THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CV-CS-0003-2013

NASRA ALI WARSAME…….PLAINTIFF
VERSUS
OSEGE RAJAB……..RESPONDENT

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

RULING

In this case, the plaintiff sued the defendant for recovery of Ug. Shs.67,000,000/= (sixty seven millions) only, being money had and received, interest and costs.

When the matter came up for hearing, the learned counsel for plaintiff raised a preliminary point of law under O.13 r.6 CPR and prayed for judgment on admission by defendants of the plaintiff's case. Counsel submitted that in the pleadings of the defendant the receipt of money was not denied. Counsel invited court to make a finding whether the handing over of money to the defendant by the plaintiff was lawful. Counsel further referred court to O.6 rules 10 and 30 of the CPR and prayed that in the alternative the written statement of defence should be struck off for being evasive, frivolous and vexatious.

In his submission, counsel relied on the case of ***MAXIMOVOLEG PETROVICH VS PREMCHANDRA SHENOI & ANOR HCCS 802/97-*** to define the meaning of frivolous and vexatious. He further referred to ***R v. Singh 1957 E.A 822 at 825***

page 24, which defined frivolous as, "not worthy of serious attention having regard to all facts." Counsel related this definition to the CPR and invited court to adopt it and find the written statement of defence frivolous and not worth of serious attention.

Counsel further attacked the defence statement in that defendant relies on Newspaper reports alleging robbery which evidence is not admissible in court. He quoted the case of ***AG v. Tinyefuza Constitutional Appeal 97 Judgment of Wambuzi C.J at page 32*** that a document must be proved by primary evidence under section 62 of the Evidence Act.

Counsel further alluded to paragraph 3 (b) of the Written Statement of Defence, where defendant claimed the transaction was illegal, and that the robbery was an act of God's and invited court not to allow defendant to benefit from the illegality at the expense of plaintiff. Counsel pointed out that the plaintiff is not seeking proceeds out of the transaction but the money he gave to the defendant. Counsel for those reasons invited court to strike out the written Statement of Defence with costs and enter judgment for the plaintiff.

In reply counsel for defence pointed out that defendant did not admit the plaintiff's claim. He averred that defendant's pleadings in paragraph 3, 4, and 5 were an attempt to explain; himself.

In paragraph 5, the explained that defendant points out why the claim should not be allowed by court. Counsel pointed out i.e. the Written Statement of Defence is not

evasive. He explained to court that if counsel looked at the plaint paragraph 3(h) and (g), issues of robbery are alluded to. He quoted paragraph "g) where plaintiff stated that she reported to Busia Police. Counsel said that the defendant in explaining himself cannot be said to be vexatious.

Counsel distinguished the **Maximov** authority from the current case, stating that in that case it was the defence not plaintiff who raised the issue whether the cause of action was frivolous and whether plaint disclosed a cause of action. Counsel wondered if in this case counsel for plaintiff was inviting court to strike out his own plaint.

In further defence of the written Statement of Defence, counsel for defendant further explained that, annextures like newspaper cuttings create pleadings and defendant intended to relay on them to buttress his defence. He explained that the cuttings attest to a robbery against defendant and also bring out evidence which confirms what plaintiff alluded to in paragraph 3(g) of the plaint. He further conceded that defendant annexed documents from Busia Police Station where defendant was released on bond having been released on the offence of robbery. Counsel insisted that in the Written Statement of Defence, this was included to show that the written statement of defence is truthful. He further attacked the **Tinyefuza** case as being quoted out of context.

Regarding the issue of illegality, counsel for defendant explained that paragraph 3(a) and (5) of the Written Statement of Defence was to assist court to determine

the remedies and it's premature to attack the same now when he has not set rejoinder pleadings. Counsel insisted that the preliminary objection be overruled with costs to be paid by counsel.

In cross reply, counsel for plaintiff maintained his plea and explained away all issues raised by defence in reply.

