

UGANDA / JUDGMENT

Kitatta & Another v Ssebiso
(Miscellaneous Application 2716 of
2023) [2024] UGCommC 186 (2 May 2024)
[2024] UGCommC 186

COURT
Commercial Court of Uganda

BEFORE
Tumusiime Rubagumya, J

CASE / FILE NUMBER
Miscellaneous Application 2716 of 2023

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**5 THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION) MISC. APPLICATION NO. 2716 OF 2023 (ARISING FROM
CIVIL SUIT NO. 1066 OF 2023)**

| 1. WASSWA KITATTA KIBIRANGO | |

|-----|-----|

| 2. NSIMBE IBRAHIM | ::::::::::::::::::::::::::::::::::
APPLICANTS |

| VERSUS | |

| SSEBISO PETER | :::::::::::::::::::::::::::::::::: RESPONDENT |

BEFORE: HON. LADY JUSTICE PATIENCE T. E. RUBAGUMYA

RULING

Introduction

- 20 This application was brought by way of Notice of Motion under **Section 33 of the Judicature Act, Cap. 13, Order 36 Rules 3 and 4 and Order 52 Rules 1 and 3 of the Civil Procedure Rules SI 71-1**, seeking orders that:
 - 1. The Applicants be granted unconditional leave to appear and defend Civil Suit No.1066 of 2023.
 - 2. Costs of the application be provided for.

Background

The background of this application is contained in the affidavit of Mr. 30 Wasswa Kitatta Kibirango, the 1st Applicant, and is summarized below:

1 1. That on 13th November, 2021, the Respondent sold land comprised in Busiro Block 351 Plot 188, land at Buddo, Wakiso District to the

- 5 Applicants at a purchase price of UGX 90,000,000/= (Uganda Shillings Ninety Million Only), which sum was paid in full leaving no monies owed.
- 2. That after executing the agreement dated 13th November, 2021, the 10 Respondent turned around and told the Applicants that he felt that the land had been undervalued and he demanded a total consideration of UGX 205,000,000/= (Uganda Shillings Two Hundred Five Million Only).
- 15 3. That on 20th May, 2022, the sale agreement dated 13th November, 2021, was amended and the final agreement was executed in which the suit land was sold at UGX 205,000,000/=.
- 4. That in addition to UGX 90,000,000/= the Applicants have since 20 paid the Respondent UGX 119,500,000/= all totalling UGX 209,500,000/= which is the full settlement and in excess of the purchase price under the amended agreement dated 20th May, 2022.
- 5. That upon receipt of the purchase price, the Respondent signed and 25 delivered transfer forms in favour of the Applicants to enable them transfer the title into their names.
- 6. That even the Respondent was a witness to the land agreements between the Applicants and other buyers in respect of the same land.
- 5 In reply, the Respondent opposed the application contending that:
 - 1. The application is frivolous, devoid of any merit and incompetent as the 1st Applicant lacks authority to swear the affidavit in support of this application on behalf of the 2nd Applicant.
- 10 2. The liquidated sum of UGX 80,500,000/= (Uganda Shillings Eighty Million Five Hundred Thousand Only), as set out in Civil Suit No. 1066 of 2023, is not opposed by the 2nd Applicant since he did not swear any affidavit in support.
- 15 3. The Respondent sold the suit land to the Applicants at a purchase price of UGX 205,000,000/= and that so far the Applicants have only paid the Respondent UGX 119,500,000/=, leaving the balance of UGX 80,500,000/= being sums sought to be recovered.
- 20 4. That after the payments made on 15th March, 2023, the Applicants wrote a letter requesting to meet with the Respondent so that they discuss how the outstanding balance should be paid.

- 5. That the Respondent only sold his land to the Applicants on 20th 25 May, 2022 and that the land sale agreement dated 13th November, 2021, is unknown to him, he never received the payment of UGX 90,000,000/= and the same is a fabrication intended to mislead the Court.

