

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
LAND DIVISION  
MISCELLANEOUS APPLICATION NO. 682 OF 2014  
(ARISING FROM HCCS NO. 30 OF 2014)**

**UGAFIN LIMITED..... APPLICANT/2<sup>ND</sup>  
DEFENDANT**

**VERSUS**

**BEATRICE KIWANUKA..... RESPONDENT/  
PLAINTIFF**

**RULING**

**BEFORE HON. LADY JUSTICE EVA K. LUSWATA**

The applicant moving under section 98 CPA, Order 6 r.28 and 29 and 0.52 r.1, 2 and 3 CPR, sought an order for dismissal of Civil Suit No. 30/2014 for being un- maintainable in law, a consequential order for the removal of any caveat/ encumbrance by the respondent on the subject land and costs.

The motion was supported by the affidavit of Taremwa Deus, Head Finance of the applicant company in which he stated *inter alia* that; the respondent filed Civil Suit No. 30 of 2014 (hereinafter referred to as the head suit) under an assumed status of a spouse to Kabagwire David the 1<sup>st</sup> defendant (therein), challenging the validity of the mortgage executed between the applicant and the 1<sup>st</sup> defendant upon the security of land and developments on Busiro Block 306 Plot 2403, land at Kalabi (hereinafter called the suit land). That through her pleadings, the respondent did not mention the type of marriage she celebrated with the 1<sup>st</sup> defendant, nor attach any marriage certificate to validate her alleged marital status with him.

Further that the applicant filed a defence challenging the respondent's competence or *locus standi*, to institute the suit but to date, there has been no reply to that defence and the respondent in addition, failed to fix the suit for hearing. In his view, failure to prosecute the suit, and the 1<sup>st</sup>

defendant's failure to file a defence are consistent with bad faith and collusion between the respondent and 1<sup>st</sup> defendant. He deduced that the head suit was a ploy by these parties to frustrate and delay the enforcement of the applicant's valid and legitimate rights under a mortgage with the 1<sup>st</sup> defendant in respect of the suit land over which the 1<sup>st</sup> defendant was already in default to a tune of 55,200,000/=, as at 30/10/2013.

Going by the record, the application was served upon the respondent's lawyers on 16/9/14. However, on 29/10/2014 when it came up for hearing, the respondent who had not filed her response, appeared before me with a newly instructed advocate and applied for more time within which to file her reply. She explained that she had been let down by her former counsel. I allowed the application and in addition, gave time lines within which the parties were expected to have filed and closed their pleadings and filed their written submissions. In particular, the applicant's dates fell on 17/11/14 and 1/12/14 respectively. However, on 18/2/2014 when the matter came up for a ruling, the respondent had not honoured my directives and both she and her lawyer were absent without explanation. For those reasons, I allowed the applicant's prayer to proceed *ex parte* against her.

In a nut shell, the issue for determination is whether the head suit as filed is so bad in law that it ought to be struck off the record. Substantially, this application is uncontested. It is therefore taken that the respondent by failing to file an affidavit in reply or to offer any arguments in defence to the question of law raised by the applicant, she fully accepts what is stated for the applicant and has no contest to the orders sought, see for example **Prof. Oloka Onyango & Ors Vs Attorney General (Constitutional Petition No.6/2014)** where the Learned Justices while considering 0.8 rule 3 CPR found that every allegation in a plaint, if not specifically or by necessary implication denied in a pleading by an opposite party, shall be taken to be admitted. The above notwithstanding, and the respondent's admissions in her pleadings aside, this court will still need to investigate whether the respondent's commissions and omissions should result into dismissal of the head suit. For that reason, I will investigate the merits of the applicant's arguments.

The basis of the applicant's contest of the head suit is that the respondent had no *locus to standi* to file it and that it was in fact filed in bad faith. Order 6 r. 28 and 29 CPR on which the application is premised, permits a party to raise a point of law, which if in the opinion of the

court disposes of the whole claim, should result into dismissal of the suit as a whole. In the head suit, the respondent seeks (*inter alia*) for a declaratory order that the mortgage between the applicant and 2<sup>nd</sup> defendant is null and void. She claims to be the 'spouse' of the 2<sup>nd</sup> defendant the latter who she claims, did not seek her consent before mortgaging the suit land to the applicant on which she and her children reside and derive sustenance. She also claims to be under threat of eviction by the applicant.

