

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISC APPLICATION NO. 801 OF 2019
(ARISING OUT OF CIVIL SUIT NO. 354 OF 2019)
ASK WITHOUT SHAME APPLICANT
VERSUS
RUTH NABEMBEZI RESPONDENT
BEFORE THE HON LADY JUSTICE ESTA NAMBAYO
RULING

This is an application by chamber summons brought under s. 98 and s. 100 CPA, Order 1 rule 3 and Order 6 rule 19 and 31 of the CPR. It seeks for orders of this Court that:

1. Leave be granted to the Applicant to amend the plaint in Civil Suit No. 354 of 2019 by adjusting the amount of money claimed for refund to USD 91,000 from 40,000 and UGX to 45,000,000/-
2. Costs of the suit

The grounds of this application are laid out in the affidavit in support of the application made by Mr. Ettienne Salborn but briefly they are that:

- i. The Applicant intends to lead necessary information for determining the real question between the parties
- ii. During the pendency of the suit before this Court, the Respondent illegally and unlawfully withdrew more money from the Applicant's account
- iii. The Applicant intends to claim for a refund of an additional USD 51,000 which will now total to 91,000 USD and UGX 45,000,000
- iv. It is just and equitable that the orders sought be granted
- v. The Respondent is not in any way prejudiced by the amendment.

In his affidavit in support of the application Mr. Ettienne Salborn states that:

- i. On the 16th day of August, 2019 the Applicant filed civil suit No. 354 of 2019 against the Respondent seeking among others for a declaration that the Respondent's act of withdrawing money from the Applicant's account for her own use was a breach of her duties as director of the Applicant and she should be directed to refund the money amounting to USD 40,000, interest at 30% per annum, general damages and costs of the suit.

- ii. During the pendency of the suit, the Respondent went ahead to withdraw more money from the Applicant's account in addition to the USD 40,000 before the commencement of the main suit.
- iii. The Respondent withdrew a sum of USD 51,000 and UGX 20,000,000 before obtaining an interim order from this court freezing the accounts in addition to the UGX 25,000,000 drawn three days before the suit was filed in this court.
- iv. The total amount now withdrawn by the Respondent from the Applicant's account is USD 91,000 and UGX 45,000,000
- v. This court is vested with the jurisdiction to allow the amendment of the pleadings
- vi. The Respondent will not be prejudiced in any way by the amendment,
- vii. The amendment is sought in good faith and is intended to enable court to effectively investigate and determine the real questions in controversy between the parties.
- viii. It is in the interest of justice that the orders sought in this application are granted by this honorable court.

The Respondent filed an affidavit in reply opposing the application.

The background of this case is that Ruth Nabembezi (Respondent), Ettienne Salborn and Chandi Tome registered a company called Ask Without Shame (the Applicant) in which they are all directors. The company runs bank accounts with Stanbic Bank – Mpigi where the Respondent is the principal signatory.

The company receives money from donors for its business.

Misunderstanding over the management of the finances arose leading to the filing of Civil Suit No. 354 of 2019 in this court and thereafter this application which seeks to amend the main suit on the grounds already laid out.

Mr. Karooro Francis represents the Applicant/ Plaintiff while Mr. Bafirawala Elisha is for the Respondent/Defendant.

When the application came up for hearing, Counsel for the Respondent raised two preliminary objections on grounds that:

1. The affidavit in re-joinder was filed out of time
2. By the time the Applicant filed the main suit and this application before court, Mr. Ettienne Salborn was no longer a Director in the Applicant company.

I will now look at the submissions of counsel in respect to the preliminary objections.

Preliminary Objection No.1

Counsel submitted that the affidavit in re-joinder was filed out of time contrary to **Order 12 rule 3 (2) CPR**. He explained that the rule requires that the affidavits in reply/re-joinder be filed in 15 days from the time of service. He explained that the affidavit in reply was served on the Applicant on the 18th /12/2019 and the Applicant filed the affidavit in re-joinder on the 20th

/1/2020. From the computation of time the affidavit in re-joinder was filed way after the 15 days provided for in the rules.

Mr. Bafirawala also submitted that even if this Court relied on the Judicature (Court Vacation Rules) where it is provided that court vacation runs from 15th July to 15 August and 23rd December to 7th January every year, all dates inclusive the affidavit in re-joinder will still be out of time. He submitted that in the circumstances, the affidavit in re-joinder is incompetent and should be struck out with costs.

In reply Counsel for the Applicant submitted that Counsel for the Respondent did not consider the provisions of Order 51 rule 4 of the CPR. He explained that under that Order, in the computation of time, the time running from the 24th December to the 15th of January every year, both dates inclusive; is not considered. Therefore, the affidavit in re-joinder filed and served on the respondent on the 20th/1/2020 is within time.

In regard to Order 12 rule 3 (2) CPR, Counsel submitted that it applies where the matter has already been conferenced. In this case the case was not yet conferenced and therefore Order 12 rule 3(2) CPR does not apply.

Relying on the case of **Dr. Lam Lagoro James Versus Muni University MC No.7 of 2016 (High Court Arua)** where Hon. Justice Mubiru observed inter alia that:

“Affidavits are a way of giving evidence to the court other than by giving oral evidence. They are intended to allow a case to run more quickly and efficiently as all parties know what evidence is before the court. Consequently, time constraints applied to defenses maybe misplaced when applied to affidavits”

Counsel submitted that considering the time of filing the affidavit in re-joinder, there is no miscarriage of justice to the Respondent. He prayed that the Preliminary objection raised by Counsel for the Respondent be over ruled.