Representation

30 The Applicants were represented by M/s R. M Ruhinda Advocates & Solicitors while the Respondent was represented by M/s Wanambugo & Co. Advocates.

5 The parties were directed to file their written submissions which they did and the same have been considered by the Court.

Issues for Determination

Following **Order 15 Rule 5(1) of the Civil Procedure Rules**, this Court has rephrased the issues to read as follows:

- 10 1. Whether the Applicants have raised sufficient grounds to warrant the grant of unconditional leave to appear and defend Civil Suit No. 1066 of 2023?
- 2. What remedies are available to the parties?
- 15 In his affidavit in reply, the Respondent under paragraphs 3,9 and 17 raised two preliminary points of law to the effect that this application is incompetent as the 1st Applicant lacks authority to swear the affidavit in support of this application on behalf of the 2nd Applicant and that the affidavit in support is riddled with falsehoods and thus should be rejected 20 by Court.

Order 6 Rule 28 of the Civil Procedure Rules stipulates that:

"Any party shall be entitled to raise by his or her pleadings any point of law, and any point so raised shall be disposed of by the Court at or after the hearing; except that by consent of the parties, or by order of* 25 *the Court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing."*

It is trite that where there is a preliminary objection capable of disposing of the matter in issue, it is judicious to determine the objection before embarking on the merits of the case. (See*: Uganda Telecom Limited Vs*

30 *ZTE Corporation SCCA NO.03 2017*).

5 Given the above, I shall proceed with the determination of the preliminary objections so raised.

Respondent's submissions on the preliminary points of law

On the first preliminary point of law; Counsel for the Respondent submitted that the application was brought by two persons to wit; Mr. 10 Wasswa Kitatta Kibirango and Mr. Nsimbe Ibrahim and that however, the said affidavit was only sworn by Mr. Wasswa Kitatta Kibirango who did not state or prove that he had authority from the 2nd Applicant to depone the said affidavit on his behalf as required by law under **Order 1 Rule 12 of the Civil Procedure Rules**.

- 15 Counsel further submitted that since the 1st Applicant swore an affidavit on behalf of the 2nd Applicant without the required authority, then the affidavit is fatally defective and thereby renders the entire application unsupported and incompetent. Counsel referred to the cases of *Bishop Patrick Baligasiima Vs Kiiza Daniel & 16 Others HCMA No.1495 of*
20 *2016, Scorpion Holding Ltd & 2 Others Vs Bank of Baroda (U) Ltd HCMA No.286 of 2013* and *MHK Engineering Services (U) Ltd Vs Macdowell Limited HCMA No.825 of 2018*.

On the second preliminary point of law; Counsel submitted that the affidavit in support of the application is riddled with falsehoods and 25 deliberate misrepresentations intended to mislead this Court and thus is fatally defective. Counsel for the Respondent referred to paragraphs 3 to 12 of the affidavit in support of the application contending that they contradict the undisputed evidence on the Court record and thus cannot be saved by the liberal approach of dealing with affidavits containing 30 falsehoods.

5 Applicants' submissions on the preliminary objections

Counsel for the Applicants submitted that where two or more people are sued together or collectively and one swears an affidavit on behalf of the other or all, an affidavit sworn in that manner would not be fatally defective where the deponent is said to lack express authorization from another or

- 10 all. Counsel contended that this is because in the circumstances the Defendants or like the facts at hand both Applicants share the same facts, hence it would be an injustice to strike out an affidavit sworn by a litigant on his behalf and on behalf of another on grounds that they have no authorization from the other litigant. Counsel for the Applicants contended
- 15 that the authorities relied upon by Counsel for the Respondent are earlier cases harboring old law. Counsel contended that the later case of *Grace Namulondo & 3 Others Vs John Jones Serwanga Salongo & 2 Others Misc. Cause No. 001 Of 2019* contains the recent position governing the law on affidavits sworn by an Applicant on behalf of another. Counsel 20 further relied on the case of *Banco Arabe Espanol Vs Bank of Uganda [1999] 2 EA 22* wherein the Supreme Court held that,

"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors or lapses should not necessarily debar²⁵ a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative it would seem that the main purposes of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered."

