

UGANDA / JUDGMENT

MK Financiers Ltd Vs Shah & Co Ltd & 4 Ors (Miscellaneous Application/appeal No. 343 of 2015) [2016] UGHCCD 15 (13 April 2016) [2016] UGHCCD 15

COURT

HC: Civil Division (Uganda)

BEFORE

Ogule Oumo, J

CASE / FILE NUMBER

Miscellaneous Application/appeal No. 343 of 2015

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION/APPEAL NO. 343 OF 2015

(ARISING OUT OF CIVIL SUIT NO. 382 OF 2014)

Mk FINANCIERS LIMITED ;;;;;;;;;;;;;; APPELLANT/PLAINTIFF

VERSUS

1. N. SHAH & CO. LTD
2. PARIKH HETAL
3. OWERE FRANCO
4. OBIRO ISAAC EKIRAPA
5. JOHN MUHAISE - BIKALEMESA::::::::::::::::::::RESPONDENTS/DEFENDANTS

BEFORE: HON. LADY JUSTICE MARGARET C. OGUU OUMO (JUDGE).

RULING

This Ruling is in respect of points of Law raised by the Managing Director of the Appellant Mr. Male Mabirizi Kiwanuka.

[The background of the Application is that the Applicant and **Respondent** in this matter had a dispute in Civil Suit No. 382 of 2014.

Worship Festus Nsenga , the then Deputy Registrar High Court Civil division made a decision on the 3rd September, 2015 withdrawing Civil Suit no. 382 of 2014 with costs.

The Applicant being dissatisfied with this decision filed an Appeal No. 343 of 2015 in this Hon. Court.

When the matter came up for hearing, the Appellant through its Managing

Director Mr. Male Mabirizi who represented it in court raised points of Law

Which Court has decided to first rule upon before proceeding with the Appeal.

At the hearing, the Appellant was represented by its managing Director Mr. Male Mabirizi Kiwanuka and the Respondent by Mr. Ekirapa Isaac Obiro Who also happens to be the 4th Respondent.

Having looked at the documents on Court record and heard the extensive arguments of both Counsel for the Respondent and the managing Director of the Applicant, court shall raise the following issues to enable it effectively determine the matters in contention.

1. Whether or not the Affidavit on Court record is defective, Incompetent and should be struck out of Court record?
2. Whether or not the Respondents filed a valid response on Court record?
3. Whether Mr. Ekirapa who is the 4th Respondent in this matter can validly represent himself and the other Respondents?

Issue 1: Whether or not the Affidavit on Court record is defective incompetent and should be struck out of Court record?

In order to support his argument on this issue, Mr. Male Mabirizi the **Managing** Director of the Appellant company contended that the **Response** Of the Respondents to this Application is defective since there are 5 Respondents on this Application, however on court record, there is only

One document filed as an Affidavit In reply and it does not specify which respondent was replying to the Application before Court.

Mr. Male Mabirizi went on to cite under **Order 3 rule 1 of the Civil Procedure Rules** which provides that any act in any court shall be done in person, recognized Agent or Advocate.

That **Order 3 Rule 2 of the Civil Procedure Rules** defines a **recognized agent** as holder of a power of Attorney.

He contended that the purported Affidavit in reply was deposed to by Parikh Hetal Who does not disclose whether he is a party to the suit or holds a power of Attorney from any of the Respondents including the 4th Respondent.

Mr. Male referred to the case of ***Lena Nakalema Binaisa & 3 others Vs Mucunguzi Myers, HC Misc. Application No. 460 of 2013,*** where Bashaija ,J ruled that, "an Affidavit is defective by reason of being sworn on behalf of others without showing that the deponent had Authority of the other and therefore the Affidavit was incurably defective"

Mr. Male further in order to support his contention that the Affidavit was incurably defective cited **S. 57 of the Evidence Act**, which provides that facts which are undisputed or admitted need not to be deponed.

In response to the 1st issue, Mr. Ekirapa who is the 4th Respondent contended that the Affidavit in reply was deponed to by Mr. Parikh Hetal who is the 2nd Respondent and in paragraph 2 of his Affidavit he states that he is the country director for the 1st Respondent.

He noted that there are other Respondents but there is one company that is the 1st Respondent.

That Mr. Hetal has sworn that he is the country Director of the 1st Respondent.

Mr, Ekirapa contended further that Annexure B to the Affidavit of Mr. Hetal is an amended an plaint showing the 1st and 2nd Respondents.

