

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
MISCELLANEOUS APPLICATION NO.103 OF 2023
ARISING FROM MISCELLANEOUS APPLICATION NO. 055 OF 2023
(ARISING FROM HCCS NO.060 OF 2023)
THE REGISTERED TRUSTEES OF
ARYA PRATINIDHI SABHA EASTERN AFRICA:::::::::::::::::::::::::APPLICANT
VERSES
MUKESH K. JAIN:::RESPONDENT

BEFORE: HON LADY JUSTICE FARIDAH SHAMILAH BUKIRWA NTAMBI

RULING

Introduction

This Application was brought under Article 126 (2)(e) of the Constitution of Uganda, Section 33 of the Judicature Act, Sections 98 & 100 of the Civil Procedure Act and Order 8 Rules 18 (2) & 20 of the Civil Procedure Rules (CPR) seeking orders that the Applicant be granted leave to file a supplementary affidavit in reply in Miscellaneous Application No. 55 of 2023 arising out of Civil Suit No.60 of 2022.

This Application is supported by the Affidavit of Abhay Agarwal wherein the grounds of the Application were set out and briefly they are;

- a) That the Respondent filed Misc. Application No.55 of 2023 against the Applicant for orders that the Applicant's suit. (HCCS No.060 of 2022) is unmaintained in law for being barred by law and should be rejected, that the Applicant has no locus standi to bring HCCS No.060 of 2022 and costs of the suit.
- b) That on behalf of the Applicant, he swore an affidavit on the 6th April 2023 which was filed in court on the same day.
- c) That prior to filing the Affidavit on the 4th of April 2023, through their lawyers of M/S Reeve Advocates they had written a letter to the Ministry of Lands and Urban Development asking for a search report on the Applicant.



- d) That however, because the days within which to file a reply were fast running out, their lawyers advised the Applicant that he needed to file an Affidavit in Reply on time in case the search report delays.
- e) That indeed the Applicant swore an Affidavit in Reply on 6th April, 2023 and the search report was released on 9th of May 2023.
- f) That on the 11th of April 2023, days after filing the Applicant's Affidavit in Reply, the Applicant received a "*return of new trustees*" from the Ministry of Lands wherein the Honorable Minister of Lands Housing and Urban Development took note of or cognizance of the new trustees of the Applicant.
- g) That these documents were not available at the time of filing the Affidavit in Reply yet they are important in so far as proving the identity of the Applicant (The Respondent in Misc. Application No.55 of 2023).
- h) That this Honorable Court has the power to grant leave to file a supplementary Affidavit in Reply so as to enable the Honorable Court determine the real questions of law.
- i) That the Supplementary Affidavit in reply will aide court to holistically determine Misc. Application No.55 of 2023.
- j) That it is important for the said documents to be on record to aid the Honorable Court delve into the real questions of law as raised by the Respondent and as opposed by the Applicant.
- k) That leave to file a Supplementary Affidavit shall not in any way prejudice the Respondent.

The Respondent opposed the Application in his Affidavit in Reply claiming that the intended supplementary affidavit in reply is untenable at law as it seeks to create locus and introduce a cause of action where there is none.

Representation

Counsel Eunice Ainembabazi represented the Applicant while the Respondent was represented by Juma Kinyiri and Godfrey Malinga.

Background

In 2022, the Applicant instituted Civil Suit No. 60/2022 (hereinafter referred to as C.S No. 60/2022) against the Departed Asians Property Custodian Board and the Respondent in this Application. In 2023, the Respondent in this Application instituted Miscellaneous Application No. 55 of 2023 (hereinafter referred to as M.A No.55/2023) against the Applicant seeking orders that the Plaintiff in C.S No. 60/2022

did not have locus standi to institute the said suit. The Applicant/Plaintiff has instituted Miscellaneous Application No. 103 of 2023, the instant Application (hereinafter referred to as M.A 103/2022) seeking leave of the Court to file a supplementary affidavit. Submissions in this Application were made orally before this Court.