He defended the maxim authority and insisted his submission is on O.6 r. 30 on the issue of the defence being vexatious and frivolous. He faulted counsel for relaying on paragraph 5 Written Statement Defence which he said if it read with paragraph 3 and 4 shows that defendant claims he received the money, but the transaction was illegal and an "act of God". Counsel stated that the defendant was not acting prudently when he pleads that "yes I received money, but it was "illegal", and "an act of God"- hence his conclusion the defense is evasive and frivolous.

He further insisted that the newspaper cuttings offend section 59 of the Evidence Act which bars admissibility of hearsay evidence; hence the relevancy of the **Tinyefuza** case in this matter. He concluded by reminding court that for judgments on admission it is trite law that pleadings must be specific so as to enable the other side the opportunity to defend and prepare accordingly. He maintained the prayers as earlier on submitted.

According to the court file, the plaintiff brought this suit by plaint dated 13th February 2013. The plaint is titled HCT CV CS No. 003 of 2013 between **Nasra Ali Warsame**…… as plaintiff and **Osege Rajab** as defendant.

Paragraph 1 states the plaintiff is an adult female Kenyan resident of Arubaine “A” village, Busia Uganda, paragraph 2 names the defendant as an adult Ugandan of sound mind resident of Kisenye Busia Uganda.

Paragraph 3 states that the plaintiff’s claim against defendant is for recovery of Ug. X. 67,000,000/= (Uganda Shillings Sixty Seven Million) only, being money had and received, interest and the cost of the suit and the facts giving rise to the cause of action arose as follows:-

(a) The plaintiff is a business woman dealing in general merchandise and buying and selling of agricultural products among other businesses at Busia-Uganda.

(b) On the 15th January 2012, the plaintiff/Defendant obtained from the plaintiff Ug. X 70,000,000/= to go and buy Kenyan Shillings from the “Money changers” around town (Busia).

(c) The plaintiff shortly thereafter called defendant to find out whether the defendant had actually furnished purchasing the Kenyan shillings but the defendant told the plaintiff that he had not and plaintiff asked him to return Ug. X 3,000,000/= which she urgently needed and the defendant did so.

(d) The defendant retained the balance of Ug. X. 67,000,000/= and continued with the earlier program of buying Kenyan shillings.

(e) The plaintiff waited for defendant to bring the Kenyan shillings but all was in vain.

(f) When the plaintiff called the defendant by evening to inquire into the matter, he was told by defendant that her money had been robbed from him.

(g) The plaintiff reported the matter to Busia Police Station from where she found that the defendant had reported the alleged robbery of Ug. X. 120,000,000/= (One Hundred and Twenty Million Shillings) and had actually stated that 67,000,000/= of the robbed money belonged to the plaintiff.

4. The plaintiff has since demanded for her money from the defendant but the defendant has neglected, ignored and or refused to pay the plaintiff's money.

5. The notice of intention to institute these proceedings was dully communicated onto the defendant but he opted to ignore the same.

6. The facts constituting the cause of action in this suit arose at Busia-Uganda within the jurisdiction of this honourable court.

REASONS WHEREFOR the plaintiff prays that judgment be entered against the defendant for orders that;

a) The defendant pays to the plaintiff Ug. X 67,000,000/=.

b) Interest on (a) above at court rate from date of filing this suit till payment in full.

c) Costs of the suit.

Dated at Kampala this 13th day of February 2013

Signed Counsel for the Plaintiff.

On 14th Feb 2013, a summons to file defence was issued to Osege Rajab and signed by the Deputy Registrar of the Court.

On 4th March 2013, the defendant filed a written statement of defence. The defence statement titled civil suit 3/ of 2013. **Nasra Ali Warsame vs Osege Rajab**.

1. Paragraph 7 states that save as hereinafter admitted, every allegation of fact in the plaint is denied as if the same was set out seriatim and specifically answered.

2. The plaint paragraph 2 as well as the plaintiff address of service and the jurisdiction of the Honourable Court are admitted.