That the 2nd Respondent is the country director of the 1st Respondent and therefore is not misled.

That Mr. Male Is trying to rely on mere technicalities to defeat Justice.

That the Affidavit in reply on court record was filed within 14 days.

In rejoinder, Mr. Male on the competence of the Affidavit referred court to 1-2 of the Respondents' Affidavits in reply and contended that the paragraphs do not talk of the term Respondent or other party.

That it's not part of Court's work to make references or cross references in Court.

He contended that civil suit no. 382 of 2014 is an independent suit from this suit and so the pleadings there cannot be brought here to validate the would be reply of the Respondent.

Mr. Male went on to define a suit as per section 2(x) of the civil Procedure Act which is defined as all civil proceeding commenced in any manner

Prescribed.

He contended that issues of competence of the deponent go to the root of the case since It determines whether court should rely on such Affidavit or not and that such omission contravenes 0. 3 R.1 of the Civil Procedure rules.

Mr. Male thus prayed that the Affidavit be struck off for being incompetent.

In the Instant case, Mr. Hetal Parikh an American Citizen swore an Affidavit in repty this Application,

He states that he is the country director of the 1st Respondent and swore the affidavit in that Capacity.

Mr. Male for the Applicant /Appellant submitted that the Affidavit is defective and yet the Respondents were relying on that Application before court.

Mr. Male contended that it was contrary to Order 3 Rule 1 of the civil procedure rules which provides that any act in any Court shall be done in Person, recognized Agent or Advocate. "

That for clarity rule 2 defines recognized agents as a holder of a power of attorney.

That the purported Affidavit in reply deponed by Hetal Parikh does not disclose whether he is a party to the suit or holds a power of Attorney from any of the Respondents including the 4th Respondent who is an Advocate before Court.

Order 3 Rule 1 of the civil procedure Rules provides as follows;

"Any application to or appearance or act in any Court required or authorized by the law to be made or done by a party in such a court may except where otherwise expressly provided by any law for the time being in force, to be made or done by the party in person, or by his or her recognized agents or by an advocate duly appointed to act on his or her behalf; except that any such appearance shall if the court so directs, be made by the party in person."

Order 3 Rule 5 (2) is mandatory and provides that;

"The appointment of an Agent under sub rule (1) of this Rule may be special or general, and shall be made by an instrument in writing signed by the principal, and the instrument, or, if the appointment is general, a certified copy of it, shall be filed in court."

Nowhere in the Affidavit of Hetal Parikh does he state that he has been authorized to swear the Affidavit in reply by the Respondents **no.3, 4 & 5** and that he swears the Affidavit on their behalf.

Besides that such Authority is not attached as required in in **Order 3 Rule (2) Civil Procedure Rules (supra)**.

Courts in Uganda have held that the use of the word shall means that it is Mandatory.

Contrary to the submissions of Mr. Ekirapa that he is swearing the Affidavit

As the managing director of the 1st Respondent,, Justice Bashaija Andrew

In the case of Lena Nakalema Binaisa & 3 others V*s* Mucunguzi

Myers, HC Land Division Misc. Application No. 460 of 2013, **held that;**

*"In representative actions, under Order 1 Rule (10)2 of the Civil Procedure Rules, or a suit by a recognized Agent, under O.3 r *.2* of the Civil Procedure Rules or by Order of Court, the person swearing on behalf of the others ought to have their authority in writing which must be attached as evidence and filed on Court record. Otherwise there would be no proof that a person purporting to swear an Affidavit on behalf of others has their express authority."*

The Courts in Uganda have held in a number of cases that an Affidavit is defective by reason of being sworn on behalf of another without showing that the deponent had the authority of the other (see **Taremwa Kamishana Tomas Vs Attorney General HC Misc. Application No.**

38 of 2012, Vincent Kafeero and 11 others Vs Attorney General, H. C Civil Misc. Application No. 048 of 2012, Mukuye and 106 others Vs Madhvani Group Limited, Misc. Application No. 0821 of 2013 (arising out of CS No. 0615 of 2012), relying on the case of Makerere University Vs St. Mark Education institute & others, H. C Civii Suit No. 378 of 1993.)

Where it was held that an Affidavit is defective by reason of being sworn on behalf of others without showing that the deponent had the authority of other.

In this case, the affidavit is defective for non-compliance with the requirements of law.

Issue 2. whether or not the respondents filed a valid response on the court record.

