THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISC APPLICATION NO 451 OF 2014

(ARISING FROM CIVIL SUIT NO 242 OF 2011)

SIMBA TELECOM}..APPLICANT/PLAINTIFF

VERSUS

1. **KARUHANGA JASON}**
2. **SANIPARS INVESTMENTS LTD}.......................RESPONDENTS/DEFENDANTS**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant filed this application under the provisions of section 98 of the Civil Procedure Act as well as section 43 of the Evidence Act for leave to be granted for the Applicant/Plaintiff to reopen its case. Secondly it is for leave to be granted for the Applicant/Plaintiff to present its documents for identification before the court with the help of an expert witness and finally for the costs of the application to be provided.

The grounds of the application as averred in the notice of motion are that the documents in question are vital for the Plaintiff's case. Secondly the documents in question can only be identified by an expert witness. Lastly that it is just and equitable for the application to be granted. The application is further supported by the affidavit of Mr Asaph Asiimwe, an employee of the Applicant Company. His deposition is that there are a series of contested documents that were received by this honourable court for identification which documents are vital for the Plaintiff's case. On the basis of information from his lawyers he asserts that the documents in question can only be identified by an expert witness namely a

handwriting expert. He further deposes that it is just and equitable that the application is granted.

In reply the first Respondent Mr Jason Karuhanga deposed to an affidavit in reply in which he deposes that he in his capacity as the first Respondent he perused the notice of motion and supporting affidavit and understood the contents thereof. Firstly he asserts that the application does not show which documents the Applicant seeks for identification. He asserts that there was no justification advanced by the Applicant whatsoever for the application specifically as to why the Plaintiff’s case should be reopened. The application does not give any reasons as to why the documents were never presented at the opportune time if they exist and does not show how vital they are. Consequently on the basis of information of his Counsel he believes that the application lacks merit, is a frivolous application and is intended to waste court’s time.

The Applicant is represented by Counsel Roger Kakooza while the Respondent is represented by Counsel Anthony Ahimbisibwe. Counsel addressed the court in written submissions.

In the written submissions the Applicant's case is that the Applicant had initially instituted a summary suit against the Respondent for general damages, costs of the suit and interest thereon. Subsequently the Respondents were granted leave to appear and defend the suit which they did. The suit was heard on merit and both parties closed their respective cases. During cross-examination of the first Respondent, questions regarding certain documents detailing the business dealings between the parties came up. The first Respondent admitted some documents and denied endorsing his signature on others. The contested documents were put on court record for identification. The Applicant seeks to reopen its case to lead evidence of an expert witness regarding the exhibits on record before they can be formally admitted in evidence. Secondly the application would not prejudice the Respondent’s case but in retrospect will serve the interest of justice.

The Applicant’s Counsel proposed two issues for determining the Applicant’s application namely:

1. Whether leave should be granted to the Applicant to reopen its case?
2. Whether the exhibits on record should be admitted in evidence?

Whether leave should be granted to the Applicant to reopen its case?

On this issue the Applicant's submission is that the Plaintiff/Applicant led evidence of six witnesses. Though Counsel for the Applicant listed the relevant documents to be relied upon in the summary of evidence, the same were not attached to the respective witness statements that were adopted as the testimony in chief of the witnesses by the court.

Procedural rules are handmaidens of justice. Courts in upholding the provisions of the Constitution, have also noted the need to dispense justice without undue regard to technicalities. The Applicant’s Counsel contends that the exhibits on record clearly show information that was being exchanged between the parties during the period relevant to the dispute. The documents also bear signatures alleged to belong to the parties. To shut out evidence from such exhibits may lead to a miscarriage of justice. In order to verify the truth behind the dealings of the parties, the services of a handwriting expert to give expert testimony is necessary in the interest of justice.

The Applicants Counsel further submitted that while it may be in the direct interest of the Applicant to reopen its case and have the expert testimony of the handwriting expert, this would not prejudice the Respondent in any way whatsoever. In the case of **Smith versus New South Wales [1992] HCA 36; (1992) 176 CLR 256** the High Court of Australia when considering whether to permit the reopening of a case held that:

> "If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But

> assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one in which reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised."

The Applicant's Counsel contends that from the facts of the application, although the evidence is not new and was indeed available at that stage, it was not called because Counsel was under the mistaken impression that he had attached the relevant documents considering that he had listed it in the summary of evidence. It was not a deliberate decision on the part of the Applicant's Counsel not to file the documents in question. As soon as Counsel realised his mistake, he made efforts to include the relevant documents including through oral as well as written application. Furthermore Order 6 rule 12 of the Civil Procedure Rules makes provision for pleadings that the effect of material documents are to be stated without setting out the whole or any part of its contents. In the Applicant's case Counsel for the Applicant did not mention the effects of the document in question showing that it was envisaged that it would be tendered in evidence at some point during the trial.

