

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

MISCELLANEOUS APPLICATION NO. 862 OF 2011

ARISING FROM CIVIL SUIT NO. 346 OF 2011 & MISC. APPLIC. NO 815 OF 2011.

EMMANUEL LUKWAJJU.....APPLICANT

VERSUS

1. MYERS MUCUNGUZI

2. NESTER BYAMUGISHA.....RESPONDENTS

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This is a ruling on a preliminary point of law (PO) raised by Counsel Eric Muhwezi for the applicant when this application came up for hearing. The PO was to the effect that there is no valid affidavit in reply to the instant application. The application itself was by notice of motion to set aside an order made by the Registrar of this court as well as the execution arising from the said order.

Counsel for the applicant referred to the affidavit on record sworn by Apollo Tumugabirwe, a clerk in the respondents' Firm of lawyers. He submitted that a clerk is not an agent of a party to a suit; and that Order 3 of the Civil Procedure Rules (CPR) defines an authorized agent to include an advocate or a person with powers of attorney. He submitted that a clerk is not among the categories stated in Order 3. He contended that the said clerk had no powers of attorney neither is he an advocate. He contended that the supplementary affidavit filed on 13th January 2012 was sworn by Robert Sewava Senyonjo who was a party to the main suit but not to the instant application. He submitted that the said Senyonjo is neither the recognized agent nor an advocate to act or

swear an affidavit for the two respondents. He pointed out that there is no affidavit either supplementary or in reply sworn by the two respondents on the court record. He challenged the two affidavits on record as being incompetent, and that they cannot consequently support the respondents' answers to the application. He submitted that where there is no valid affidavit which is credible, the facts stand unchallenged. He cited **Kaingana V Dabo Boubou [1986] HCB 59** and **Serefaco Consultants V Euro Consult B V & Anor Misc. Applic. No. 16/2007 arising from CA 74/2003 (COA)** to support his position. He prayed this court to hold that there is no affidavit in reply by both respondents and to allow the application as being unchallenged.

In response, the 2nd respondent Nester Byamugisha, who represented himself, submitted that Order 3 of the CPR is not applicable to the instant situation. He maintained that the said Order applies to recognized agents/advocates for purposes of appearance for service of process. He submitted that affidavits are governed by Order 19 of the CPR. He argued that affidavits are sworn by people who know or perceive the facts in any other form. He pointed out that the application seeks an order setting aside a decree passed by the Registrar of this court. He stated that the Registrar entered a judgment on certain facts which are in the knowledge of the clerk who swore the affidavit. That it is common knowledge a law clerk who files pleadings and court records follows up and reports back to their principal a state of affairs of the file they are following up. He explained that that is how the order arose, and that if it was the advocate who had sworn it, it would be hearsay. He submitted that Sewava's affidavit supplements that of Tumugabirwe who is competent. He reiterated that an affidavit is a statement of fact by a person who knows, not a pleading under Order 3 of the CPR. He maintained that the authorities cited by the applicant's Counsel are inapplicable and prayed court to overrule the objection with costs.

In rejoinder, Counsel Muhwezi submitted that Order 19 cited by the 2nd respondent is correct and applicable on who swears affidavits but it does not answer or oust Order 3 of the CPR about recognized agents of a party. He contended that under Order 19 a person deposes to an affidavit on knowledge, information and belief if that deponent falls under

the category stated under Order 3, and that it is not limited to appearances only for service of court process. He argued that it also includes an act in any court required or authorized to be by a party in person or by his/her agent or by an advocate who represents that party. He submitted that an affidavit in reply is an act to be done by a party in person or recognized agent but not any person from the street or anywhere, and that according to the **Kaingana** case, such person would be incompetent for that act on behalf of a party. He argued that the same would apply to the supplementary affidavit as it also falls under the same category as the affidavit in reply., and that both can only be sworn by an authorized agent. He reiterated his prayer to strike out the affidavit in reply and the supporting affidavit.

I have addressed the submissions of both Counsel within the legal authorities on the matter.

Order 3 rule 1 of the CPR provides as follows:-

*“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 or her recognized agent, or by an advocate duly appointed to act on his or her behalf**, except that any such appearance shall, if the court so directs, be made by the party in person.”* (emphasis mine).

Order 3 rule 2(a) of the CPR defines the recognized agents of parties by whom such appearances, applications and acts may be made, to be persons holding powers of attorney authorizing them to make such appearances and applications and do such acts on behalf of parties. Order 19 of the CPR requires affidavits to be confined to matters within the deponent’s knowledge, except in interlocutory applications where statements of the deponent’s belief may be admitted provided the said belief are stated.

Applying the foregoing provisions to the instant case, it is very clear that that Order 3 of the CPR is applicable to the instant situation. I would therefore, with respect, not agree with the submissions of the 2nd respondent that the order is not applicable to this

application or that it applies to recognized agents/advocates for purposes of appearance for service of process. The wording of the Order is very clear that it applies to appearances, applications and acts. It is not limited to appearances only for service of court process as argued by the 2nd respondent.

The 2nd respondent also submitted that affidavits are governed by Order 19 of the CPR, and that affidavits are sworn by people who know or perceive the facts in any other form. It is clear from the wording of Order 19 that the said Order is applicable on matters to which affidavits are to be confined. However, while it is correct that affidavits are sworn by people who know or perceive the facts in any other form, it does not answer or oust Order 3 of the CPR about recognized agents of a party. In my opinion, Order 3 and Order 19 of the CPR are not mutually exclusive and must be read together. I would in that respect agree with Counsel for the applicant that under Order 19 of the CPR, a person deposes to an affidavit on knowledge, information and belief if that deponent falls under the category stated under Order.

In the instant application there were two affidavits in reply. The initial one was sworn by a one Apollo Tumugabirwe a process server employed by M/S Barya Byamugisha & Co Advocates. He deposed to matters concerning the application. The second which was called a supplementary affidavit, was sworn by a Robert Sewava Senyonjo, a defendant in the main suit from which this application arose, but not a respondent in this application. The said two deponents were not respondents in this application.

The objection in the instant case is similar to the second objection that was raised in **Kaingana V Dabo Boubou [1986] HCB 59**. In that case the affidavit accompanying the application was sworn by the husband on behalf of the wife. The objection was that the husband not being a party to the suit, could not swear such an affidavit when he was not a recognized agent and had not filed papers which authorized him to act in that representative capacity. Court held as follows:-

“A person is competent to swear an affidavit on matters or facts he knows about or on information he receives and believes. Whereas the deponent in this application claimed that he was fully acquainted with the facts deposed to

nevertheless he swore the affidavit in a representative capacity. There was no authority given to him by the defendant to qualify him to act on his behalf either as his advocate or a holder of power of attorney or duly authorized. The affidavit was therefore incompetent and defective.”

Similarly, in this case, I find that the two persons who swore the affidavit in reply and the supplementary affidavit in response to the application, not being parties to the said application, had no authority given to them by the respondents to act on their behalf either as their advocates or holders of power of attorney or duly authorized.

The PO is accordingly sustained. I find that the two affidavits are incompetent and defective. In effect there are no affidavits in reply to this application and it stands unchallenged. This leaves the facts as stated on oath by the applicant neither denied nor rebutted by the respondents. The application is allowed as it stands unchallenged.

Dated at Kampala this 18th day of October 2012.

Percy Night Tuhaise

JUDGE.