Court

I have carefully considered the submission of Counsel for both parties.

Counsel for the Respondent has relied on Order 12 rule 3(2) of the CPR which deals with timelines for filing of interlocutory applications, service thereof and handling of interlocutory applications.

Counsel for the Respondent did not seem to pay attention to Order 12 rule 3(1) which provides that

“All remaining interlocutory applications shall be filed within 21 days from the date of the completion of the Alternative Dispute Resolution and where there has been no Alternative Dispute Resolution, within 15 days after the completion of the scheduling conference”

Rule 3(2) cannot not be read in isolation of the first part because it is a continuation. In this case there was no Alternative Dispute Resolution or scheduling conference yet. Therefore, I find that 15 days provided for under Order 12 rule 3(2) of the Civil Procedure Rules would not apply.

I have also taken into account the provisions of **Article 126 (2)(e)** of the Constitution which enjoins Courts to endeavour to do substantive justice without undue regard to technicalities. This Article was not meant to do away with the Civil Procedure Rules or substitute any rules, but where the effect of adherence to a technicality may have the effect of denying a party substantive justice, then the Court should endeavour to invoke that provision of the Constitution.

In this case I see no miscarriage of justice in any way because the Respondent had time to study the affidavit in re-joinder before the matter came up for hearing. Therefore, I find no merit in this preliminary objection and it is hereby over ruled.

Preliminary objection No. 2

In regard to this objection, Counsel submitted that Mr. Etienne Salborn was not competent to swear the affidavit in support of the application because by the time he swore the affidavit, he had been dismissed and was no-longer a director of the applicant.

Counsel relied on paragraphs 3,4 and 6 of the affidavit in reply which indicate that Mr. Etienne had ceased to be director of the Applicant. He prayed that the affidavit of Mr. Etienne be struck of the record and therefore the application be dismissed for having no affidavit.

In reply, Counsel for the Applicant stated that the resolutions attached to the affidavit in reply offends s. 195 of the company's Act which provides for removal of the Directors.

Counsel submitted that Directors can only be removed by an ordinary resolution and not a resolution by the Board.

Counsel submitted that the resolution attached to the affidavit in reply is the resolution of the board passed in a board meeting which makes it illegal. Counsel relied on the case of **Makula International Ltd Vs His Eminence Cardinal Nsubuga & Anor CA No. 4 of 1981** where it was held that;

“a court of law cannot sanction what is illegal, an illegality once brought to the attention of court overrides all questions of pleading, including any admission thereof and court cannot sanction an illegality”

Counsel went on to explain that the affidavit in reply does not show whether Etienne was notified of the meeting that took place to remove him as director of the company as required under S. 195(3) of the companies Act. In this case, counsel submitted that Mr. Etienne was not notified of the meeting, neither did he attend the meeting. He referred to paragraph 5 of the affidavit in rejoinder.

Under paragraph 6 of the affidavit in rejoinder, the Applicant has petitioned the Registrar General of the Uganda Registration Services Bureau in regard to the illegal and fraudulent registration of the resolution attached to the affidavit in reply.

Counsel explained that the attached resolution was back dated to the 11/9/2019 and yet it was received on the 9/11/2019 which all raise questions of fraud and illegalities.

Counsel prayed that the preliminary objection be dismissed with costs so that the application is heard on its merit.

In re-joinder counsel for the Respondent submitted that all issues relating to the procedure and compliance of the removal from office of Mr. Etienne as director from the Applicant company requires a different cause which cannot be addressed in this matter.

Mr. Bafirawala submitted referring to annexure A of the affidavit in rejoinder that it is rather Ask without Shame (the Applicant company) and not Mr. Etienne who petitioned the Registrar General regarding the validity of the resolution to dismiss Mr. Etienne. He prayed that the annexure relied on be disregarded as having no evidential value. He prayed that the affidavit in rejoinder be disregarded and struck of the record.

From the evidence on record, the Respondent states in Paragraph 4 of the affidavit in reply that the Board of Directors of the Applicant resolved in a meeting and relieved Mr. Etienne Salborn from the position of Director in the Applicant company. The evidence that was relied on is a photocopy of the Applicant's resolution attached as annexure "A".

I note that the said annexure bares a certifying stamp; but it doesn't indicate the certifying officer.

Under paragraph 5 of the affidavit in re-joinder, Mr. Etienne denies knowledge of the resolution. He states that he was not notified of any meeting leading to that resolution and he did not attend any such meeting. Mr. Etienne also indicates in paragraph 6 of the affidavit in rejoinder that he has petitioned the Registrar General of the Uganda Registration Services Bureau over the illegality of the said resolution.

Counsel for the Applicant submitted that S.195(3) of the Companies Act makes it mandatory that a Director must be notified within 21 days before a meeting to remove him or her from being a director is held which was not done in this case.

I note from the above evidence and submissions of both counsel that there is a dispute on whether or not Mr. Etienne is still a director of the Applicant company or not.

The information provided in the preliminary objection and the related submissions are not enough to guide this court on whether Mr. Etienne was validly removed from being Director of the Applicant Company or not.

In the circumstances, this preliminary objection also fails and it is hereby overruled.

Costs stay in the cause.

I so order.

Esta Nambayo

Judge

5/2/2020