Secondly under Order 7 rule 14 of the Civil Procedure Rules provides that where a Plaintiff relies on a document as evidence in support of his claim, he shall enter the document in a list to be added or annexed to the plaint. The Applicant added the documents to his list of documents attached to the plaint. Although Order 7 rules 18 renders documents not produced when the plaint is filed inadmissible, it provides for admissibility of such documents with the leave of court. The Applicant is therefore appealing to the discretion of the court to admit the document in light of section 98 of the Civil Procedure Act.

In reply Counsel for the Respondent agreed that the Applicant instituted a summary suit against the Respondent and leave was granted to the Respondents to file a defence and they subsequently filed a defence together with a counterclaim. Pursuant to the counterclaim the court ordered the appointment of

external auditors who carried out a joint audit and both parties through their internal auditors availed all the necessary documents as requested by the court referee. During cross-examination the first Respondent denied ever endorsing some photocopied documents which the Applicant wanted to tender in as evidence. Consequently the Applicant filed this application seeking to reopen its case so as to lead evidence of an expert witness regarding the exhibits on record before they can be formally admitted in evidence.

Furthermore the Respondent's Counsel submitted that the Applicant filed a suit and listed all relevant documents to be relied upon in its summary of evidence. Secondly through their internal auditor the Applicant went ahead and availed all the necessary documents to Messieurs Ernst and Young which documents were required for the joint audit. The Applicant's Counsel filed a trial bundle and even attended court for a scheduling conference up to the extent of leading evidence of six witnesses and closing the Plaintiff's case. All the preparatory steps demonstrate that the Applicant had enough time to realise and correct any mistake it may have made. The Applicant has not shown any justification whatsoever for the application and specifically why the case should be reopened and does not show how the documents will improve the case of the Plaintiff if any. Furthermore the application does not give any reasons as to why the documents were never presented at the opportune time, if they exist and does not show how vital they are.

In the premises the Respondents Counsel submits that leave should not be granted for the Applicant reopen this case since it is now trite law as held in the case of **Uganda Commercial Bank versus Ssanyu and another HCMA NO 1042/1998** that:

> "That invocation of inherent powers of court under section 98 of the Civil Procedure Act is precedent on the application coming properly before court; they should not be used as a convenient escape route for defaulters of procedural and substantive law."

Issue number 2: Whether the exhibits should be admitted in evidence?

Regarding the second issue of whether the exhibits on record should be admitted in evidence, the Applicant's Counsel submitted that section 43 of the Evidence Act gives guidance by providing for the use of an expert witness by the court. In this case, the document in question was signed by the Respondent who now denies it. As such an expert witness is required for purposes of having the signature identified. In the premises the Applicant seeks leave of the court to reopen its case for the admission of one additional witness.

In reply the Respondent's Counsel submitted that section 63 of the Evidence Act provides for proof of documents by primary evidence. Consequently the photocopied documents should not be admitted as evidence for they are not primary evidence. He relied on the case of **Kananura Melvin Consultant Engineers and others versus Conee Kabanda Civil Appeal No 31 of 1992** where it was held:

> "The trial court improperly admitted the tenancy agreement; moreover, the court had not been shown why the original agreement was not availed."

Because the Applicant is silent on the whereabouts of the original documents, the Respondents Counsel contends that the application lacks merit, is frivolous and intended to waste the time of court and ought to be dismissed with costs.

Additionally when the matter came for mention to give a ruling date on 25 June 2014 the Respondent's Counsel referred to the Applicant's written submissions and submitted that it was not true that the documents in question were attached to the plaint or listed. He contended that neither the original plaint nor the amended plaint or the scheduling memorandum attached the documents or listed them. Secondly that implied that the Applicant told lies and in order to get an equitable relief, the Applicant must tell the truth. He relied on the case of **UEB versus Emmanuel Turyamuhika HCT – 05 – CV – MA 0182 - 2004**.

In reply Counsel Roger Kakooza submitted that the documents should be taken in their entirety and made reference to the summary plaint. He contended that the documents were listed therein and some were attached.

Ruling

I have carefully considered the gist of the Applicant's application, the pleadings and affidavit evidence as well as the written submissions of Counsel and the authorities cited. I have duly set out the written submissions, the application and affidavit evidence above.