It is clear from her prayers that the respondent is seeking protection as a spouse under Section 38A Land (Amendment Act) which guarantees her security of occupancy and Section 39 Land act which prohibits any dealings in family land (including mortgages) without prior written consent of a spouse. The fact of marriage between the respondent and 1<sup>st</sup> defendant is thereby an important fact in the head suit. I do agree with counsel for the applicant that it is not disclosed in the plaint the type of marriage that existed between the respondent and 2<sup>nd</sup> defendant at the material time.

According to Black's law Dictionary, 7<sup>th</sup> Edition at pg 952 locus standi is defined as '*the right to bring an action to be heard in a given forum*'. In line with that definition, the plaintiff could seek the protection of the Land Act, only if she showed by her pleadings that she is the legal spouse of the 1<sup>st</sup> defendant. According to Order 6 rule 1, every pleading shall contain a brief statement of the material facts on which a party pleading relies for claim.

I do therefore do agree with counsel for the applicant, that the respondent was required to give the legal specifics of her marriage to the 2<sup>nd</sup> defendant distinctly in her plaint. She did not do so and interestingly, failed to provide proof of such marriage even when it was raised as an issue in the written statement of defence and even after being formerly requested by the applicant (in communication to her advocates dated 15/5/14). She again chose to remain silent when challenged on the same legal point in this application and according to the authority of **Prof. Oloka Onyango & Ors Vs Attorney General (supra)**, failure to rebut a fact specifically traversed in an affidavit amounts to an admission of that fact.

Therefore, the respondent's admissions aside, the nature of her claim required that she presented together with her pleadings proof of her marriage to the 1<sup>st</sup> defendant. This would have been in

the form of a marriage certificate in line with the several types of marriages attainable under our law or such other proof under custom. This is because, under Order 7 rule 14 (1), where a plaintiff files upon a document in her possession or power, it must be presented to court when the plaint is presented for filing. Therefore, attaching or showing proof of her marriage to the pleadings was that important because her claim in the plaint was founded on her alleged marriage to the 1<sup>st</sup> defendant and in addition, her claim was not directed against the 1st defendant only, but also, against the applicant, whose rights to the suit land, as a third party would be adversely and unfairly affected.

By failing to show or attach that important proof to her pleadings, the respondent could not show by her plaint, that the applicant (or indeed the 1st defendant) owed her a duty, which they breached when they purported to transact in the suit land without her consent.

In other words, she has not disclosed a cause of action against those two parties as she has not demonstrated that she enjoyed a right that has been violated by the two defendants in the head suit. See for example, **Motorrov Vs Auto Garage Ltd & Ors (1970) HCB 133**. Further, without some proof of the marriage, the head suit is without a foundation and cannot possibly succeed. The plaint lacked seriousness and I can only conclude that it is frivolous and vexatious (see for example **Day Williams Hill (Park Lane Ltd) (1949) 1 ALLER 219** and **Mpaka Road Development Ltd Vs Kana (2004) 1 EA 161**). The head suit is thus liable to be dismissed under 0.7 11 (a) and (e) CPR.

The above notwithstanding, I find no merit in the arguments that the suit was filed in bad faith. The omission of the 1<sup>st</sup> defendant to file a written statement of defence cannot be attributed to the respondent from and terming it collusion between the two to defeat justice would be a mere speculation. Further, the prayer to remove any caveat/encumbrance by the respondent from the suit land would have been speculative and unsubstantiated. This ground was in fact abandoned, and I shall accordingly make no findings on it.

Again, I have noted that the written statement of defence was filed on 12/2/14. Thereafter, the respondent took no positive step to fix the matter for hearing or seek any action in view of the non-appearance by the 1<sup>st</sup> defendant. It was not until this application was filed on 17/6/14, that this court saw some positive step taken to prosecute the head suit. The inactivity of the

respondent points to her disinterest in prosecuting the suit and offends the provisions of Order 17 Rule 5 CPR.

In conclusion, the point of law raised against the head suit has merit. It goes to the foot of the claim and substantially disposes of the whole suit. This application succeeds and I thereby move under Order 6 r.28, 29 and 30 CPR to dismiss HCCS.No.30 of 2014 with costs to the applicant/2<sup>nd</sup> defendant. However since the 1<sup>st</sup> defendant in the head suit did not file a written statement of defence, he is not awarded any costs.

The applicant is in addition awarded the costs of this application.

I so order.

**EVA K. LUSWATA**

**JUDGE**

**17/6/2015**