30 Counsel for the Applicants further submitted that the Respondent should first answer the question as to whether the 2nd Applicant was served to

- 5 which the answer is no; on the basis that the 2nd Applicant is in the United States of America. Counsel submitted that the Respondent never sought leave of Court to serve summons out of jurisdiction. Counsel contended that since the Respondent did not follow the procedure for service of summons on the 2nd Applicant, he should not turn around and claim 10 absence of authority as he who comes to equity must come with clean hands. Counsel further contended that both Applicants were sued jointly and severally. Counsel further contended that even if the affidavit was found defective in respect of the 2nd Applicant, the same cannot be defective in respect of the 1st Applicant.
- 15 Respondent's submissions in rejoinder

Counsel for the Respondent submitted that the decision of **Hon. Justice Ssekaana Musa** in the case of **Grace Namulondo and 3 Others Vs Jone Johns Serwanga Salongo & 2 Others (supra)** is distinguishable from the present case. Counsel further contended that the 2nd Applicant was 20 duly served and an affidavit of service to that effect is on Court record.

Analysis and Determination of the first preliminary point of law

In the case of **Namutebi Matilda Vs Ssemanda Simon and 2 Others, Misc. Application No.430 of 2021**, **Hon. Justice Stephen Mubiru** relied on the case of **Amtorg Trading Corporation Vs United States, 71 F.2d²⁵ 524**, that defined an affidavit as;

"a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath." (See also *Black's Law Dictionary 8th Edition* 30 pg.178).

5 At the onset, therefore, it must be borne in mind that affidavits are sworn evidence, and have to comply with the law to be admissible.

To that effect, **Hon. Justice Stephen Mubiru** in the case of **Namutebi Matilda Vs Ssemanda Simon and 2 Others (supra)**, stated that;

"What is required in affidavits is the knowledge or belief of the¹⁰ deponent (see for example Order 5 rule 24, Order 10 rule 19 (3) of the Civil Procedure Rules*)."

In the instant case, the Respondent disputes the competence of this application because the 1st Applicant allegedly swore the affidavit on behalf of the 2nd Applicant without authorization.

15 From paragraph 1 of the affidavit in support, the affidavit was sworn on the 1st Applicant's behalf and on behalf of the 2nd Applicant and the 1st Applicant states that he has full knowledge of the facts pertaining this case.

Counsel for the Applicants contended that the case of *Grace Namulondo*

20 * & 3 Others Vs Jone Johns Serwanga Salongo & 2 Others Misc. Cause No. 001 Of 2019* contains the recent position governing the law on affidavits sworn by an Applicant on behalf of another wherein **Hon. Justice Ssekaana Musa** held that:

"Therefore the failure by the rest of the applicants to depose 25 *affidavits and relying on the affidavit of the 1st applicant is a mere irregularity which would not defeat their application. This is premised on the fact that they are relying on the same facts and evidence. Otherwise it would have been very different if they were relying on different grounds that required different evidence to* 30 *support them."*

- 5 Court in the above case made reference to the case of *Ready Agro Suppliers and Ors Vs Uganda Development Bank Ltd HCMA 379 of 2005* which I shall consider as well. I find that the facts in that case are also distinguishable from the instant case. In the case of *Ready Agro Suppliers Vs Uganda Development Bank Ltd* (*supra*), **Hon. Justice**
- 10 **Egonda-Ntende** (as he then was) in considering an application for leave to appear and defend, an objection was raised that the Applicants no. 1 and 3 had not filed applications for leave to appear and defend and that the affidavit filed by Applicant no. 3 was filed out of time. Court stated that:
- *"No where in the body of that affidavit is there any indication that it* 15 *is sworn on behalf of applicant no. 3. I find that the above paragraph in the affidavit of Mr. Olendo Ogola, applicant No. 2 is sufficient authority for the applicant no. 1, which is a body corporate, and can only act through its natural officers."* (Emphasis mine).