To determine the Application, the court came up with one issue;

1. Whether the Applicant should be granted leave to file a supplementary affidavit in reply.

Preliminaries

Counsel for the Respondent argued that this court had already made a ruling in the negative on an oral application made on the 2nd of May 2023 by the Applicants seeking leave to file a supplementary affidavit. As such, the court was functus officio. Counsel relied on the cases of **Major Retired Kakooza Mutale Vs Balisigala CACA No. 121/2020, Kodak Limited Vs Kovergie & Anor (1969) EA 295**. He further argued that if the Application is allowed, it will result in the impairment of the binding effect of a court order. It will lead to an improper and inconsistent practice as court orders could be ignored and fresh applications filed regarding the same matter.

Counsel for the Applicant submitted that this court has never made any order concerning the Application for leave to file a supplementary affidavit. Rather, the court made a ruling on an application for cross-examination of the Applicant in Miscellaneous Application No. 55 of 2023 on the 2nd of May 2023. This therefore implies that the court is not functus officio.

I agree with Counsel for the Respondent that as soon as an Order is made by a Court, that Court becomes functus officio. It ceases to have control over the case and has no power to review, alter, or interfere with it. See **Major Retired Kakooza Mutale Vs Balisigala CACA No. 121/2020, Kodak Limited Vs Kovergie & Anor (1969) EA 295**.

The question before the court is whether a ruling was made by this Court with respect to an application by the Applicant for leave to file a supplementary affidavit on the 2nd day of May 2023. I have found the Ruling below on the court record;

"I disallow the prayer to cross-examine the Applicant since such cross-examination shall not disclose any issue regarding the issue of locus standi. In the interest of time and justice of this case, I direct the Respondent to file her written submissions in response to the Applicant's written submissions."

I agree with counsel for the Applicant that indeed this court did not make a ruling in respect of an Application for leave to file a supplementary affidavit despite the Applicant having made an oral application to that effect. This was an oversight by the



court and as such the court will entertain this Application. Having resolved that there was never a ruling in respect of the application to file a supplementary affidavit, this court is not functus officio as argued by counsel for the Respondent. This objection is therefore overruled and shall proceed to determine this Application on its merits.

Issue 1:

Whether the Applicant should be granted leave to file a supplementary affidavit in reply

Submissions by Counsel for the Applicant

Counsel for the Applicant submitted that the current Application before the court is aimed at adducing more evidence that recently came into the possession of the Applicant. She argued that the Respondents argue that the Applicant does not have the locus to institute C.S No.60 of 2022 and Misc. Application No. 103 of 2023. She went on to say that the evidence sought to be adduced in the supplementary affidavit will enable the court understand and determine the question of locus standi to its logical conclusion. Counsel argued that the decision by the Respondent to challenge the Certificate of Incorporation presented by the Applicant/Plaintiff as the basis of its locus standi, leaves the Applicant no option but to justify that it is a proper Certificate of Incorporation that gives it locus to bring C.S No.60 of 2022 and M.A 103/2023. She therefore, prayed that the Court allows the Applicant to adduce more evidence that has recently come into the Applicant's possession to demonstrate that the Applicant has locus to institute the suit.

Submissions by counsel for the Respondent

Counsel for the Respondent argued that this Application should not be entertained because it was brought after the pleadings had been closed. It was brought as an afterthought to try and cure the lack of locus standi on the part of the Applicant. Secondly, he averred that counsel for the Applicant in her own submissions admitted that she filed Civil Suit No. 60/2022 without the prerequisite documents that create locus standi and a cause of action. Counsel therefore prayed to this court that this Application be dismissed.

Rejoinder by counsel for the Applicant

Counsel for Applicant in her rejoinder argued that on the aspect of filing the application when the pleadings had closed, Misc. Application No. 103/2023 was filed on the 12th of May 2023, four days before the Respondent filed his submissions in reply. However, fixing the Application took longer than the Applicant would have desired and in any case, it is not the duty of the litigant to fix cases.



Consideration by Court

I have considered the submissions of both counsel for the Applicant and the Respondent in my decision.