In regard to this issue, Mr. Male for the appellant submitted that while there are five respondents to the application, there is only one document titled affidavit in reply and it does not specify which respondent was replying to the application before court. He also contended that order 3 r 2 defines a recognized agent as a holder of a power of attorney.

That the purported Affidavit in reply was deposed by one Parikh Hetal, who didn't disclose whether he is a party or a holder of a power of Attorney.

Mr. Male thus contended that the Respondent in not filing their response to the Application admitted contents of averments in the Affidavit.

He went on to cite the case of **Lt. Col. John Kaye Vs Attorney General, Constitutional Application No. 25 of 2012**, where Justice Kavuma as he then was stated that,

"It is settled law that where certain facts are sworn to in an affidavit, it is a burden on the other hand to deny them, failure to do that, they are presumed to have been accepted."

And the case of **Akankwasa Vs. Registrar of Titles Misc. Cause No. 33 of 2008**, where my Learned Sister J. Tuhaise P. stated that **failure to respond by a party means that he has no locus in a court of Law'**, to **support** his contention.

Mr. Male thus contended that order 8 r 1 & 2 of the civil procedure rules provides that any reply must be within 15 days and that they have since passed.

In reply to this issue, counsel for the respondents Mr. Ekirapa contended that the affidavit on record was deponed by Mr. Parikh Hetal who is the country director of the 1st respondent and he states in paragraph 2, that he was the 2nd respondent in the suit.

Mr. Ekirapa stated that there were other respondents but there is one company.

That the affidavit in reply on court record was filed within 14 days.

In rejoinder on this issue, Mr. Male contended that there is no proof to show whose affidavit is on court record.

That even if court would accept counsels argument, that this deponent swore the affidavit as a country director, then then the 4 respondents would be without any defense. Mr. male thus submitted and prayed that court finds that there is no reply but even if there was, it is for the 1st respondent and there is not for the other 4 respondents

Mr. Male thus submitted and prayed that Court finds that there is no reply but even if there was, it is for the 1st Respondent and there is not for the other 4 Respondents.

In the instant case, the Affidavit in reply is deponed by Mr. Hetal Parikh who is the Country Director of the 1st Respondent, he does not disclose whether he is a party or a holder of a power of Attorney.

By not filing their reply to the averments in the Affidavit in support, the Respondents are deemed to have admitted the contents of the averments.

I am fortified in my finding by the case of **Lt. Col. Kaye and Akankwasa (supra)**.

That brings me to the 3rd issue: whether Mr. Ekirapa who is the 4th respondent in the matter can duly represent himself and respondents before this court?

Mr. Male submitted that having looked, regulation 9 of the Advocates (professional conduct) regulations S. I 207-2, it is provided that:

"No Advocate may appear before any Court or Tribunal in any matter in which he or she has reason to believe that he or she will be required as a witness to give evidence whether verbally or by Affidavit; and if, while appearing in any matter, it becomes apparent that he or she will be required as a witness to give evidence whether verbally or by Affidavit, he or she shall not continue to appear; except that this Regulation shall not prevent an Advocate from giving evidence whether verbally or by declaration or Affidavit on a formal or non-contentious matter or fact in any matter in which he or she acts or appears...."

Mr. Male contended that in this case Mr. Ekirapa is the 4th Respondent and at any time in the main suit, he will come to defend himself either orally or by Affidavit and there is no way he will represent himself and others in this

matter.

He contended that Mr. Ekirapa has signed and stamped documents as Counsel for the Respondents so there is no doubt that he is their Counsel.

Mr. Male submitted that since the aforementioned in coached in mandatory terms, all the documents could be invalidated.

In reply to this issue, Counsel Ekirapa for the Respondents contended he is not listed as a witness of the Appellant or any other party in matter. He conceded that he was a party but that he would not testify that the inclusion of his name as a party is erroneous.

He referred to annexure C attached to the affidavit in reply, a decision that the learned trial judge at pg. 9 held that;

“With regard to the alleged presence of the respondents, other than the Bailiff at the execution of the distress for rent, the evidence before me shows that the process was carried out by the 1st respondent as a bailiff and among others a police officer of the rank of ASP witnessed it.

Mr. Ekirapa thus argued that the question of participation has been determined in the above mentioned ruling.

That Mr, Male is also in the same position as him as he had written letters and sworn Affidavits.

Mr. Ekirapa thus prayed that court proceeds with the suit and hears it.

