THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA

MISCELLANEOUS APPLICATION NO.157 OF 2016
(ARISING OUT OF H.C.C.S. NO.068 OF 2016)

SOT ENTERPRISES LIMITED:: APPLICANT

VERSES

AGATHA RUKERIBUGA DOII:: RESPONDENT

RULING
BEFORE HON LADY JUSTICE EVA K. LUSWATA

This is an application brought by way of chamber summons under Order 41 r.1 (a), 2(1) of the Civil Procedure Rules and section 98 Civil Procedure Act seeking the following orders: -

a. A temporary injunction be issued against the respondent, her employees or agents whatsoever from entering the applicant's business premises at the Source of the Nile, Jinja District and or interfering with the applicant's business at the said place pending the hearing and determination of the pending suit between the applicant and the respondent.
b. Costs of the application be provided for.

The grounds of this application as set out in the motion and supporting affidavit of Prof. G. W. Kanyeihamba, stated to be the chairman of the applicant. Briefly he deposed that the applicant is the owner of a business consisting of a restaurant, bar, crafts shop and other leisure and hospitality services located at the source of the Nile in Jinja District. That without lawful cause, the respondent who is a shareholder and former director in the applicant, has at various times since 2010 forcefully and illegally entered upon and interfered with the running of the business, by establishing therein a rival business, locking out other directors, and demanding for a winding up of the applicant. That in addition, she has mismanaged and on occasion, dissuaded prospective visitors from accessing the business. As a result, the applicant instituted Civil Suit No. 68/16 against the respondent seeking *inter alia*, declaratory orders, a permanent injunction, special and general damages on account of their alleged losses and that, if the respondent is not

restrained from further interference, the applicant will suffer irreparable loss whereas the balance of convenience lies in their favour.

When this application first came up for hearing on 24/8/16, I allowed *exparte* proceedings against the respondent owing to her absence and that of her counsel. My ruling was reserved for 19/9/16. However before it could be delivered, the respondent filed MA. 468/2016, seeking an order to set aside my order for the exparte hearing. That application was on 19/9/2016, settled by consent thereby re-admitting her into the proceedings, with the agreement that the pleadings and evidence filed by both parties in the first place in this application, would form the basis of my ruling.

On her part, the respondent contested the application. In her affidavit, she denied the fact that Prof. Kanyeihamba is either the chairman or shareholder in the applicant, and as such, any resolution he passed to have her deposed as director would have no legal merit. She went on to state that the contested business is not the property of the applicant but instead, the property of Rippon Falls Leisure Resort Ltd [hereinafter called Rippon Falls] of which she is the managing director and majority shareholder. That the applicant has never purchased or been assigned the property and business of Rippon Falls, and cannot thereby suffer any loss by her activities which she deems lawful and in line with her assignment in Rippon Falls. She concluded that the status quo to be maintained was for Rippon Falls to continue with her legitimate operations with no interference from the applicant.

Both counsel filed written submissions as requested by Court and as part of their submission, a preliminary objection was raised for the applicant that there was no competent reply to the application, as the respondent's affidavit in reply was filed out of time in contravention of Order 12 Rule 3 (2) CPR. Counsel relying on the authority of **Stop and See Vrs Tropical Africa Bank Ltd HCMA 333/10,** argued that the rule applies to interlocutory applications, and that affidavits must be filed 15 days immediately following the date the application was served upon the respondent. That the respondent did not seek leave to file her affidavit in reply out of time and in so doing, made a belated filing that did not leave the applicant sufficient time to file an affidavit in rejoinder, which was a subversion of justice and designed to delay court business.

Counsel for the respondent did not deny the fact that Ms. Doii's affidavit in reply was filed out of time. He argued however that the applicant had themselves not complied with the requirements under Order 12 Rule 3[1] CPR that require that an interlocutory application can be filed only after completion of alternative dispute resolution, or, scheduling conference proceedings, both which did not take place in these proceedings, partly due to the applicant's failure or refusal to attend formal mediation.

Counsel argued further that the decision in **Stop and See (U) Ltd (supra)** was erroneous since it was assumed that affidavit evidence must be filed in much the same way as written statements of defence or counterclaims. He argued that injunctions as interlocutory proceedings fall under Order 41 CPR and not Order 12 CPR and that, statements made in affidavits is evidence that falls under Order 19 CPR which did not specify a time limit within which such evidence can be received in court. He invited Court to instead consider the constitutional right of any party to be heard on their case under Article 28, and exercise her inherent powers to validate the respondent's affidavit in reply as it raised very vital and pertinent issues.

Having said so, respondent's counsel also raised a preliminary objection that the application is incurably defective because Prof. George W. Kanyeihamba who has no stake in the applicant as director or shareholder, cannot represent her in this application. Relying on the authority of **Makerere University Vs St. Mark Education Institute Ltd & Ors (1994) V KALR,** he argued that an application supported by an affidavit of one who lacks authority to depone such an affidavit on behalf of the applicant, is incurably defective and cannot stand. That although Kanyeihamba's remoteness to the applicant was raised in Ms. Rukeribuga's affidavit, no rebuttal was filed which would leave her evidence unrebutted and thus, true.

I would agree with counsel for the respondents that pleadings by affidavit is in true sense written evidence that needs to be given special attention. Order 17 CPR made provision for when affidavit evidence may be allowed, its content, and provided room for cross examination of what is deposed. On the other hand, Order 41 CPR made provision for when injunctions can be granted and makes it mandatory for notice to be furnished against the opposite party before an

injunction is granted. Both orders made no mention of the time within which an affidavit in reply could be filed. I would thereby have recourse to Order 12 rr 3(2) that made a specific provision that a response to an application must be filed within 15 days from the date of service of the application and, then served upon the applicant within the same period of time.

