THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)

MISCELLANEOUS APPLICATION NO. 140 OF 2013
(Arising from Civil Suit NO. 247 of 2011)

DR. WENCESLAUS RAMA MAKUZA :::::::: APPLICANT/PLAINTIFF

VERSUS

1. MADINA NAKAMYA
2. BADRU JJAGWE ::::::: RESPONDENTS/DEFENDANTS
3. JAMES SSEMAKULA

RULING BY HON. MR. JUSTICE JOSEPH MURANGIRA

The applicant through his lawyers M/s Rwaganika & Co. Advocates brought this application under Order 6 rule 30, Order 52 rules 1, 2, and 3 of the Civil Procedure Rules and Section 98 of the Civil Procedure Act, Cap. 71 against the respondents seeking the following orders; that:

(a) The written statement of defence be dismissed on account of fraud.

(b) The defence be dismissed for being frivolous and vexatious.

Alternatively;

(c) The written statement of defence be struck out on the ground that it discloses no reasonable answer to the suit.

(d) The written statement of defence be struck out on grounds of illegality.

(e) Costs of the application be provided for.

This application is based on 12 grounds which are well set out in this application and expounded on in the affidavit in support of this application deponed by the applicant.

The respondents did not file affidavits in reply despite service of the Court process on their counsel. In that regard the applicant was allowed to proceed exparte with the hearing of his application.

Though the application proceeded exparte, it is important to note that in all civil matters he/she who alleges a fact has to prove that fact on the balance of probabilities. That standard of proof must be discharged by the applicant in this application. Justice must be seen by all concerned or likely to be affected by the decision in this application, being done by this Court.

Resolution of this application by Court.

This is an application for orders that the written statement of defence be dismissed on account of fraud and, for being frivolous and vexatious. In the alternative, that the written statement of defence be struck out on the grounds that it discloses no reasonable answer to the suit; and on the grounds of illegality and; the last prayer is for costs.

The grounds of the application are summarized in the averments in the Notice of Motion and amplified by the affidavit in support of Dr. Wenceslaus Rama Makuza, and, on any other ground to be raised and discussed in these

submissions. The application is brought under Order 6 rule 29 Order 6 rule 30, Order 52 rule 1, 2 & 3 and S. 98 of the Civil Procedure Act.

The background to the application is stated in paragraph 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25& 26. The gist of these paragraphs is that the applicant bought the suit property described as Kibuga Block 26 Plot 284 from the 1st Respondent's father called Musa Mpagi in 1993. The 1st Respondent's father died in 2002 before transferring it to the Applicant. In 2004 the 1st Respondent obtained letters of administration for her late father's estate together with her 2 other sisters.

Counsel for the applicant, Mr. Rwaganika Henry argued that however, it so happened that the above property was not in the names of her late father. The 1st Respondent's father was called Musa Mpagi. It was in the names of her father's mother called Ajija Nabukalu. The 1st Respondent's father had inherited the property from this late mother of his and it was in his possession and full use when he sold it to the Applicant. When they obtained the letters of administration it was not possible for the 1st Respondent and her 2 sisters to administer the said property as it was still registered in their grandmother's names. This argument by Counsel for the applicant creates a problem as far as conveyencing of the suit land between the applicant and the father of the respondents is concerned. In such regard, there is need for Court to investigate which party has proprietary rights over the suit land. Certainly there are triable issues between the parties which have to be sorted out by this Court.

It is also the argument of Counsel for the applicant that in 2006 the 1st Respondent forged letters of administration for Ajija Nabukalu's estate, which she used to administer the above property fraudulently and got it registered in her names. The Applicant knew the 1st Respondent because she was the person

who used to be sent by her father to collect rent from him even before her father died. On 26.9.2009 the 1st Respondent told the Applicant that she was going to transfer the suit property to the Applicant's names. She said she was going to do this since it was already registered in her names. To do this she demanded to be paid the sum of UGX.20,000,000/= as facilitation fees to enable her carry out the transfer. The Applicant agreed and paid UGX.17,000,000/= in five installments. Whenever the 1st respondent came for the money, she was in the company of the 2nd and 3rd Respondents who she introduced as her compatriots who were going to assist her carry out the transfer process in the land registry. The three signed for the money together. They also signed the acknowledgments together. ***The Agreement and the acknowledgment documents are annexed to the application and marked A1, A2,A3,A4 and A5.***

The above arguments raise triable issues between the parties which could be resolved in the main suit and not in this application.

That after receiving the money the three respondents disappeared from the public when the Applicant put a condition that the balance of UGX. 3,000,000= would be paid after the respondents have brought to him the certificate of title duly registered in his names. All efforts to trace the three were futile.

When it occurred to the Applicant that he had been conned, he decided to institute the main suit against the three respondents jointly seeking the following reliefs;

a) A declaration that the suit property belongs to the Applicant.

b) An order for cancelation of the 1st Respondent's name from the certificate of title,

c) An order for registration of the Plaintiff's name in the certificate of title for Kibuga Block 26 Plot 284 in substitute for the 1st Respondent's name.

d) A permanent injunction.
e) An order for recovery of the UGX.17,000,000/= at the rate of 25% p.a from 20.9.2009 till payment in full.

f) Costs of this suit.

g) Any other relief.

