

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.679 OF 2022

(Arising out of Civil Suit No.363 of 2021 & Civil Suit No.467 of 2021)

BUILDNET CONSTRUCTION MATERIALS & HARDWARE LTD:.....APPLICANT

VERSUS

1. KALULE JAPHER

2. MUWONGE FAUZIA:.....RESPONDENTS

Before: Justice Alexandra Nkonge Rugadya.

RULING.

Introduction:

This is an application by chamber summons under **Section 98 of the Civil Procedure Act cap.71 and Order 11 rules 1(a) & 2 of the Civil Procedure Rules SI 71-1** seeking orders that **High Court Civil Suit No.363 of 2021 Fauzia Muwonge -vs- Kalule Japher & 2 Others (Land Division)** and **High Court Civil Suit No. 467 of 2021 Buildnet Construction Materials & Hardware Ltd -vs- Kalule Japher (Commercial Division)** be consolidated, and costs of the application be provided for.

Grounds of the application:

The grounds in support of the application are contained in the affidavit in support of Dr. Ibrahim Semaganda, the applicant's Managing Director. He deposes that while the 2nd respondent on 20th April, 2021 filed **Civil Suit No.363 of 2021** against the applicant and the 1st respondent seeking among others: declaratory orders nullifying the applicant's purchase of property comprised in **Kyadondo Block 244 plot 1774 at Muyenga**.

On 4th August, 2021 the applicant (hereinafter referred to as the company) also filed **Civil Suit 467 of 2021 Buildnet Construction Materials & Hardware Ltd vs Japher Kalule** seeking



among other orders raising issues of misrepresentation, breach of contract and recovery of **Ugx. 1,640,450,000/= (Uganda Shillings One billion six hundred forty million four hundred fifty million only)** against the 1st respondent.

The plaintiff company upon reading the pleadings in both suits contended that both suits raise similar questions of law and fact; the subject matter and the documents sought to be relied on the same and therefore the determination of one suit will automatically affect the other. Accordingly that the consolidation of the two suits will avoid multiplicity of suits and no prejudice will be suffered by the respondents.

Ms. Fauzia Muwonge, the 2nd respondent however opposed the application through affidavit in reply deponed by Counsel Specioza Tayebwa, an advocate authorized to depone the affidavit. She refuted the claim that that **Civil Suit No. 363 of 2021 and Civil Suit No. 467 of 2021** are based on the same cause of action.

According to her, the applicant company has no actionable claim against Fauzia Muwonge in respect of the underlying sale agreement upon which the company suit is premised, since she was not a party to the said agreement.

That consolidation of the two suits will not only cause a misjoinder of the parties, but also force her to litigate on a sale agreement that she has no interest in. That the two suits do not involve the same or similar questions of law or fact as they seek conflicting orders and the determination of Muwonge's suit will not in any way affect that of the company, in which he seeks recovery of monies purportedly paid under the agreement, and in respect of which Muwonge was not party to.

She further averred that allowing this application at this stage will prejudice Muwonge's suit as any issue regarding service of the applicant with court process in **High Court Civil Suit No. 467 of 2021** shall cause undue delay in the determination of Muwonge's suit which is already set for hearing and determination by this court.

That the application is premature, and legally misconceived as it has been lodged before Japher Kalule, the 1st respondent has been served with summons to file a defence in **Civil Suit No. 467 of 2021**. There is no indication that he was ever served with the instant application or that any effort was taken to effect service of court process on him which would explain why he did not file an affidavit in reply.

The applicant company filed an affidavit in rejoinder to the affidavit in reply contending that the mere fact that Muwonge was not a party to **HCCS No. 467 of 2021** or that the applicant company has no actionable claim against her would not bar both suits from being consolidated.

It is sufficient that the underlying subject matter in both suits is the same and that the averment that the two suits seek different orders is misconceived since the orders sought by the applicant in **Civil Suit No.467 of 2021** are consequential to the court finding on the validity of the sale of the suit property and would not defeat the remedies sought by Muwonge, the 2nd respondent.

5 **Representation:**

The applicant was represented by **M/s Tumusiime Kabega & co. Advocates** while the 2nd respondent was represented by **M/s H & G Advocates**. The 1st respondent, Kalule Japher was not represented and it is also apparent that he had not been served with this application.


From the record, his last known counsel was Robert Friday Kagoro of **M/s Muwema & Co. Advocates**. On 2nd August, 2021 the said firm had filed his written statement of defence, as the 3rd defendant in **Civil Suit No. 363 of 2021**. The suit had been filed by the 2nd respondent, Fauzia Muwonge. On 15th October, 2021 the same firm had filed his Scheduling notes for that suit.

When this matter came up for trial on 6th May, 2022, Ms. Aritha Uwera who was holding brief for counsel MacDusman Kabega from **M/s Tumusiime Kabega & Co. Advocates** informed court that **Civil Suit No. 467 of 2021** which had been filed in the Commercial Division by the applicant company against Kalule had never taken off.

Counsel claimed that they had endeavored to serve Kalule with the summons for **Civil Suit No. 467 of 2021**, through his counsel, **M/s Muwema & Co. Advocates**. However that Friday Robert Kagoro (who had been attending some previous hearings for Kalule) had informed them that the firm had no instructions to represent Kalule in that suit.

Counsel further told court that it is upon failing to effect ordinary service to Kalule that they sought an order for service out of jurisdiction. The order was issued on 6th September, 2021 and served through the Permanent Secretary of the Ministry of Foreign Affairs. He had subsequently written to the Chief Registrar of this Court on 4th April, 2022 forwarding the court documents as confirmation that efforts had been made to serve Kalule in respect of the **Civil Suit No. 467 of 2021**. However, deduced from the contents of the correspondences attached to this application, Kalule could not be found as he had shifted to another location.

