will illustrate the point.

“19. All the documents mentioned in paragraphs 4(c) - (j) were duly produced in Court on 24th March, 2010 and the same remained in the Courts custody. The boxes containing the said documents were subsequently opened on or about 15th April 2010 and inspected in the presence of the parties and or their representatives and their respective counsel. Some of the said documents could not be traced in their said boxes.

20. It is not true as stated in paragraph 5 of the said affidavit that the respondent refused to produce the documents specified in the Court Order. The respondent only failed to produce the merger agreements between the respondent's shareholders in respect of which the respondent was not a party.”

Mr. Godfrey Mafabi who represented the applicant raised two issues, namely, whether or not the written statement of defence in HCCS No. 269 of 2007 and HCCS No. 113 of 2008 are liable to be struck out of the Court record and whether or not the Applicants/Plaintiffs can proceed to present their case as though the Respondent had not filed a defence. The issues raised by Mr. Mafabi is what is provided under Order 10 Rule 21 of the Civil Procedure Rules which I reproduce hereunder:-

“Where any party fails to comply with any order for the discovery or inspection of documents, he/she shall, if a Defendant to have his/her defence, if any struck out, and to be placed in the same position as if he/she had not defended; and the

party seeking discovery or inspection may apply to Court for an order to that effect.”

The question that remains disturbing is as to whether or not the Respondent complied with the order of discovery. In his final submissions Mr. Kanyemibwa Counsel raises the issue of the credibility of Mr. Siraj Ali who swears that the order was not complied with when he very well knew that boxes containing documents were presented in Court. He submits as under:

“It is the respondent’s case that the documents mentioned in paragraph 4 (c) – (j) of the affidavit in reply were produced in Court on 24th March 2010 and subsequently inspected by the parties and their counsel on 15th April 2010. It is most surprising and most unexpected of Counsel for the applicants who was present in Court together with the applicants on 24th March when the boxes in question were brought to the chambers of Hon Justice Magezi in the course of the Court appearance on the said date to respectively prepare an affidavit in support of the application and an affidavit in rejoinder denying the respondent’s compliance with the discovery order. The judge had no time to scrutinise or supervise the opening of the boxes and identification of the numerous documents therein. The boxes containing the said documents remained in the Court’s custody. The judge subsequently directed that the parties and their representatives and their respective counsel open the said boxes and scrutinise the said documents. This scrutiny was carried out on the 15th April, 2010 in open Court in presence of the clerk to the judge who was directed to do so. The said clerk retained the custody of the said boxes. For Counsel for the applicants and one of the applicants to cause an affidavit in rejoinder denying this fact to be filed on this Honourable Court’s record is most unfortunate.”

If boxes containing documents were produced and the documents inspected why would

anybody plead that there was none compliance with the Court Order even if all the documents were not produced. The plaintiffs in the suit are over one hundred and Court would not require all the documents to 'discover' as to whether or not the respondents had fully paid them. The other documents referred to as mergers create their own problems. The respondents plead that these documents are not in their possession because they were not privy to the agreement. The cure for this problem cannot be to strike out the defence of the respondents but if during trial it was to be found that they are party to the merger that would be a point in favour of the applicants.

In the circumstances this Court declines to strike out the defendant's written Statement of Defence as prayed. The Chamber Summons is dismissed. The costs will abide the outcome of the main suit.

Eldad Mwangusya

J U D G E

Court: After preparing this ruling I established that boxes containing documents are lying at the Land Division of this Court. The D/Registrar (civil) is to retrieve all the documents for inspection by the parties and then fix a date for hearing of the suit on its merits.

Eldad Mwangusya

J U D G E

04-03-2011

10/03/2011

Magambo Victor for respondent

Respondent not in Court

Applicants in Court

Counsel for applicants absent

Court: Ruling read in open Court

John Keitirima

DEPUTY REGISTRAR

10/03/2011