3. The defendant while demanding strict proof of the plaintiff paragraphs 3, and 4 as well purported cause of action against him, will aver and contend, inter alia.

    a) that the plaintiff and myself were involved in a money rending business partnership earning proceeds on the interest charged in buying and selling Kenya currency for Uganda currency along the customs Road Busia, in the Busia Municipality Busia District Uganda for some time.

    b) that the money lending transaction the plaintiff and myself were involved in as a business partners for a profit was illegal and or unregistered in accordance with the laws of Uganda in force.

    c) that on 16th day of September 2012 in the ordinary course of trading in the money lending businesses aforesaid. I was robbed violently of a cash sum of Ushs 120,000,000/= which was inclusive of shs.1, 2000,000/= in Kenya currency.

d) that pursuant to the said robbery I filed a complaint with the central Police Station (CPS) Busia Vide S 12/16/09/2012 (CRB 1918/2012).

e) that the fact of the said robbery was widely published in local daily newspaper, to wit a Luganda "Bukedde" newspaper, the issue of September 21,2012 a page 7 thereof. A photocopy of the said newspaper, together with its English translation are hereto attached and collectively marked annexture D1.

f) that the police at the Central Police Station (CPS) Busia are still investigating the case todate.

g) that on 12th October 2012, almost a month after the occurrence of the violent robbery aforesaid, the plaintiff purported to lodge a complaint against me on a trumped up charge of obtaining money by false pretences vide Central Police Station. (CPS) Busia vide CRB 2068/2012 inter alia claiming a sum of Ushs.76,577,000/=.

h) that my arrest and detention was published in another "Bukedde" newspaper the issue of 7th October 2012 a photocopy whereof is hereto attached and marked annexture D2 with its English translation.

i) That pursuant to the aforesaid on 7th November 2012 I was released on bond by the OC CID CPS Busia despite the fact that I was the complainant in CRB 1918/12 and after my protest, to the contrary. A photocopy of the "Release on Bond sued to me together with other relent documents issued by police are hereto attached and collectively marked annexture D.3.

BY THE MATTERS aforesaid the plaintiff has not come to this Honourable Court with clean hands she having commenced criminal proceedings against me vide CRB 2068/2012 to secure a conviction to the contrary.

4. IN THE ALTERNATIVE but without prejudice to the aforesaid the defendant will aver and contend that the plaintiff's suit claim arises as a base cause and void and unenforceable against him on account of a legal maxim "*extur pi cause aritur non action*"

5. IN THE FURTHER ALTERNATIVE, but without prejudice by virtue of a robbery which occurred on the 16th day of September 2012, the defendant is entitled to a plea of an act of God against the purported claim of Ushs 67,000,000/= in the suit action by the plaintiff.

WHEREFORE the said defendant prays this Honourable Court inter alia to dismiss the plaintiff's case with costs.

Dated at Kampala this 4th day of March 2013.. Counsel for the defendant.

Lodged under my hand and the Seal of this Court this 4th day of March 2013. Signed by the Assistant Registrar.

Having gone through the submissions raised by counsel in support or against the pleadings above, the following issues stand out for determination:

Issue 1: Whether the plaintiff is entitled to Judgment on admission under O.13 r.6.

Issue 2: Whether the Written Statement of Defence offends O.6 r. 10 and should be struck out for being evasive, and frivolous under O.6 r.30.

Issue 3: Whether the handing of money to the defendant by the plaintiff was unlawful.

Issue 4: Whether the reference to Newspaper reports alleging robbery (of the defendant) violates section 59 of the Evidence Act.

Issue 5: Whether the defences pleaded by defendant of "illegality", act of God and '*exturpi causa oritur non action*" are frivolous and vexatious and not available to support the defence case.

I will discuss and resolve these issues in the order which I have listed them as here below:

Issue 1: Whether the plaintiff is entitled to a Judgment on admission under O.13 r.6 CPR.