It is trite law that an affidavit is not only a pleading but also evidence provided to the court to enable the determination of a suit. In **Opollot V Attorney General Miscellaneous Application No. 687 of 2021**, Justice Sekaana held;

“There is a wealth of authorities on the law on affidavits. Blacks Law Dictionary 8th Edition Pg. 178 defines an affidavit as a voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths, such as a notary public. It is a statement or declaration in writing on oath or affirmation before a person having authority to administer the oath or affirmation. It is supposed to contain only what the author knows as actual facts and any second hand information or information that is not witnessed or known by the person is inadmissible. Thus, what is required in affidavits is the knowledge or belief of the deponent and not any other person. An affidavit is therefore used as evidence. (emphasis mine)”

Justice Mubiru in **Dr. Lam-Lagoro James vs Muni University HCM.C No. 07 of 2016** held the view that an affidavit in reply is evidence rather than a pleading in *stricto sensu*, and therefore this is why it should be filed and served on the adverse party within a reasonable time before the date fixed for hearing.

It is on this basis that I make my assertion that an affidavit is sworn evidence that is presented before the court to enable it to come to a judicious conclusion when handling any legal dispute before it. This is the reason why the contents of an affidavit are scrutinized by the court and the parties to the suit. In a case where there is a need to challenge facts laid out in the affidavit, the parties may do so by filing replies to the affidavit or by moving the court to cross-examine the deponent of the said affidavit (See order 19 of the CPR).

In the instant case, the Respondent filed M.A No.55/2023 wherein he sought among other orders, an order that Plaintiff did not have locus to bring the civil Suit No. 60 of 2022. In the affidavit in Rejoinder, the Respondent who is the Applicant in Misc. App. No.55/2023, stated that the Respondent is a non-existent entity and as such has no locus to commence Civil Suit No. 60 of 2022.

The Respondent in that Application then filed Miscellaneous Application No. 103/2023 seeking for court's leave to file a Supplementary Affidavit. Under paragraphs 6, 7, & 8 of the Affidavit in Support of this Application, the Applicant avers that he received several documents that he did not have at the time of filing his

Affidavit in Reply in Misc. App.No.55/2023. That the said documents go to the root of determining the question of locus standi to be determined in M.A No. 55/2023.

It is not in dispute that pleadings in M.A No. 55/2023 had been closed and the court had moved to the stage of receiving submissions from the parties. The said pleadings were deemed to have been closed when the affidavit in rejoinder was filed on the 13th of April 2023. This therefore means that the Applicant in this matter could not file a supplementary affidavit without leave of court hence leading to this Application.

Justice Boniface Wamala in **Surgipharm (U) Limited Vs Uganda Investment Authority and Another Misc. Application No. 65/2021** discussed this issue of a party seeking leave to file a supplementary affidavit and held that;

"In that regard, therefore, even in absence of an affidavit in rejoinder in a particular matter, if a party waits up to after the matter has come up for hearing, and for some reason the matter does not take off, a party seeking to file any supplementary affidavit would need to seek leave of the court and to notify the opposite party."

This court is clothed with the jurisdiction to grant leave to a party to file a supplementary affidavit when the pleadings have been closed. This jurisdiction is enshrined in Section 33 of the Judicature Act and Section 98 of the Civil Procedure Act. This power is however discretionary to the court and is not as of right to the Applicant. In the case of **Krakauer V Katz [1954]1 ALL ER 224**, Denning L.J held;

"A preliminary point has arisen whether in an interlocutory matter this court can or should admit further affidavits on behalf of the defendant. It was suggested that an appellant on an interlocutory matter has a right in this court to adduce further evidence by affidavit. I am clearly of opinion that he has such no right. It is a matter of discretion in this court whether or not further evidence by affidavit should be admitted." (Emphasis mine)

Having determined that the court has the discretionary power to allow such applications, I will move to determine whether the application has merit.

In determining this matter, I will consider two aspects; firstly, whether the supplementary affidavit will enable the court to determine the issue at hand conclusively and secondly, whether the Application was brought in good faith.

On the first aspect, it should be noted that this Application originates and is hinged on the question of whether the Applicant had locus to institute Civil Suit No. 60 of 2023. The Applicant avers that he got vital information that will enable the court dispose of this question. Annexure "A" to the Affidavit in support of M.A. 103 of 2023 is a letter from the Ministry of Lands, Housing and Urban Development addressed to the



Advocates of the Applicant. The contents of the said letter indicate that there was a search conducted on the status of the existence of the entity called "THE REGISTERED TRUSTEES OF ARYA PRATINIDHI SABHA EASTERN AFRICA". The contents of the said letter will enable the court to determine whether indeed the Applicant is a non-existent entity and therefore lacks locus to bring the suit.

