

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

5 **(CORUM: JUSTICE OKELLO, JSC)**

CIVIL APPLICATION NO. 19 OF 2010

B E T W E E N

KASAALA GROWERS CO-OPERATIVE SOCIETY ::::::::::::::: APPLICANT

10 **A N D**

1. KAKOOZA JOHATHAN

2. KALEMERA EDSON: ::::::::::::::: RESPONDENTS

15 **(An application for extension of time within which to institute
an appeal against the decision of the Court of Appeal
(Twinomujuni, Kitumba and Kavuma, JJA.) dated 6th
February 2009, in Civil Appeal No. 19 of 2007).**

20 **RULING OF G. M. OKELLO, JSC:**

This application was brought by Notice of Motion under rules 2(1), 2(2), 5,
42 & 50 of the Judicature (Supreme Court) Rules. It seeks an order of this
court to extend the time within which to file Memorandum and Record of
25 Appeal in the Supreme Court, Civil Appeal No. 14 of 2010.

The applicant, Kasaala Growers Co-operative Society, and the respondents
had executed a Sale Agreement in which the applicant sold to the
respondents a piece of land measuring 1000 hectares and known as Block
30 No. 3 Plot No. 3 situate at Nampiki, Luwero for Ug. Shs. 34 million. The

respondents paid Ug. Shs. 14,250,000/= of the said price and the balance was to be paid after the title of the land was renewed.

5 A dispute arose between the parties when the applicant sold off one square mile of the land to a one Kigayaza. The respondents sued the applicant in the High Court seeking among other reliefs, specific performance and an order of eviction of the applicant's agents, tenants or licensees on the land.

10 In its written statement of defense, the applicant pleaded acquiescence/waiver on the part of the respondents. In other words, it stated that the respondents agreed to the sale of the one square mile of the land to Kigayaza.

15 The High Court heard the case and dismissed it; thus giving judgment in favour of the applicant.

Dissatisfied with that decision of the High Court, the respondents successfully appealed to the Court of Appeal which reversed the decision of the High Court.

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The applicant was dissatisfied with the decision of the Court of Appeal and ten days after the delivery of the judgment, filed a Notice of Appeal against that decision and also requested for a certified record of proceedings from the Court of Appeal. Subsequently, it instructed M/s. Tibaijuka & Co. Advocates to pursue the appeal and prosecute it on behalf of the applicant. That firm of Advocates however, did not file the appeal. Meanwhile, the time within which to file Memorandum and Record of Appeal had expired.

Disappointed by their delay, the applicant withdrew instructions from M/s. Tibaijuka & Co. Advocates and instructed another firm of Advocates to file an application for extension of time within which to file the Memorandum and Record of Appeal. Unfortunately, this firm of Advocates
5 too did not carry out the instructions; hence this application drawn and filed by Bambukali Sande who holds Powers of Attorney from the applicant.

The application contains eight grounds which may be summarised to two grounds; firstly that although the applicant instructed a firm of advocates
10 (M/s. Tibaijuka & Co. Advocates) in time to pursue and prosecute the appeal, the firm of advocates negligently delayed and the time within which to file the appeal had expired before the appeal was filed.

Secondly, that it is just and equitable that the applicant's appeal be heard on
15 its merits and that the time be extended to enable the applicant to institute its appeal.

The application is supported by the affidavit of Bumbakali Sande sworn on
20 24th August, 2010.

The respondents opposed the application and relied on the affidavit in reply sworn by the second respondent on 13th September, 2010.

When the application came up for hearing before me on 14-09-2010, at
25 2.30 p.m., Mrs. Murangira Kasande, appeared for the respondents while Mr. Bumbakali Sande who holds Powers of Attorney from the applicant appeared in person.

At the instance of Mrs. Murangira, the hearing of the application was adjourned to 22-09-2010. This was firstly to enable her to study the applicant's written submissions that were served on her just before the application was called for hearing that afternoon. Secondly, to offer the parties an opportunity to settle the application amicably out of court and to report the result of their settlement on the adjourned date.

However, on 22-09-2010, when the application was called, Mrs. Murangira Kasande, reported that they had failed to reach a settlement on the application as they had language barrier. Mr. Bumbakali Sande insisted to speak in Luganda, a language she did not understand well. She then submitted written submissions in response to those filed by the applicant. Both parties therefore filed written submissions.

In her said submissions, Mrs. Murangira Kasande, raised two or three points which I consider to be preliminary objections, some of which could dispose of the application. I therefore, propose to deal with them first before I consider the merits of the application.

The first point challenges the affidavit of Bumbakali Sande Sworn in Support of the application. Mrs. Murangira kasande contended that the said affidavit is incurably defective for failure to indicate at the bottom thereof, that the contents thereof were interpreted to the deponent in the language he understands and that he in fact understood them or appeared to have understood them. It was counsel's contention that this was necessary because, Bumbakali Sande himself had declared in court that he does not understand the English language, in which the affidavit was written. She

argued that without such an endorsement, Bumbakali Sande, cannot own the contents of the affidavit written in a language he does not understand. She prayed that the affidavit be struck out for being defective.

5 Mr. Bumbakali Sande had no response to the above submissions. In fact, when I asked him whether he had anything to say on the written submissions of Mrs. Murangira Kasande, he spoke in Luganda. Through the Court Clerk who acted as an interpreter, I understood that in that Luganda, he stated that he does not understand English language. Then I asked him who drew the
10 application, supporting affidavit and his written submissions all of which were written in perfect English. He at first replied that he drew them. But he later changed to say that they were drawn by one Charles Kaddu to whom he had spoken in Luganda and the said Kaddu recorded in English. When I asked why the affidavit does not indicate that the contents thereof were
15 interpreted to him in the language he understands and that he understood them. He replied that it was an oversight.