The Applicant's application was not made in a vacuum. The need to file the application became apparent when upon cross examination of DW1 Mr Jason Karuhanga, certain documents put to him which were allegedly written by him, were denied by him as duly endorsed by him. Proceedings of 22 April 2014 are pertinent to the resolution of the Applicant's application. The first problem arose when the witness DW1 was referred to a document dated 1st of July 2009 which was supposed to have been acknowledged by the witness. The witness denied that it was his signature on the document. Application by the Plaintiff's Counsel to have the documents exhibited was strongly opposed by the Respondent's Counsel. The ruling of the court was that documents could be produced during cross-examination of the Defendant under Order 7 rule 18 (2) of the Civil Procedure Rules. The court further ruled that it was an exception to the rule that documents had to be listed or attached before they can be produced. The document was accepted for identification purposes only and the court ruled that it may be tendered if it is subjected to any forensic analysis. I further observed in the ruling that the Plaintiff closed its case and cannot prove the document in question without its witnesses. The document was admitted as PID1 for identification purposes only as it was not an exhibit.

Secondly DW1 was referred to a letter from the second Defendant addressed to the Plaintiff and dated 28th of July 2010 and a second document of the Plaintiff addressed to the second Defendant dated 4th of August 2010. The witness stated that the documents were photocopies and denied the documents. Again for the same reasons the document was tendered as an ID and the court held that it may be admitted upon any forensic analysis confirming signature. Additionally the witness was referred to a disputed document of 20th of September 2010 and a similar objection was raised against admissibility of the document. The document

was accepted for identification purposes as PID 4. The Plaintiff's Counsel closed his cross-examination and the witness was re-examined whereupon the defence closed its case. The hearing was adjourned to enable auditors/referees be summoned to present their joint report formally in court.

I have carefully considered the first and second issues which are intertwined. The first issue is whether leave should be granted to the Applicant to reopen its case? Secondly whether the exhibits on record should be admitted in evidence? As far as the second issue is concerned, there are no exhibits on record except documents admitted for identification purposes as stated above. The Applicant omitted to indicate which documents he wanted tendered for purposes of this application. The only purpose for which the first issue can be answered is whether the Applicant should be permitted to call an expert witness for purposes of the court considering the documents accepted for identification purposes.

I will start by considering the provisions of Order 7 rule 18 of the Civil Procedure Rules which provides as follows:

> "18. Inadmissibility of document not produced when plaint filed.
>
> (1) A document which ought to be produced in court by the Plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the court, be received in evidence on his or her behalf at the hearing of the suit.
>
> (2) Nothing in this rule applies to documents produced for cross-examination of the Defendant's witnesses, or in answer to any case set up by the Defendant or handed to a witness merely to refresh his or her memory."

The first sub rule of rule 18 quoted above forbids admitting of documents which are not on the list or annexed to the plaint when it is presented in court. However sub rule 2 is an exception to the general prohibition of sub rule 1 for the Plaintiff to have admitted any document which is not listed or annexed to the plaint if it is

produced during cross-examination of the Defendant's witnesses. A document that is produced during cross-examination may be presented for purposes of discrediting the witness or disproving the witness testimony through documentary proof. In this particular case the witness was supposed to have signed certain documents. However the witness denied the documents or that they were endorsed by him. The denial of the documents presented a unique problem not envisaged by Order 7 rule 18 (2) of the Civil Procedure Rules which permits documents to be presented to a Defendant witness during cross-examination and which document is admissible even if it has not been listed or annexed to the plaint. Where the witness denies the document, the Plaintiff is left without any ground to stand upon to produce the document.

I do not agree with the Respondent’s Counsel that the Plaintiff did not utilise the opportunities afforded by listing the documents in the plaint, having them attached to the plaint or admitted during the scheduling conference where additional documents can be admitted by consent or presented for identification and subsequent proof by a competent witness. The exception to admissibility of documents applies even if the document is not listed or annexed. I however agree to a limited extent that the purpose of holding a scheduling conference is to give notice to the opposite side of points of agreement and disagreement. In this negotiation process, the Plaintiff's Counsel ought to have indicated that they were certain documents he intended to rely upon irrespective of whether he intended to prove the document through the Plaintiff's witnesses or for purposes of presenting it to any defence witness during cross-examination.

The question for consideration is whether the Defendants would be prejudiced through failure to notify them of the documents presented to the defence witnesses during cross-examination. I do not think so. In the first place where a document is presented during cross-examination, the witness would have an opportunity to clarify on whatever has been elicited from him or her when he or she is re-examined by his or her own Counsel. A document presented to the defence witnesses is presented after closure of the Plaintiff's case. The fact that the Plaintiff did not present the document for purposes of proof cannot by itself

preclude the Plaintiff from presenting a fresh document to the defence witnesses during the legitimate pursuit of a cross-examination objective.

