THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 622 OF 2019

(ARISING FROM CIVL SUIT NO. 628 OF 2019)

NAMBI HOLDINGS LIMITED :: APPLICANTS

VERSUS

1. **EXIM BANK LIMITED**
2. **SABHAPATHY KRISHNAN**
3. **AMAZAL HOLDINGS LIMITED**
4. **ALYKHAN KARMALI**
5. **EVAX & SONS LIMITED**
6. **ALI REZA WALJI :: RESPONDENTS**

BERORE: HON. MR. JUSTICE BONIFACE WAMALA

RULING

This was an application seeking a temporary injunction restraining the Respondents, their agents, servants or assignees from evicting, alienating and/or interfering in the Applicant's quiet possession and/or occupation of property comprised in Kyadondo Block 245 Plot 321 at Kiwuliriza, Kansanga (the suit property) until the hearing and final determination of the main suit.

The application was opposed by the Respondents through their respective affidavits in reply.

When the application came up for hearing, the Applicant was represented by Mr. Nyambogo Machel holding brief for Mr. Brian Othieno. The Respondents were represented by Mr. Alex Rezida for the 6th Respondent; Mr. David Mpanga for the 3rd & 4th Respondents; and Mr. Mika Eria for the 1st and 2nd Respondents. Counsel for the 5th Respondent was absent but a Director of the 5th Respondent was present.

Counsel for the Respondents intimated that they jointly intended to raise some preliminary points of law against the application. It was agreed that the same be raised and responded to by way of written submissions, which was done.

In their submissions, Counsel for the Respondents raised two preliminary points of law, namely:

1. **The Affidavits in support and rejoinder of this Application sworn by Brian Kaggwa are argumentative and prolix as they restate the Applicant's pleaded case in its Plaint and to that extent are barred in law and should be struck out and the application thereof dismissed with costs.**
2. **This application is overtaken by events as the Applicant has since been evicted from occupation of the suit property and the 5th Respondent has been in possession of the property since 1st July 2019 rendering this application nugatory and incompetent.**

I will handle the objections in the order they were raised and argued.

Preliminary Objection 1:

The Affidavits in support and rejoinder of this Application sworn by Brian Kaggwa are argumentative and prolix as they restate the Applicant's pleaded case in its Plaint and to that extent are barred in law and should be struck out and the application thereof dismissed with costs

Submissions by Counsel

It was submitted by Counsel for the Respondents that the Applicant's affidavits in support and in rejoinder of the application dated 25th July 2019 and 4th September 2019 respectively sworn by Brian Kaggwa cannot be relied upon because they are prolix and argumentative. Counsel submitted

that the affidavit in support contains more than 100 lengthy paragraphs which largely contain the pleadings of the Applicant in its plaint and what appears to be submissions and arguments of Counsel in contravention of Order 19 Rule 3 of the Civil Procedure Rules (CPR) which requires that affidavits should only be confined to facts within the deponent's knowledge.

Counsel relied on the authority in ***Male Mabirizi vs Attorney General Supreme Court Misc. Application No. 7 of 2018*** in which the applicant's affidavits were struck out for being argumentative, prolix and non-compliant with Order 19 Rule 3 of the CPR. Counsel submitted that the affidavits in the present application were evidently similar in nature to the affidavits described by their Lordships in the above cited case and they ought to be struck out as a matter of law. Counsel further submitted that as a consequence of striking out the affidavits, there would be no competent application before the Court as Order 41 Rule 1 of the CPR requires that an application for grant of an injunction is proved by an affidavit and in the absence of an affidavit or such other evidence, the application must fail. Counsel therefore prayed that the affidavits be struck out as prayed and the application be dismissed with costs.

In reply, Counsel for the Applicant submitted that the Applicant strongly opposed the Respondent's submissions on the preliminary points of law.

On the first preliminary point of law, Counsel for the Applicant submitted that the alleged critique by the Respondents is merely a matter of style (suitability of taste) coupled with factual detail narrated and cannot by any stretch of imagination amount to being argumentative and prolix because it simply enumerates events perhaps with twists and turns over a long stretch of time. As such it cannot by any stretch of imagination amount to what the Respondents allude to whatsoever.