Counsel for the applicant submitted that, in reply the Respondents filed a written statement of defence and a counterclaim. ***Mentioned as some of the documents supporting the written statement of defence and counterclaim were copies of cheques as annextures "A", "B" & "C".*** The cheques were mentioned but not attached to the Written Statement of Defence and counterclaim as required by law. However, I wish to emphasize that this argument is taken care of under Order 7 rule 18 (1) of the Civil Procedure Rules, which reads:-

" Rule 18: inadmissibility of documents not produced when plaint filed.

(i) 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 leave of the Court be received in evidence on his or her behalf at the hearing of the suit."

Order 8 of the Civil Procedure Rules which deals with the filing of written statements of defence do not cover this referred to area. Therefore, Order 7 rule 18 (1) of the CPR would be applied to the issue under investigations with necessary modifications.

Morestill, Order 6 rule 2 of the Civil Procedure Rules is of great assistance on this issue under investigation. It reads:

"Order 6 rule 2 thereof

Every pleading shall be accompanied by a brief summary of evidence to be adduced, a list of witnesses, a list of documents and a list of authorities to be relied on except that an additional list of authorities may be provided later with leave of Court."

I have looked at the defence that was filed by the respondents/defendants and they complied with the above quoted rule 2 of the Order 6 thereof.

It is the argument of Counsel by the applicant that as if filing written statement of defence without attaching documents or serving the opposite party was not fraudulent enough, the written statement of defence is riddled by other forms of fraud. That the Respondents attached another document as "F" to the written statement of defence. That this was a letter written in a language which is not the language of the court. This contradicts S. 88 (1) of the Civil Procedure Act which states that the language of the court shall be English. This provision is couched in mandatory terms, and failure to comply with it is illegal and fatal to the defence.

Counsel for the applicant in my view invoked Section 88 of the Civil Procedure Act to support his argument out of context. Section 88 of the CPA, thereof reads:-

"S.88. Language of Courts

(1) The language of all Courts shall be English.

(2) Evidence in all Courts shall be recorded in English

(3) Written applications to the Courts shall be in English."

It is my interpretation of the law that when a document written in the local language and attached to the pleading without being interpreted into English language; then at the time of adducing evidence, the Court shall direct that such

documents be translated into English Language. Then the original document together with its translated copy shall be admitted in evidence. Therefore, I make a finding that attaching the document written in a local language cannot make the respondents' written statement of defence and counterclaim illegal. Wherefore, Counsel for the applicants' arguments in that direction do not hold any water at all.

It is further my finding that the forgeries submitted on by Counsel for the applicant cannot be raised and argued in this application. There is need for the parties to adduce evidence to prove or /and disapprove the alleged fraud attributed to the respondents. Counsel for the applicants' submissions would be relevant in final submissions after the suit has been heard interparties. There is need for evidence to be adduced in full flagged trial.

It has been decided that for fraud to affect the respondents' defence it must be proved that the respondents had knowledge of or indeed were party to the fraud. This point was well considered in Kampala Bottlers Ltd –vs- Damanico(U) Ltd (S.C.C.A No. 22 of 1992)quoted and followed by Justice Yorokamu Bamwine in Bank of Uganda & 2 Ors –vs- Basajjabalaba Hides & Skins & 7 Ors(supra) at Pg 12 where the court observed that even if fraud is proved, it must be attributable directly or by implication to the Respondents. In **Damanico Wambuzi C**. J stated that:

> **"…Fraud must be attributed to the transferee. I must add here that it must be attributable either directly or necessary implication. By this I mean the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act".**

In the instant application no evidence was adduced in the main suit and the allegations of the fraud have not been proved against the respondents. Fraud cannot be proved in such an application. Counsel for the applicants shall address this issue to fraud in the main suit when he adduces evidence against the respondents.

Furthermore, I agree that Courts have inherent powers to dismiss a written statement of defence or strike it out, but certainly not under the circumstances expressed in this instant case/application. The High Court held in the case of **Kayondo –Vs- Attorney General [1988-1990] HCB 127that:**

> **"Court will use its inherent powers to strike out defective written statement of defence where the defect is apparent on the face of the record and where no amount of amendment will cure the defect. The procedure is intended to stop proceedings which should not have been brought to court in the first place and to protect the parties from the continuance of futile and useless proceedings."**

The respondents' written statement of defence does not fall under the ambits of the above quoted case. The respondents' written statement of defence is not defective at all.

In Conclusion and for the reasons I have given hereinabove in this ruling, this application has no merit at all. Those grounds in this application complained of shall be resolved in a fully flagged trial
interparties in the main suit, HCCS No. 247 of 2011. And accordingly, this application is dismissed without costs.

Date at Kampala this 25th day of March, 2013.

sgd
MURANGIRA JOSEPH
JUDGE