At that point it became increasingly clear that the learned counsel for the applicant ought to have sought further guidance from this court on how to make Kalule aware of the matters against him, including the present application for consolidation of **Civil Suit No. 467 of 2021** with **Civil Suit No. 363 of 2021**.


3

It was also observed by this court that this was the same firm which on 1st September, 2021 had also acknowledged receipt of the documents (summons for directions). In both these suits, Kalule was a party and therefore had a stake in each, and in respect of this application.

Counsel Uwera's claim that **M/s Muwema & Co. Advocates** had no instructions to represent was mere submissions from the bar and ought to have been followed up for confirmation in writing by the firm.

In the absence of any other reason to think differently, it is that firm which continued to represent him in matters relating to the suit property. As also noted by court, the firm had represented Kalule in an earlier application: **Build net Construction Materials & Hardware Limited: MC No. 052 of 2021** under which the applicant company sought orders that:

a) *the caveat lodged on the comprised in **Kyadondo Block 244 plot 1774 at Kisugu, Kampala, vide Instrument No. KCCA-00078196** on 18th February, 2021 by the 2nd respondent be removed/vacated.*

b) *The respondents pay compensatory/damages to the applicant for lodging the caveat without lawful or reasonable cause;*

c) *Costs of the application be provided for.*

The ruling was delivered by this court on 8th July 2021, and in the terms below:

1. *the plaintiff shall make the necessary amendments under **Civil Suit No. 363 of 2021**, to merge with all the matters and issues arising out of this application: **MC. No.52 of 2021**, and serve the amended plaint within two weeks after the delivery of this ruling;*


2. *the defendants under the main suit shall file their respective statements of defence within two weeks after receiving service of the plaint;*

3. *the rejoinder to be filed seven days after receipt of the WSD;*

4. *costs of this application shall abide by the outcome of the main suit.*

Order 11 rule (1) of the Civil Procedure Rules S.I 71-1 under which this application was brought provides:

"Where two or more suits are pending in the same court in which the same or similar questions of law or fact are involved, the court may, either upon the


4

application of one of the parties or of its own motion, at its discretion, and upon such terms as may seem fit-

a) *order a consolidation of those suits; and*

b) *direct that further proceedings in any of the suits be stayed until further order."*

The fundamental principle for consolidation is to enable the court to effectually and completely deal with all matters brought before it and to avoid multiplicity of proceedings. (*See: Kololo Curring Co. Ltd. v. West Mengo Co-op Union Ltd. [1981] HCB 60*).

It is therefore well established that where two or three suits are filed involving the same parties and arising from the same cause of action, they should either be consolidated for purpose of determining liability or only one of them, first in point of time heard first. (*See: Teopista Kyebitama v Damiyano Batuma (1976) HCB 276, Luyimbazi Saul vs Mukasa Benon & others MA No.351 of 2021*)

In the above ruling of 8th July 2021 as stated, this court had ordered a consolidation or merger of all the issues as may be identified in relation to the parties and property in contention. On 21st July, 2021, the amended plaint was filed but none of the defendants (who included the applicant company) deemed it necessary to amend their pleadings.

Going by Kalule's Scheduling memorandum, by 15th October, 2021 the same firm of *M/s Muwema & Co. Advocates* was still representing Kalule at that point and presumably also in respect of the suit now pending before the commercial division, filed in August, 2021.

Service of court process is generally governed by *order 5 of the CPR*. It is a mandatory requirement under *order 5 rule 10 of CPR* to effect personal service to a defendant or his/her appointed agent. The firm of *M/s Muwema & Co. Advocates* still qualified for service as recognized agents for the purpose of *Order 3 rule 2*.

Also worthy of note is that for service to be deemed proper and effective there must be proof of service by a serving officer or process server. In all cases an affidavit of service must be filed, stating the time and manner in which the summons was served, and name and address of the person if any, identifying the person served; and witnessing the delivery of summons (*order 5 rule 16 of the CPR*).

The content of the affidavit of service is what forms the basis of the assertion that the party was properly and effectively served but failed and/or refused to honor the service. (*Dr. B. Byarugaba vs Kantarama HCMA No.229 of 2019*).



It is thus a settled principle of law, as has been held in a plethora of cases that service of court process is a condition precedent to the exercise of jurisdiction by a court over a litigant.

5 The non-service of a process therefore renders such process and all subsequent proceedings incompetent. In the circumstances of this case, the applicant ought to have requested court for its guidance on how to make Kalule aware of the application, having failed initially to effect service to him out of jurisdiction.

10 Thus in absence of proper service or leave to effect service out of time, a court would regard **Civil Suit No. 467 of 2021** as incompetently before it. But not only that. What appears in the court system under **Civil Suit No. 467 of 2021** in this division bears the names: **Nakimbugwe Evalyne vs Abdul Lugumya & Others**, which is before another judge of this division.

This court is therefore devoid of the jurisdiction to make any decision on consolidation regarding a matter that is not properly before it. It would also hesitate to make an order for consolidation where there appears to be two separate causes of action.

15 In **Stumberg and another v Potgieter (1970) EA 323**, court held that consolidation of suits should be ordered where there are common questions of law or fact. It should not be ordered where there are deep differences between the claims and defence in each action.

For those reasons, I therefore decline to grant the application.

Costs shall abide by the outcome of the main suit.

20


Alexandra Nkonge Rugadya

Judge

12th July, 2022.

Deputed by email



12/7/2022