The provisions of Order 12 appear to be couched in mandatory terms. However, I note that the provision fell short to prescribe the consequences in the event an affidavit in reply was filed or served out of the period allowed by statute. The Court of Appeal in their decision of **Edward Byaruhanga Katumba vs. Daniel Kiwalabye Musoke [Election Appeal No. 2/98]**, while following the authority of **Secretary of State for Trade & Industry vs. Langridge [1991]3 ALL ER** quoted a passage from **The Smith's Judicial Review of Administrative Action 4th Edition 1980 pp. 142-143,** which is relevant to the facts here that:

> *"When Parliament prescribes the manner or form in which a duty is to be performed or power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The court must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done, or as directory, in which case, disobedience will be treated as irregularity not affecting the validity of what has been done [though in some cases it has been said there must be 'substantial compliance' with the statutory provisions, if the deviation is to be excused as a mere irregularity]."*

Following the above decision, I would choose not to treat the provision as strictly mandatory but only directory. I am further fortified in my decision on the premise that timelines for filing and service of proceedings have been traditionally regarded merely as procedural provisions meant to give proper direction for the trial of matters within specific timelines. In my view, except where there are specific statutory provisions, failure to adhere to timelines should not be fatal to proceedings especially where the offended party has suffered no injustice or extreme hardship thereby. I would thereby prefer not to shut out vital evidence of a litigant and rather have them exercise their constitutional right to be heard. I would thereby allow the prayer to extend the time

for filing and also validate Ms. Rukeribuga's affidavit in reply as part of these proceedings albeit filed late. I hasten to add however that, this court does not condone the lax behaviour of some advocates in failing to follow time lines given by statute. Thus respondent's counsel is admonished for that unacceptable practice.

In his affidavit, Prof. G.W. Kanyeihamba claimed to hold majority shares in the company and signed as chairman to the Board meeting minutes filed as Annexture 'SOT.2'. To the contrary, an issue was raised against Prof. Kanyeihamba's ability to represent the applicant, and swearing the affidavit in support of the application. It was raised in paragraph 3 of Ms. Rukeribuga's affidavit, that he is neither the chairman nor a shareholder in the applicant. There was no rebuttal to that assertion and the reason advanced for the applicant in their counsel's submissions, is that they were served too late for them to have filed a rebuttal before the hearing. Counsel further argued that Prof Kanyeihamba did in his affidavit swear to his legal relationship to the applicant and the burden thereby fell on the respondent to prove the contrary.

Ms. Rukeribuga's affidavit in reply was served upon the applicants on 22/8/16. I would accordingly agree with applicant's counsel that they had no sufficient time to file a response by the hearing date of 24/8/16. However, they were not precluded from securing an extension from the court to file a supplementary affidavit [since they were contesting the affidavit in reply] especially under the apparent circumstances of late service. Instead, they chose to forge ahead with the hearing *exparte*.

Again, with respect, I disagree with applicant's counsel that the respondent did not discharge the burden to prove whether Prof. Kanyeihamba had legal nexus to the applicant. According to Section 101 and 103 of the Evidence Act, It was enough for Ms. Rukeribuga to produce the vital incorporation documents of the applicant, to wit, the Memorandum and Articles of Association [which are public documents] to disprove Prof. Kanyeihamba's directorship and membership in the company, which in my view, she did *prima facie* and to the required standard at this stage. Further, the Board meeting minutes annexed as Annexture 'SOT.2' were not registered to lend credence to Prof. Kanyeihamba's position in the company. Once those inconsistencies were raised, it is assumed that the Prof. Kanyeihamba had special or better knowledge of the facts

proving his position in the applicant. Thus, under Section 106 of the Evidence Act, the burden then shifted to him to disprove the respondent's allegation by providing other proof of his directorship and membership in the form e.g. of a special resolution, annual returns, notice of his appointment or other like documents. This would have been achieved through a supplementary affidavit or one in rejoinder, which was never filed.

To disprove Prof. Kanyeihamba's membership, the respondent provided copies of the applicant's memorandum and articles of association. One Joel M.M Kanyeihamba but not, Prof. G.W Kanyeihamba is mentioned as an initial subscriber. Therefore, in the absence of any evidence to the contrary, the latter is a stranger to the applicant and would in that event, require clear instructions from the applicant to represent her, which are absent here. I would thereby agree with the decision of Justice Lugayizi [as he then was] in **Makerere University vs. St. Mark Education Institute Ltd & 8 Ors – HCCS No. 378/1993** following the Supreme Court decision in **Yunusu Ismail t/a Bombo City vs. Alex Kamukamu & Ors t/a O.K. Bazaar [Civil Appeal No. 7/87]** that such an affidavit is incurably defective. I would move to strike it off the record.

According to Order 52 rr.7 CPR, where a chamber summons is supported by an affidavit, the same shall be attached to each copy of the summons directed to be served. The affidavit thereby becomes an intrinsic component of the application, and one cannot do without the other. I have found the affidavit of Prof. G.W. Kanyeihamba incurably defective. It is incapable in law to support the chamber summons, which for the same reason cannot be maintained on the record.

I accordingly dismiss the application. However, I did note the respondent's lax behaviour or that of his counsel in filing their evidence late. For that reason I choose to deny them the costs of the dismissal.

I so order.

EVA K. LUSWATA

JUDGE

24/11/2016