Counsel argued that the nature and detail of the contents in the affidavits referred to were mere facts narrated in evidential detail; to show the illegal mischief and fraud on the part of the Respondents. Counsel for the Applicant asserted that the detailed averments were simply meant to lay down facts and supportive evidence without any arguments whatsoever. Counsel further argued that the said content does not contain any scandalous input.

Counsel for the Applicant also submitted that in the alternative but strictly without prejudice, the Respondents had elected not to point out whatsoever any specific content that is argumentative or prolix. In any event, should there have genuinely been such content, which the Applicant denies, it would not only have been explicitly pointed out but also the Respondents should have gone on to show how they were prejudiced by such content. Counsel argued that the correct position in instances where such content exists is for the offending content to be removed but not to do away with the entire substance of the case. Counsel relied for this submission on the case of ***Col. Dr. Besigye Kiiza v Museveni Yoweri Kaguta & Electoral Commission (Election Petition No.1 Of 2001)***.

Counsel for the Applicant further relied on Article 126 (2) (a) – (e) of the Constitution which directs courts to ensure that justice is done to all irrespective of their social or economic status and that substantive justice shall be administered without undue regard to technicalities. Counsel submitted that the Supreme Court case of ***Male Mabirizi vs Attorney General (supra)*** is distinguishable from the present case as the facts and circumstances of the two matters are quite different.

In rejoinder, Counsel for the Respondents contended that as earlier pointed out, the affidavit in support contains more than 100 lengthy and argumentative paragraphs making the entire affidavit defective specifically **paragraphs 8 (a) to 8 (ss)** and **paragraphs 8 (tt) to 8 (xxii)** where the

applicant at great length lists in detail his arguments for oppression, duress, unconscionable bargain, lifting the corporate veil, financial and economic loss.

The Respondents' Counsel further submitted that the instant affidavits in their entirety contravene the provisions of Order 19 Rule 3 of the CPR going to the root of the matter and leave nothing to be salvaged contrary to what was submitted by the Applicant's Counsel. Counsel further submitted that the Applicant could not rely on Article 126(2)(e) of the Constitution to cure their defective affidavits as the courts have held that this article is not meant to do away with rules of procedure and, in any case, the Applicant had not shown to the Court any satisfactory reason for failure to depone their affidavits within the confines of the rules of procedure. Counsel for the Respondents therefore reiterated their earlier prayer to strike out the affidavits and dismiss the suit.

Consideration by the Court

The provision of the **Civil Procedure Rules** relevant to the matter before the Court is **Order 19 Rule 3** which provides as follows:

> *(1) Affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted, provided that the grounds thereof are stated.*
>
> *(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents shall, unless the court otherwise directs, be paid by the party filing the affidavit.*

On the case before the Court, both affidavits in issue are sworn by Brian Kaggwa who is a Director in the Applicant Company. The deponent also happens to be an advocate. It is argued by the Respondents' Counsel that the affidavits of the Applicant, particularly the affidavit in support contains

more than 100 lengthy paragraphs which largely contain the pleadings of the Applicant in its plaint and what appears to be submissions and arguments of Counsel in contravention of Order 19 Rule 3 of the CPR. Counsel argued that the affidavits cannot be relied on for being argumentative, prolix and non-compliant with Order 19 Rule 3 of the CPR.

In the case of ***Male Mabirizi vs Attorney General (supra)***, the Supreme Court, while defining **prolixity**, adopted the definition in the **Black's Law Dictionary, 9th Edition at page 1331** as the **"unnecessary and superfluous stating of facts and legal arguments in pleading or evidence."** Their Lordships went on to say: **"An affidavit as we understand it is meant to adduce evidence and not to argue the application ... An affidavit should contain facts and not arguments or matters of law."**

Looking at the impugned affidavits, it is true that they are lengthy and winding, particularly the affidavit in support of the application. As pointed out by Counsel for the Respondents, the affidavit in support is in the excess of 100 paragraphs, spanning up to 15 pages. However as held by their Lordships in ***Male Mabirizi vs Attorney General (supra)***, the length of the affidavits is not by itself sufficient to make them prolix or argumentative. To my understanding the affidavit(s) must be setting out facts and legal arguments in an unnecessary and superfluous manner in order to be deemed prolix.