Hon. Justice Egonda Ntende (as he then was) further held that:

20 *"The only affidavit filed in time in support of the application is the affidavit of applicant no. 2 sworn on behalf of applicant no. 1 and no. 2 only. I have been unable to gather from the contents of this affidavit that it was sworn on behalf of the applicant no.3. There is no express statement to that effect. Nor have I been able to find any implicit* 25 *authority that it is sworn on behalf of applicant no.3"*

In the instant case, it is clear from the contents of the affidavit that the Applicants were involved in the same transaction and the 1st Applicant in the affidavit in support of the application makes specific reference to the 2nd Applicant in paragraphs 1, 3, 5, 6 and 15. While in other paragraphs, 30 the 1st Applicant refers to 'Applicants' and categorically states that it is

5 just and equitable that the Applicants be granted leave to appear and defend the suit.

Accordingly, unlike in the case of **Ready Agro Suppliers Vs Uganda Development Bank Ltd** (*supra*), with specific reference to applicant no. 3 in that case, in the instant case, in the affidavit sworn by the 1st Applicant, 10 there is specific reference to the 2nd Applicant and the 1st Applicant further states that the affidavit is sworn on behalf of the 1st Applicant and the 2nd Applicant. Further the two Applicants are relying on the same evidence such as the sale agreement and payments allegedly made. It would therefore be unjust for this Court to hold that the affidavit sworn by the 15 1st Applicant is fatally defective on grounds that there is no authorization from the 2nd Applicant.

Further, in the case of **Ready Agro Suppliers Vs Uganda Development Bank Ltd** (*supra*), Court held that since the application by the 3rd Applicant was unsupported, it was dismissed and Court proceeded to 20 consider the merits of the application and considered the averments in the affidavit of Applicant no. 2. It should also be noted that the affidavit for the 3rd Applicant was filed out of time.

In addition, **Hon. Justice Stephen Mubiru** in the case of **Namutebi Matilda Vs Ssemanda Simon and 2 Others (supra)**, further discussed 25 in detail the argument that where there is no written authority to swear on behalf of the others, the affidavit is defective. His Lordship Stephen Mubiru did not find any basis for the principle in the rules of evidence nor those of procedure and thus held that;

"Of course the Rules of procedure, like any set of rule, cannot in* 30 *their very nature provide for every procedural situation that arises. Where the Rules are deficient, my view is that the Court should go*

5 *so far as it can in granting orders which would help to further the administration of justice, rather than hampering it. For those reasons I am not persuaded to follow the principle that where there is no written authority to swear on behalf of the others, an affidavit is defective*."

10 Hon. Justice Stephen Mubiru further stated that:

"... one golden thread is always to be seen; that what is required in affidavits is the knowledge or belief of the deponent, rather than authorization by a party to the litigation. Their content is dictated by substantive rules of evidence and their form by the* 15 *rules of procedure*."

The Applicants filed this application disputing the debt and it was supported by an affidavit deposed by the 1st Applicant who specified that it was on his behalf and on behalf of the 2nd Applicant. Similar to the issue in the case of **Grace Namulondo & 3 Others Vs John Jones Serwanga** 20 **Salongo & 2 Others Misc. Cause No. 001 Of 2019,** in the instant matter, both Applicants participated in the said transaction and were knowledgeable of all the facts regarding the same. The evidence adduced by the 1st Applicant is not any different from what the 2nd Applicant would present in this Court.

25 Furthermore, on the issue of service, Court has duly noted that there is an affidavit of service on Court record dated 24th November, 2023 wherein the Court process server deponed that the 1st Defendant had acknowledged service of the summons and the plaint on his behalf and on behalf of the 2nd Defendant on 3rd November, 2023.