As far as the question of whether the Plaintiff should be permitted to reopen its case is concerned, I have carefully considered the case of **Smith versus South Wales Bar Association (1992) 176 CLR 256,** a copy of which case was attached to the Applicant's application. The decision of Brennan, Dawson, Toohey and Gaudron JJ on the principles to be applied in an application to reopen the case or take additional evidence is as follows:

First of all they held that it is necessary to distinguish between the considerations which may bear on a decision to reopen a case and the processes involved in reconsideration once a case has been reopened. Where there is an application to reopen on the basis that new or additional evidence is available, it will be relevant to enquire why the evidence was not called at the hearing. If there was a deliberate decision not to include it, it would tell decisively against the application. However if there was no deliberate omission, different considerations may apply depending on whether the case is simply one in which hearing is complete; or one in which the reasons for judgment have been delivered. As regards the former the primary consideration is whether there would be embarrassment or prejudice to the other side. Where reasons for judgment have been delivered, appeal rules relating to taking fresh evidence provide a useful guide to the manner in which the discretion to reopen should be exercised.

I have carefully considered the above quoted decision on the principles to be applied. That matter arose when disciplinary proceedings were commenced in the Court of Appeal and subsequently the Appellant moved the Court of Appeal to reopen the matter by reason of an error contained in a statement. The Court of Appeal allowed the application to reopen and even though the case was reopened the Court of Appeal ruled that it would not consider the further evidence which the Applicant wished to present. Subsequently an appeal was filed to the highest appellate court which is the High Court of Australia in which one of the grounds was that the court had not considered the case put forward in the second hearing. The High Court of Australia is the highest appellate court and

therefore the case was decided by the highest court in a common law country and is very persuasive.

It is my considered judgment that the Plaintiff has made a case to reopen its case because of the denial of certain documents allegedly endorsed by and put to DW1 Mr Jason Karuhanga during cross-examination. The Plaintiff's Counsel assumed that by presenting the documents and pointing out the signatures or endorsement allegedly made by DW1, his admission would make the document admissible. The witness however denied the documents firstly on the ground that some of them are photocopies and secondly that it was not his signature. The plaintiff’s counsel did not anticipate the denial of the signature of DW1 on the documents in question and a new controversy emerged after the plaintiff closed its case.

I have further duly considered the submissions on the basis of the Evidence Act that documents are proved by primary evidence which is the original document itself. Secondly there was a submission that any question of fact may be tested through expert witness.

Starting with the question of opinions of experts, section 43 of the Evidence Act cap 6 laws of Uganda provides that:

> "When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting or finger impressions, the opinions upon the point of persons specially skilled in that foreign law, science or art, or in questions as to the identity of handwriting or finger impressions, are relevant facts. Such persons are called experts."

The question of whether there was a need for forensic evidence was raised by the court when the Plaintiff's Counsel applied for admission of documents disputed by DW1. I was definitely of the opinion that the matter could not be resolved without expert opinion. The documents in question were tendered for identification purposes only.

On the second question of the proof of documents through primary evidence the Respondent's Counsel invoked the provisions of section 63 of the Evidence Act. Section 63 provides as follows:

> "Documents must be proved by primary evidence except in the cases hereinafter mentioned".

There are exceptions to the general rule which are clearly stipulated in section 64 of the Evidence Act. The question of whether the Plaintiff’s case should be reopened cannot be prejudiced by the fact of whether the contents of any document are provable through primary or secondary evidence. It is premature to raise the issue of whether the document is primary evidence or secondary evidence. The issue to be considered is whether the Plaintiff should be allowed to reopen its case and whether it would embarrass or prejudice the Respondent if the case is reopened. The Plaintiff applied to reopen the case on the record to produce an expert witness for purposes of dealing with the denial by the Respondent of certain documents. DW1 and Counsel for the Defendants will have ample opportunity to clarify on any issue or to cross examine. The expert will not necessarily confirm that the documents in question are documents endorsed by DW1. The expert is supposed to establish and form an opinion as to whether the questioned documents were duly endorsed by DW1. In that effort whether the document is original or a copy and the effect thereof on the opinion of the expert as to whether the document was duly endorsed by DW1 will be part of the scientific analysis of the expert and may be a controversy on which the court may be addressed. I agree with the holding in the case of **Smith versus South Wales Bar Association (1992) 176 CLR 256,** where it was held that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened. Consequently even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not.

In the premises the Plaintiff's application to reopen its case is allowed for purposes of calling an expert witness to testify about whether certain documents admitted for identification purposes during the cross-examination of DW1 are

documents endorsed by him or acknowledged by him. This is still an issue for trial and the Defendants will have ample opportunity to either admit the documents or challenge it on any just grounds. They have a right of rebuttal. The question as to whether identified documents should be tendered in evidence will only be considered on the merits after evidence has been adduced. In the premises the Applicant's application is allowed with costs to abide the outcome of the main suit.

Ruling delivered in open court the 20th day of August 2014

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Anthony Ahimbisibwe for the Respondents

Roger Kakooza for the Applicant

Respondent not represent

Plaintiffs Asaph Asiimwe Internal Auditor present

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

20/08/2014