I have carefully perused and studied the impugned affidavits. I agree that they are lengthy and repetitive in some parts. But I have found no argumentative statements of fact and/or law. The facts and evidence, though set out in great detail and at times repetitive, are set out in a factual and evidential manner. The contents, for instance, in paragraphs **8 (tt) to 8 (xxii)** of the affidavit in support, which the Respondents' Counsel refer to in their submissions in rejoinder, are in my view particulars of conduct described by the Applicant as oppression, duress, unconscionable bargain,

lifting the veil, financial and economic loss; and not arguments as submitted by the Respondent's Counsel. I have not been able to find statements of law or legal arguments in the impugned affidavits. The style and manner in which the averments were presented by the Applicant may be onerous or uncomfortable to the other party and, indeed, to the Court, but this does not qualify as prolixity.

I also find that the impugned affidavits are confined to facts within the knowledge of the deponent. They do not contain any hearsay or matters of belief the grounds of which have not been disclosed. It is therefore my finding that the Respondents have not established to the Court's satisfaction that the impugned affidavits are argumentative, prolix or non-compliant with the provisions of Order 19 Rule 3 of the CPR. The first point of objection is therefore overruled.

Preliminary Objection 2:

This application is overtaken by events as the Applicant has since been evicted from occupation of the suit property and the 5th Respondent has been in possession of the property since 1st July 2019 rendering this application nugatory and incompetent.

Submissions by Counsel

It was submitted by Counsel for the Respondents that by the time the Applicant filed this application for an order of a temporary injunction on 25th July 2019, the 5th Respondent had already taken possession of the suit property on 1st July 2019 and the 5th Respondent has to date remained in possession and has since mortgaged the suit property to another financial institution. Counsel therefore contended that this application offends Order 41 Rules 1 and 2 of the CPR as the acts sought to be restrained by the injunction have already taken place and, as such, this application remains nugatory and incompetent and the remaining issues, if any, should rightly be dealt with in the main suit.

In reply, Counsel for the Applicant submitted that the matter raised in the second preliminary point of objection should have been argued at the hearing of the main application, since it is factual in context needing the leading of evidence on it. Counsel further submitted that by this objection, the Respondents were seeking to white wash the illegalities and fraud associated in the foreclosure that form the very substance of matters to be tried at a full hearing with evidence and not prematurely as the preliminary point of law seeks to do. Counsel highlighted the alleged illegalities and fraud and prayed that the preliminary objections raised by the Respondents be dismissed with costs.

In rejoinder, Counsel for the Respondents submitted that the Applicant's Counsel had instead opted to make arguments for the substantive suit referring to alleged failure to issue statutory notice and purported illegalities and eventually conceded to the eviction. Counsel also submitted that the Applicant's Counsel seems to make arguments for specific performance under the guise of maintaining the status quo which argument is not tenable at law. Counsel relied on the case of ***Punch Telecom (U) Ltd vs Warid Telecom (U) Ltd HC M.A No. 59 of 2008*** (**Geoffrey Kiryabwire J.** as he then was) in which the situation where the status quo had changed was dealt with. Counsel reiterated their earlier submissions and contended that the application had remained nugatory and incompetent and ought to be struck off with costs.

Consideration by the Court

The gist of this preliminary point of objection by Counsel for the Respondents is that the status quo sought to be preserved by the Applicant in the instant application has already changed and, as such, the application is nugatory and incompetent since by the time the application was filed, the status quo had already changed. However, as submitted by Counsel for the Applicant, this claim is factual in context and requires proof by way of

evidence. The evidence before the court by way of the affidavits for and against the application is not up for consideration and evaluation by the court at this point since the parties have not been given an opportunity to present and test it. That is supposed to be done when dealing with the merits of the application.

By this objection therefore, there is nothing to lead the Court to conclude, prima facie, what the status quo at the suit land is and how it got there. The allegation that the 5th Respondent has since taken possession of the suit land is a matter of evidence that has not been tried and proven before the Court. It therefore cannot be the basis to terminate the substantive application without offering the Applicant an opportunity to be heard.

I am therefore in agreement with Counsel for the Applicant that the matter raised in the second preliminary point of objection is better reserved for consideration during the hearing of the application on merits. I therefore find that the second preliminary point of law also has no merit and it is overruled.

In all therefore, both preliminary points of objection raised by Counsel for the Respondents have failed. I accordingly overrule them and order that the application shall proceed for hearing on its merits. The costs shall abide the outcome of the application. It is so ordered.

Signed, dated and delivered by email this 28th day of May, 2020.

BONIFACE WAMALA

JUDGE