In rejoinder Mr. Male contended that Civil Suit No. 382 /2014 is an independent suit from the suit before Court and the pleadings there cannot be brought here to validate the reply of the Respondents and

That it is not true that Mr. Ekirapa is not listed as a witness. That in the list of witnesses, the 1st defendant is a defendant and he is part of the defendants.

That although he claims that he was wrongly included, Mr. Ekirapa has not filed an Application to be struck out and Order 13 gives him a right to do so.

As regards to the decision of Justice Owiny Dollo, cited by Counsel Ekirapa, Mr. Male argued that that part did not concern joinder, it was based on Affidavit evidence before Judgment because a party may be joined but found not liable.

That the Orders made by the Learned Judge in that case, he awarded costs to the Applicant and that he did not save the 4th Respondent.

That had he struck him out, he would have said except and that this is an independent suit.

With regard to counsel Ekirapas submission that Mr. Male was in the same situation as him in the matter, Mr. Male`s argued that he is not an advocate of the high court like Mr. Ekirapa and he was not subject to the said regulations.

That being an advocate is a voluntary thing which he has not done.

He therefore defined an Advocate as per S. I (a) of the advocates Act cap 267 as “ any person whose name is dully entered upon the Roll’ which he argued he was not ,he thus contended that he is not an Advocate where as Mr. Ekirapa is.

Mr. Male thus prayed that the application be heard expert since the applicants have no response on record.

Regulation 9 of the Advocates (Professional Conduct) Regulations *S I 207-2,* **provides as follows;**

No Advocate may appear before any Court or Tribunal in any matter in which he or she has reason to believe that he or she will be required as a witness to give evidence, whether verbally or by Affidavit; and if, while appearing in any matter, it becomes apparent that he or she will be required as a witness to give evidence whether verbally or by Affidavit, he or she shall not continue to appear; except that this Regulation shall not prevent an Advocate from giving evidence whether verbally or by declaration or Affidavit on a formal or non-contentious matter or fact in any matter in which he or she acts or appears..”

In the Instant case, the Respondents are being represented by Mr. Ekirapa Isaac Ebiro, who happens to be the 4th Respondent in this matter and the 4th Defendant in the main suit.

In the case of Uganda Vs. Patricia Ojangole criminal case no.1 of 2014, Justice Gidudu,in the Anti-corruption court division in a similar case stated that,

“It is not permitted to use ones fiduciary relationship to gain advantage”.

Having drafted, signed and sealed documents for the respondents which are not disputed.

Mr. Ekirapa cannot respresent the respondents as he has been a party to various agreements in contention as he runs the problem of placing himself in a position of conflict of interest.

In the case of the common wealth bank of Australia Vs. R and Anor(1991) 102 ALR 453 it was held that “ A fiduciary is expected to be extremely loyal to the person(s) he or she owes duty ,she or he must not put personal interests before the duty and must not profit from that position as a fiduciary.

In the instant case, for Mr. Ekirapa to represent the respondents when he signed and sealed their documents as their counsel ,he is likely to be called as a witness and the regulation is very clear that if he or she has reason to believe that he will be required as a witness, it does not matter that he is listed as a witness but if he or she believes that he will be required as a witness, there is likely hood that Mr. Ekirapa the one who signed and sealed may be called as a witness.

It is on the basis of that insider information that he has, that he is disqualified as it is likely to lead to conflict of interest

In those circumstances, am of the considered opinion that Mr. Ekirapa cannot represent the respondents as their counsel when he was involved in the matter however under Article 28(3) the respondents have a right to be represented by counsel of their choice, they can therefore engage a different counsel of their choice to do it. Iam fortified in my finding by the case of Uganda vs. Patricia ojangole (supra)

The cumulative effect of courts findings are that:

- (1) The affidavit in court is defective and incompetent.
- (2) Mr. Ekirapa who is the 4th respondents and counsel in personal conduct of this matter but the respondents can instruct another lawyer of their choice.
- (4) The costs of this application shall be in the cause.

This court has inherent powers to make such orders as are necessary in the interest of justice and to prevent the abuse of court process under sec.98 of the civil procedure Act and it has powers to grant orders absolutely or on such terms as it deems fit to avoid a multiplicity of legal proceedings concerning those suits.

Under Article 28 of the constitution parties have a right to a fair hearing in order for the respondents to participate in this hearing, they can apply for extension of time in which to file a reply under section 96 of the C P A and O.51 r 1 of the civil procedure rules.

Application should be made within 7 days.

M C Ogule. Oumo

Judge

13/04/2016

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Prepared on 14 October 2026 · Esheria