5 This Court is also enjoined under **Article 126 (2) (e) of the Constitution of the Republic of Uganda 1995**, to administer substantive justice and avoid technicalities.

Considering the above and on account of the authorities cited herein and in the interest of justice, I hereby find the affidavit in support of the 10 application competent. This preliminary objection is accordingly overruled.

Whether the affidavit in support of the application is riddled with falsehood and deliberate misrepresentations?

The 2nd point of law raised by Counsel for the Respondent is that the 15 affidavit in support of the application is riddled with falsehoods and deliberate misrepresentations intended to mislead this Court. In particular, Counsel for the Respondent referred to paragraphs 3 to 12 thereof. Counsel for the Applicants submitted that the Respondent cannot detach himself from the earlier arrangements.

- 20 In the instant case, the contended averments are statements aimed at convincing the Court that the Applicants have a defence to the suit. In my view, the averments stated by Counsel for the Respondents cannot at this stage be considered to be falsehoods without further evidence adduced to point to the specific falsehoods. The issues pointed out as being falsehoods
- 25 are issues that go to the root of this dispute and it would be in the interest of justice for the Applicants to be given an opportunity to present their defence in respect of the same. The Applicants in such an application for leave to appear and defend the main suit only have to show that there is a dispute as to the facts or the law which ought to be tried and Court does 30 not at this stage attempt to decide these issues. Accordingly, I find no merit in this preliminary point of law hence it also fails.

5 Whether the Respondent is entitled to amend his pleadings?

Counsel for the Respondent in his submissions sought leave of Court under **Order 6 Rule 19 of the Civil Procedure Rules** to amend the plaint under Civil Suit No. 1066 of 2023 by adjusting the amount claimed to UGX 85,500,000/=.

10 In response, Counsel for the Applicants contended that whereas Counsel for the Respondent correctly cited **Order 6 Rule 19 of the Civil Procedure Rules**, he adopted a wrong procedure, strange at law and one that would cause an injustice to the Applicants. To achieve the purpose, the right procedure is by filing a formal application by chamber summons and not 15 making the prayer in written submissions.

Order 6 Rule 19 of the Civil Procedure Rules as rightly quoted by Counsel for the Respondent provides for amendment of pleadings. Given the nature of the instant application, I agree with the submission of Counsel for the Applicants that the Respondent should file an application 20 for amendment of the plaint for Court to consider the same as opposed to

seeking leave to amend the plaint vide submissions in an application filed by the Applicants for leave to appear and defend the main suit.

Furthermore, **Order 6 Rule 31 of the Civil Procedure Rules** provides that applications under **Rules 18, 19 and 22 of this Order** shall be by 25 summons in chambers. In the premises, the Respondent should follow the above procedure as stated hereinabove to seek leave to amend the plaint.

I shall therefore proceed to consider the merits of the application.

5 Analysis and Determination

Issue No.1: Whether the Applicants have raised sufficient grounds to warrant the grant of unconditional leave to appear and defend Civil Suit No. 1066 of 2023?

- **Order 36 Rule 3 (1) of the Civil Procedure Rules**, stipulates that a 10 Defendant served with summons, issued upon the filing of a specially endorsed plaint and affidavit under **Rule 2** of this Order shall not appear and defend the suit except upon applying for, and obtaining leave from Court.
- 15 For leave to appear and defend a summary suit to be granted, an Applicant must show by affidavit or otherwise that there is a bona fide triable issue of fact or law. See the case of *Maluku Interglobal Trade Agency Ltd Vs Bank of Uganda [1985] HCB 65 at 66*.
- 20 As defined in *Jamil Ssenyonjo Vs Jonathan Bunjo, H. C. Civil Suit No. 180 of 2012,* a triable issue is one that only arises when a material proposition of law or fact is affirmed by one party and denied by the other. It is, therefore, capable of being resolved through a legal trial that is, a matter that is subject or liable to judicial examination in Court.
- 25

A defence so raised by the Applicant should not be averred in a manner that appears to be needlessly bald, vague or sketchy. A triable issue must be differentiated from a mere denial. Therefore, the defence raised must not be a sham intended to delay the Plaintiff from recovering his/her 30 money. If the defence is based upon facts, in the sense that material facts alleged by the Plaintiff in the plaint are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues

5 or to determine whether or not there is a balance of probabilities in favour of the one party or the other.

