THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-MA-0031-2004

(FROM HCT-05-CV-0011-2003)

JETHA BROTHERS LTD…… APPLICANT

VERSUS

1. MBARARA MUNICIPAL COUNCIL)

2. HILLARY KATEMBEKO)

3. THE ADMINISTRATOR OF THE ESTATE OF JUSHUA MUGYENYI) ……RESPONDENTS

4. MARY MUGYENYI)

5. AGGREY TWIJUKYE)

BEFORE: THE HON. MR. JUSTICE P. K. MUGAMBA

RULING

Following an application by the plaintiff to amend the plaint the defendants objected it and this ruling is in consequence.

The application is by Chamber Summons under Order 6 rules 1 8 and 30 of the Civil Procedure Rules and seeks leave to amend the plaint by reason of new facts having emerged which at the time the plaint was filed were unknown to the applicant. An affidavit sworn by Noorali Jetha, a director of the applicant supports the application. However two objections were raised by the respondent at the outset of the hearing or the application**.** The first was that the application is not tenable in law because it offends Order 6 rule 1 (b) of the Civil Procedure Rules given that it does not contain the items that should accompany a pleading

under the provision**.** The second point of objection is that the application is incompetent by reason of being supported by a defective affidavit and that as such the application should he struck out. I shall deal with the points of objection in sequence.

Order 6 rule 1 (b) of the Civil Procedure Ru1e reads:

> 'Every pleading shall be accompanied by a brief summary of evidence to be adduced, a list of witnesses, a list of documents amid a list of authorities to be relied on: except that an additional list of authorities may be provided later with the leave of court'.

It was argued by the respondents that since the application was bereft of the items named in the provision it was incompetent. Counsel for the applicant on the other hand contended that failure to accompany an application such as this with the detailed items does not ipso facto render he application incompetent, lie added that the omission is by no means fatal. I agree that despite the fact the wording of the provision is mandatory its application has been held by this court not to be universal. In a case where a pleading is a specially endorsed plaint under Order 33 of the Civil Procedure Rules, for example, an affidavit deponed in support to the exclusion of the details mentioned in Order 6 rule 1 (b) of the Civil Procedure Rules has been found sufficient. This is because the affidavit amplified all the essentials in the suit without need of anything else. See *Sula Pharmacy Ltd vs The Registered Trustees of the Khoja Shia Itana Shari Janat.* Miscellaneous Application No. 14 of 1999 (unreported). It is therefore instructive to see if this application comes within the exception.

According to the Chamber Summons the application is made because new facts have emerged which were hitherto unknown to the applicant at the time the main suit was filed. Paragraphs 8 and 9 of the affidavit in support of the application underscore the urgency for making the application. They stated:

> '8. That at that time I did not know that the defendants had been fraudulently registered and obtained certificates as proprietors of the appell1ant's land and

9. That I have been advised by the applicant's advocate which advice I believe to be true that it is vital to amend the plaint to reflect the above as not doing so would be prejudicial to the applicant's case.'

The affidavit in support of the application refers to two documents. It refers to the written statement of defence from which knowledge was gained that registration of the relevant defendants under the Registration of Titles Act had taken place. It also refers to the plaint. Given the circumstances of the application therefore there is need to include a list of documents to be called to hand such as the original plaint, the written statement of defence to be referred to and even a draft amended plaint. Given that the affidavit in support on its own is not enough**,** compliance with provisions of Order 6 rule 1 (b) CPR is must. In the event I find non-compliance with the provisions of Order 6 rule 1 (h) CPR fatal to the application and would strike it out on that score.

The other objection arises from the affidavit in support of this application and relates to paragraph 8 of the affidavit, which I have already laid out in full**.** According to paragraph 8 of the affidavit at the time the plaint was filed the plaintiff had no knowledge that the defendants had been registered as proprietors of the land in issue and that they had received certificate of title. Paragraph 8 aforesaid states that such knowledge was gained after receipt of the written statement of defence. An affidavit sworn by Husainali Jetha, a director of the applicant, is relevant. It was sworn on 5th June 2002 in support of the caveat (Annexture H to the plaint) and in paragraph 3 thereof states:

'3. That contrary to the law the company's property was leased to Mr. Hillary Katembeko under the above volume and folio.

For avoidance of doubt the caveat is in reference to Land Register Volume 2625 Folio 20. According to Annexture B to the written statement of defence of the second defendant the proprietor is Hillary Katembeko, who was registered as proprietor to the property on 16th April 1998 and the certificate was issued on 12th May 1998. It is therefore most probable that on 5th June 2002 annexture H was executed by the plaintiff with the full knowledge that the

second defendant had been registered as proprietor, since documents in the land registry are public documents. It follows therefore that when the plaint was filed on 18th February 2002……

reveals the plaintiff was aware the defendants involved had their titles already. There is no doubt that well before the filing of the written statements of defence, indeed at the time of filing of the plaint, the applicant was aware of the registration of the defendants under the Registration of Titles Act in so far as this suit is concerned. I find that the affidavit in support of this application does contain a falsehood as a result. In ***Sirasi Bitaitana & 4 others vs Emmanuel Kananura [1977] HCB34*** this court held that an affidavit which contains an obvious falsehood naturally becomes suspect and that an application supported by a false affidavit is incompetent. The instant application is supported by a, false affidavit for the reasons already stated. Once it appears an affidavit has been permeated by a falsehood as in this case there is no way an application, not to mention an affidavit, can be redeemed.

In the result I strike out this application with costs.

Before I take leave of this matter I must comment on some bother pointed out by the respondents in the course of hearing. It relates to the long tortured affidavit in support of the application. It was on the face of it sworn in Kampala on 26th February 2003 before the Chief Magistrate's Court of Mbarara. This cannot he true given that the affidavit could not be sworn in Kampala before the Chief Magistrate's Court of Mbarara. The swearing of the affidavit no doubt offended section 6 of the Oaths Act, Cap 19 of the Laws of Uganda. This added no credit to the intended application.

27th October 2004