O.13 r.6, CPR provides as follows:

> "*6: Judgment on admissions:*
>
> *Any party may at any stage of a suit, where an admission of facts has been made, either on the pleadings or otherwise, apply to the court for such Judgment or order as upon the admission he or she may be entitled to, without waiting for the determination of any other question between the parties and the court may upon the application make such order, or give such judgment as the court may think just"*

> *It is the case for the plaintiff that the defendant's pleadings as they stand amount to an admission for reasons I have already laid down in the review of his submissions to court. Likewise counsel for defendant, again for reasons stated in his submissions opposes this proposition*."

In the case of ***MESSRS EQUATOR TOURING SERVICES LTD VS CITY COUNCIL OF KAMPALA MISC. APP. 406/2013 FROM HCCS 278/210***

Justice Madrama while discussing circumstances under which the applicant can move court for Judgment under this order, refers to the cases of ***Central Electrical International Ltd versus Eastern Builders and Engineers MA No. 176/2008, arising from HCCS No. 43 of 2008***, and the case of ***Excel Construction Ltd versus AG. HCCS No. 3007***, in these cases the gist of the holdings was that;

> "(i) *An admission of facts be made either on the pleadings or otherwise.*
>
> *(ii) the rule applies to any party to the suit whether the plaintiff or the defendant*."

The facts before me are that the admission is implied from the defendant's answer to the plaint, contained in paragraphs 3, 4, and 5 of the Written Statement of Defence. In these paragraphs the defendant states in paragraph 3 thereof that "the defendant while demanding strict proof of the plaint paragraphs 3 and 4 as well the

purported cause of action against him will aver inter alia….. (and he sets his reasons from (a) …. (j) his chronology of the events.

In paragraphs 4 and 5 he raises alternative answers to the claim raising the legal maxim of "*exturpi causa oritur non actio*" and that of "an act of God" as possible defences to the plaintiff's claims.

Counsel for plaintiff attacked these pleadings for being evasive, frivolous and vexatious, and concluded that they amount to an admission of plaintiff's case because they do not specifically deny his claim.

As pointed out above, any admission of facts must be made either on the pleadings or otherwise.

The rules which govern pleadings were well laid out by ***ODGERS PRINCIPLES OR PLEADINGS AND PRACTICES*** **22nd EDN pg. 136** that

> *"It's not sufficient for a defendant in his defence to deny generally the allegations in the statement of claim or for the plaintiff in his reply to deny generally the allegation in a counter claim but each party must traverse specifically each allegation of fact which he does not intend to admit*."

The above rule requires that pleadings must specifically address each statement of claim as raised by the other party to give them reasonable apprehension of the intended answer to the allegations raised. The Written Statement of Defence in

this case in paragraph 3, is detailed. It has a total of 7 phrases explaining the answer that the defendant intends to put forward against the allegations including a requirement "to be put to strict proof". That statement alone is enough to imply a denial. However the Written Statement of Defence in explaining the intended defence in paragraph 3(a) – (i) avers that he was involved in a money lending transaction with plaintiff which went bad. Can this be construed as an admission?

O Hare & Hill: Civil Litigation 10th Edition at page 311, states that.

> "*the admission must be sufficiently clear that the issue in question can be said to be closed." He quotes the case of* ***Techistudy Ltd v. Kelland (1976) 1 WLR 1042****, where it was Held that*
>
> *"If the admission is ambiguous seek further information by way of clarification and/or serve a notice to admit facts*."

I find the above legal positions persuasive and directive in this matter. The paragraph 3 of written statement of defence is at most ambiguous in as far as answering plaintiff's assertions. However it contains in itself matters of law which unless examined cannot be said to sufficiently clear the issue in question. In that type of scenario therefore, counsel for plaintiff upon receipt of defence pleadings should have sought further clarification from defendant whether he is admitting these facts or not. The CPR takes care of the procedure to be followed here in O.13 r.4 which provides that;

> "*Any party may by notice in writing at anytime not later than 9 days before the day fixed for hearing call on any other party to admit…..*"

The rules do not envisage an "implied" admission. The admission must be specifically. ***O. Hare*** page 239 (supra) advises that "a claimant may be able to put pressure on a defendant to make admissions by serving a notice to admit. If the admission of fact amounts to an admission of liability then the claimant can obtain judgment on them without the necessity of a trial.