In the case of **Kotecha Vs Adam Mohammed [2002] 1 EA 112,** it was held that where a suit is brought under summary procedure on a specially 10 endorsed plaint, the Defendant shall be granted leave to appear if he/she can show that he/she has a good defence on merit, or that a difficult point of law is involved; or a dispute as to the facts which ought to be tried; or a real dispute as to the amount claimed which requires taking an account to determine; or any other circumstances showing reasonable grounds of 15 a bona fide defence.

In the instant case, the Applicants dispute being indebted to the Respondent. As per their averments, on 13th November, 2021, the 20 Applicants purchased land comprised in **Busiro Block 351 Plot 188, land at Buddo, Wakiso District** from the Respondent at UGX 90,000,000/= which was paid in full. In evidence, they attached **annexure "A"**, a sale agreement in respect of the above-mentioned land dated 13th November, 2021 between the Applicants and the Respondent.

25 The Applicants also contend that the said purchase price was amended to UGX 205,000,000/= because the Respondent contended that the land had been undervalued. In evidence, they attached **annexure "B"** dated 20th May, 2022. The Applicants also contend that they cleared the purchase price as evidenced by **annexures "C"** which are acknowledgements of 30 receipt of UGX 6,500,000/=, UGX 10,000,000/= and UGX 10,000,000/= dated 4th September, 2022, 22nd November, 2022 and 17th December, 2022 respectively.

- 5 The Applicants also contend that according to **annexure "D"**, they continued transacting with the Respondent something that would have not happened if they had not paid the full purchase price. The Respondent on the other hand disputes the above averments and some of the annexures such as **annexure "A"** contending that it is a fabrication as it 10 is unknown to him. This raises a triable issue of fact relating to whether
- or not the purchase price was fully paid.
- 15

As espoused in the authorities discussed above and as laid out in the case of **Twentsche Overseas Trading Co. Ltd Vs Bombay Garage [1958] EA 741**, summary procedure is resorted to in clear and straightforward cases where the demand is liquidated and there are no issues for determination 20 by Court except for the grant of the claim. As analyzed above, the facts and the evidence adduced by both Counsel disclose issues that need to be verified. This Court has to determine whether there was any sale agreement executed by the Applicants and Respondent on 13th November, 2021 and whether the same was amended and this is a triable issue of 25 fact. This Court has to also ascertain whether the Applicants owe the Respondent the money claimed in the plaint. Further, the parties would have to give evidence in a trial to support their respective assertions hence placing the plaint outside the ambit of **Order 36 of the Civil Procedure Rules**.

Issue No.2: What remedies are available to the parties?**The East African Court of Appeal in the case of *Churanjila & Co. Vs A. H***

35 *Adam (1) (1950) 17 EACA 92*, held that a Defendant who has a stateable and arguable defence must be allowed to state it and argue it before the Court. That all the Defendant has to show is that there is a definite triable issue of fact or law.

In the premises, having found that the application has raised triable issues of law and fact, that merit the grant of the application, as such the Applicants are entitled to unconditional leave to appear and defend the main suit. The application is accordingly granted with the following orders:

- 1. The Applicants are hereby granted unconditional leave to appear and defend Civil Suit No.1066 of 2023.
- 2. The Applicants are ordered to file their Written Statement of Defence 15 within fourteen (14) days from the date of this Ruling.
- 3. Costs of this application shall be in the cause.

I so order.

20 Dated, signed and delivered electronically this **2nd** day of **May, 2024**.

Patience T. E. Rubagumya **JUDGE** 252/05/2024

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Prepared on 13 October 2026 · Esheria