It then became clear to me that although the application, affidavit in support and the applicant's written submissions all show in the jurat to have been
20 drawn by Bumbakali Sande, they were clearly not drawn by him. He admitted so and stated that he does not understand the English language. The documents are therefore not what they purport to be.

I do agree with what this court had stated in *Banco Arabe Espanal - vs. - BOU, Civil Appeal No. 8 of 1998, that;*

5 “-- - - - a general trend is towards taking a liberal approach in dealing with defective affidavits. This is in line with the Constitutional directive enacted in article 126 of the Constitution that courts should administer substantive justice without undue regard to technicalities Rules of Procedure should be used as handmaiden of justice but not to defeat it.”

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However, a distinction must be drawn between a defective affidavit and failure to comply with a statutory requirement. A defective affidavit is, for example, where the deponent did not sign or date the affidavit. Failure to comply with a statutory requirement is where a requirement of a statute is not complied with. In my view, the latter is fatal.

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Section 3 of the Illiterate Protection Act (Cap) 78 of the Laws of Uganda 2000, enjoins any person who writes a document for or at the request or on behalf of an illiterate person to write in the jurat of the said document his/her true and full address.

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This shall imply that he/she was instructed to write the document by the person for whom it purports to have been written and it fully and correctly represents his/her instructions and to state therein that it was read over and explained to him or her who appeared to have understood it.

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In the instant case, the affidavit of Bumbakali Sande sworn on 24th August 2010, shows in the jurat that it was drawn by Bumbakali Sande himself. Yet he confesses his illiteracy in the English language in which the affidavit was written. In his own admission, the document was drawn by one Charles
5 Kaddu. Unfortunately, the said Kaddu did not comply with the provision of section 3 of the Illiterate Protection Act above.

I accept Mrs. Murangira Kasande's argument that Mr. Bumbakali Sande cannot own the contents of the affidavits since it is not shown that they were
10 explained to him and that he understood them.

In *Ngoma-Ngime - vs - Electoral Commission and Hon. Winnie Byanyima, Election Petition Appeal No. 11 of 2002*, the Court of Appeal confirmed the rejection by the trial High Court judge of an affidavit by an illiterate
15 deponent which did not comply with the provision of that Act.

I agree with and endorse that decision as the correct one. The Act was intended to protect illiterate persons and the provision is couched in mandatory terms. Failure to comply with it must render the document
20 inadmissible.

Likewise in the instant case, failure of the said Charles Kaddu to write his full name and address and to state in the document that the same was read over and explained to Bumbakali Sande in the language he understands and
25 that he appeared to have understood it rendered the affidavit inadmissible.

In the circumstances, I find merit in this objection.

The second point was that the Power of Attorney that was given to Mr. Bumbakali Sande by the applicant is invalid for failure to pay on it
5 the necessary stamp duty as required by the Stamp Duty Act (cap) 342, Laws of Uganda 2000.

I have scrutinised the copy of the said Power of Attorney that was annexed to the application as Annexure A. I note on the face thereof a Stamp from
10 URA showing that the “*duty has been paid.*” There is no evidence to show that that stamp which is on the document is not genuine. In that circumstance, I find no merit in this objection.

The third point was that there was no resolution from the applicant’s Board
15 of Directors authorising the appointment of Mr. Bumbakali Sande as its attorney in all matters.

It has been stated by this court on a number of occasions that a resolution of the board of directors of a company is not always necessary for institution of
20 a suit in the name of the company. Any director who is competent to exercise the powers vested in the board of directors of the company can give instructions for filing a suit in the name the company. See

(1) *United Assurance Co. Ltd. - Vs - A. G., Civil Appeal No. 1 of 1986. (CA, pre-decessor of SC).*

(2) *Navichandera Kakubhai Radia - vs. - Kakubhai Kalidas and Co. Ltd., Civil Appeal No. 10 of 1994 (SCU).*

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By analogy therefore, a competent director who is competent to exercise the powers vested in the board of directors of the applicant Growers Co-operative Society can authorise the issuing of Powers of Attorney to an individual to do or carry out certain acts on behalf of the applicant. A resolution of the board of directors is not always necessary.

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In the instant case, the Powers of Attorney was signed by the Chairman and Secretary of the Applicant with its stamp affixed thereto. There is no evidence that these officers of the applicant were not competent to exercise the powers vested in the board of directors of the applicant. In the circumstances, I find no merit in this objection.

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On the merit of the application, it is important to note that rule 43 of the Rules of this Court requires that all formal applications to this Court be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts. The purpose of this requirement is to enable the affidavit provide the necessary evidence to prove the facts alleged in the application.

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In the instant case, I have already found earlier in this ruling that the affidavit of Mr. Bumbakali Sande sworn in support of this application does not contain statement showing that the contents thereof were read over and explained to the deponent who appeared to have understood them. It cannot
5 be relied on by this court. It is thus struck out. That leaves the application without the requisite supporting affidavit. The application is thereby rendered incompetent for not complying with rule 43 above.

In the result, it is struck out with costs in favour of the respondents.

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Dated at Kampala this 28th day of September, 2010.

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G. M. OKELLO
JUSTICE OF THE SUPREME COURT

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