It is my finding therefore that the CPR lays down the procedure on admission under O.13. The proper procedure is that a party intending to apply for Judgment on admission of facts must notify the other party that he intends to do so by notice under O.13 r. 4. The rules do not envisage a situation where the admission is "inferred" from the pleadings, unless they specifically do so.

In this application, counsel for plaintiff did not move under O.14 r. 4 and he therefore cannot get judgment under O.14 r. 6 as prayed. This issue therefore is terminated in the negative.

Issue 2: Whether the written Statement of defence offends O.6 r.10 and should be struck out for being evasive and frivolous under O.6 r. 30.

O. 6 r.30 states that;

> " *the court upon application may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer and in any such*

> *case or in case of the suit or defence being shown by pleadings to be frivolous or vexatious may order the suit to be stayed or dismissed or Judgment to be entered accordingly as may be just*."

In attacking the written statement of defence the above arm, counsel for plaintiff referred to the case of ***Maxim HCCS 802/97*** citing ***Republic v. Dan 1965 E.A 167*** where court defined frivolous and vexatious to mean lack of serious thought. Defence counsel maintained all through that the written statement of defence was a proper defence and that paragraph 3 thereof offered an extensive explanation of the defence case, and that it was not evasive.

According to ***O' Hare and Hill Civil Litigation 10th Edn at page 240***,

> "*As a general rule if the defendant fails to address an allegation he is deemed to admit it. However if he has his case in relation to that issue he is taken to have required the claimant to prove it. In addition where the claim includes a money claim, a defendant is always assumed to require any allegations relating to its amount to be proved, unless he expressly admits it*."

Also in the case of Attorney General for Kenya (1939) EACA 18, it was held by Sir Joseph Sheridan C.J. that,

> "*What is important in considering whether a cause of action is revealed by the pleadings is the question as to what right has been violated*."

Going through the written statement of defence as we have already done, the defence case is clearly elaborated under paragraphs 3, 4 and 5.

The Alifar Keya (1938) EACA 18, case above points out that,

> "*It must be noted that the court must look at the pleadings (plaint) while determining whether a cause of action has been made out. That the plaintiff must clearly come out as the person aggrieved by the violation of a right and the defendant as the person who is liable*."

The plaint in paragraph 3 names the defendant as the person who took shs.67,000,000/=, in a contractual or partnership relationship which money is owing and due.

The defendant in paragraph 3 has conceded that he has done business with plaintiff, and suffered loss by way of robbery, an act of God, and puts forward other explanations to deny liability citing illegality and the "*exturpi causa aritur non action*" defence.

At the level of pleadings, which O.6 r.30 is deemed to be dealing with, in my view paragraph 3 of the defence cannot pass for a no defence. It cannot be described as

frivolous and vexatious, I hold that the written statement of defence is not frivolous as it clearly puts forward the defence case. I terminate this issue in the negative.

Issue 3: Whether the handing of money to the defendant by plaintiff was unlawful.

This issue came up in counsel's submission in that when defendant alludes to the fact that the business they were involved in with defendant was unlawful this does not render the fact that he received the money from plaintiff lawful. That such a defence is evasive and should be rejected.

On this point, defence counsel pointed out that the defendant in bringing out this point among others in paragraph 3 of the written statement of defence was explaining to court why the plaintiff's claim should be disallowed if the proper investigations are done and a just decision reached. He pointed out that attempting to explain himself further would amount to giving evidence from the bar.