On the second aspect as to whether this application was brought in good faith; counsel for the Respondent submitted that this Application is seeking to introduce evidence that will create locus for the Applicants to bring both C.S 60/2022 and M.A No.103/2023. However, I would like to point out that the Applicant brought this Application as a result of the Respondent having instituted M.A No. 55/2023 wherein he claimed that the Applicant did not have locus to institute C.S 60/2022. The basis of this averment was a discrepancy in the Certificate of Incorporation presented by the Plaintiff vis-a-vis the name of the Plaintiff in C.S 60/2022. Whereas the Plaintiff/Applicant instituted this suit in the name of "THE REGISTERED TRUSTEES OF ARYA PRATINIDHI SABHA EASTERN AFRICA", the certificate of incorporation presented by Plaintiffs read as, "THE REGISTERED TRUSTEE OF ARYA PRATINIDHI SABHA EASTERN AFRICA".

I should also note that the Applicant made an oral application to have a supplementary affidavit filed, which application was not ruled upon out of an inadvertent error and oversight by this court. The Applicant brought this Application 10 days after the Applicant's counsel had made an oral application which is within reasonable time. However, as the Counsel for the Applicant stated, it is not the duty of the Applicant to fix a matter for hearing, the duty lies with the court.

Before I render a final ruling on this matter, I would like to address a pertinent issue that was raised by counsel for the Respondent. He argued that this Application was brought after the Respondent had filed his affidavit in rejoinder in M.A 55/2023. He argued that at this point all pleadings had been closed and the Applicant had no right to adduce further evidence by way of affidavit. It should be noted that suits determined on affidavit evidence are very delicate because the court solely relies on the contents of the affidavits to determine the matter.

Ordinarily, if this suit had been brought by way of Complaint under order 4 of the Civil Procedure Rules and the Plaintiffs had closed their case but later got evidence that would support their case, they would simply move the court to grant them leave to reopen their case under Section 98 of the Civil Procedure Act, Cap. 98, Section 33 of the Judicature Act Cap.13 and Order 18 Rule 13, Order 52 Rules 1 and 2 of the Civil Procedure Rules SI 71-1. Courts have on several instances allowed parties in suits to reopen their cases to enable them adduce evidence that they received after their cases had been closed. *See Simba Telecom v Karuhanga & Anor (Misc Application No 451*

of 2014) [2014] UGHC 98 (20 August 2014); Luvutu Kanya (suing through his lawful attorney Ssemugwe) v Mukwaya and 2 Others (Miscellaneous Application No. 514 of 2022) [2022] UGHCLD 142 (5 August 2022) among others.

So, in Applications such as the one before this court, the parties may not have the luxury to apply to the court to reopen their cases. The most suitable remedy at their disposal is seeking leave of court to file a supplementary affidavit to enable them to adduce evidence to buttress their case.

In any case, Courts should focus on ensuring that every party is accorded the opportunity to adduce its evidence to allow the court to reach a judicious decision. It was held in the case of **Bank Arabe Espanol versus Bank of Uganda [1999] 2 E.A 22** that the administration of justice should envisage that the substance of all disputes should be investigated and decided on their merits and that errors or lapses should not necessarily debar a litigant from the pursuit of his or her rights and unless a lack of adherence to the rules renders the litigation process difficult and inoperative, it would seem that the main purpose of litigation namely the hearing and determination of disputes should be fostered rather than hindered.

For the above reasons and in the interest of substantive justice, I will allow this application on condition that the Applicant pays the costs of this application to the Respondent.

It should however be noted that the position is that in an application to be determined on the basis of affidavits, all affidavits and pertinent documents should be filed and served on the opposite party. *See Surgipharm (U) Limited Vs Uganda Investment Authority and Another Supra.* That being said, it is only fair that the Respondent is accorded an opportunity to amend his Affidavit in Rejoinder if he wishes to.

I, therefore, allow this Application and orders as follows;

1. The Applicant is granted leave to file a Supplementary Affidavit in Miscellaneous Application No. 55 of 2023.
2. Costs for this Application shall be awarded to the Respondent.

I so order


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FARIDAH SHAMILAH BUKIRWA NTAMBI
JUDGE


Dated this day of July 2024