I have already found that paragraph 3 of the written statement of defence is an assertion of the defendant's pleadings given in answer to plaintiff's claims. The decision as to the nature of relationship, whether legal or illegal in my view is a question of law to be proved at the trial. Its therefore premature to invite court to reject the defendant's case for being evasive, on account of him rising a possible legal defence to the claim against him. I therefore find that this issue will be substantively determined during the hearing after hearing all available evidence on the matter.

Issue 4; Whether the reference to Newspaper reports alleging robbery (of the defendant) violates section 59 of the Evidence Act.

In his pleadings, paragraph 3(e) of the Written statement of defence refers to the fact that the robbery was widely published in local daily newspaper, to wit a luganda "Bukedde" newspaper attached as annexture 'D'.

Plaintiff's case referred court to the case of Tinyefuza as application to his submission that this paragraph 3(e) of the written statement of defence offends the rules of evidence under section 59 Evidence Act.

Counsel for defendant said the annextures like newspaper cuttings create pleadings, and uses the documents to buttress his defence. He pointed out that the Tinyefuza case is irrelevant in this matter.

In the ***Tinyefuza Case***, **Wambuzi C.J.** as he then was held that:

> "*Oral or written statements made by persons who are not parties are not called as witnesses are inadmissible to prove the truth of the matters he states, except in the cases hereinafter mentioned*."

This is the position of the law as contained in section 59 of the Evidence Act which provides that oral evidence must in all cases be direct. Indeed the Tinyefuza case above J. Wambuzi points out at page 33 of his judgment out that section 62 of the

Evidence Act requires proof of a document by primary evidence. Hon. J. Kanyeihamba in the same case at page 27 of his Judgment holds that;

> " *under the Evidence Act of Uganda, hearsay is inadmissible. Copies of newspaper reports are hearsay statements*."

With due respect to defence counsel, the above position of the law cannot be faulted. The newspaper reports are hereby found to be hearsay and a violation of the law. They should be expunged from the pleadings for being hearsay and should be removed from the written statement of defence and are hereby struck off the record and will not be allowed to be part of the defence pleadings for being hearsay. The issue is accordingly terminated in the positive.

Issue 5: Whether the defences pleaded by defendant by illegality, act of God and *exturpi causa oritur non actio* are frivolous, vexatious and not available to support the defence case.

This issue is premised on the fact that plaintiff's counsel argued that the written statement of defence as a whole discloses no cause of action, and the above assertions under paragraph 4 and 5 of the written statement of defence are merely evasive and an attempt by defendant to benefit from the transaction at the expense of the plaintiff.

The defendant's counsel alluded to the fact that the above are explanations that the defendant has in answer to allegations put by plaintiff and that he is entitled to plead them.

Subject to the finding in issue 4 above, the defendant in my opinion has a right to put across the possible defences he has in answer to the plaintiff's claim for as long as such defences are lawful. I have already held that the reference to Newspaper reports in the pleadings is unlawful. However further reference the Ugandan Law of evidence shows that a party has a right to call evidence to prove what he alleges. According to section 102 of the Evidence Act, the burden of proof in a suit or proceeding lies on the person who would fail if no evidence at all were given on either side. Section 103 of the same Act further places the burden of proof of any particular facts on he who wishes the court to believe in its existence.

Going by the above rule of evidence, the burden is upon the defendant in this case to lead evidence to prove his allegations of "illegality", "act of God" and "base contract". He has shown that he intends so to do in paragraph 4 and 5 of his Written statement of defence. My view is that save the impugned newspaper cuttings and references to hearsay which is overruled in issue 4, the defendant has a right to plead the defences he raised in paragraph 4 and paragraph 5 of his written Statement of defence. I therefore find that this issue terminates in the negative.

All in all, having found as above on all the issues above, the objection fails on issues 1, 2, 3 and 5 and succeeds on issue 4. The defendant is directed to expunge

the hearsay evidence from his pleadings and the matter shall proceed for hearing as earlier on scheduled.

I so order. Costs in the cause.

Henry I. Kawesa

JUDGE

06.09.2013