THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLEANOUS APPLICATION NO. 825 OF 2018

(FROM CIVIL SUIT NO. 723 OF 2018

MHK ENGINEERING SERVICES (U) LTD :::::::::::::::::::::: APPLICANT

VERSUS

MACDOWELL LIMITED :: RESPONDENT

BEFORE: HON. MR. JUSTICE BONIFACE WAMALA

RULING

Introduction

This application was brought by Notice of Motion under *Section 98 of the Civil Procedure Act (CPA), Order 6 Rules 8, 10 & 30, Order 9 Rules 6, 10 & 11(2) and Order 52 Rules 1 & 3 of the Civil Procedure Rules (CPR)* seeking orders that:

1. The Defence filed by the Respondent on the 20th September 2018 in Civil Suit No. 723 of 2018 be struck out for offending Order 6 Rules 8, 10 and 30 of the Civil Procedure Rules.
2. Judgement be entered on liquidated sums of money claimed by the Plaintiff/Applicant against the Defendant/Respondent.
3. Costs of the application be granted to the Applicant.

The grounds of the application are contained in the Notice of Motion and in an affidavit in support deposed by **Mr. Musoke Hussein Kafulu**, the Managing Director of the Applicant Company. Briefly, the grounds are that:

a) The Respondent on 20th September 2018 filed a Written Statement of Defence (WSD) in Civil Suit No. 723 of 2018 wherein it denied generally the claims put forward by the Applicant thereby offending Order 6 Rule 8 of the Civil Procedure Rules.

b) The said Written Statement of Defence filed by the Respondent was an evasive denial of the claims and statements of the Applicant thereby offending Order 6 Rule 10 of the Civil Procedure Rules.
c) The Written Statement of Defence also did not disclose a reasonable defence or answer to the Applicant's claim thereby offending Order 6 Rule 30 of the Civil Procedure Rules.
d) Judgement be entered on the liquidated sums of money in favour of the Applicant.
e) It is in the interest of justice that this application is granted.

The Respondent opposed the application through an affidavit deponed to by **Ms Atim Winnie**, an Accountant/Administrator of the Respondent, in which she stated that the Respondent instructed Counsel Waigo John Paul to file a WSD. Before the WSD was drafted, Counsel for the Defendant was informed of the facts of the matter and Counsel was expected to reply to the plaint while addressing each issue as alleged. The deponent stated that if at all the WSD as filed is a sham, baseless, frivolous and vexatious as alleged by the Applicant, then it is the mistake of the drafting lawyer, which mistake should not be visited upon the Respondent. The deponent stated that she had been advised by her lawyer that the mistake of the drafting lawyer could be cured through an amendment. The deponent further stated that striking out of the WSD would imply that the Respondent would not be heard which would cause an injustice to the Respondent.

The Applicant filed an affidavit in rejoinder whose contents I have taken into consideration.

At the hearing, the Applicant was represented by Mr. Isabirye Deric while the Respondent was represented by Ms Amoding Janet and Mr. Opok Pascal. The hearing proceeded by way of written submissions.

Issue for Determination by the Court

Whether or not the Written Statement of Defense filed by the Defendant/Respondent offends Order 6 Rules 8, 10 and 30 of the Civil Procedure Rules.

Submissions

Applicant's Submissions

It was submitted by Counsel for the Applicant that in their WSD filed on 20th September 2019, the Respondent denied generally the claims put forward by the Applicant thereby offending Order 6 Rule 8 of the CPR. Counsel relied on the case of **Eco Bank Uganda Limited versus Kalsons Agrovet Concerns Ltd & 2 Others, Civil Suit No. 573 of 2016** where Hon. Justice Billy Kainamura upheld an application to strike out a defence on the same ground.

Counsel submitted that in the impugned WSD, the defendant merely asserts a general denial of failure to pay for the invoices and hence liability for breach of contract. Counsel argued that the Respondent's defence does not give clear and specific responses to the Applicant's allegations, thus offending the provisions of Order 6 Rule 8 of the Civil Procedure Rules. Counsel prayed that the said WSD be struck out and judgement entered on the liquidated claim. Counsel relied on **Nile Bank Ltd & Another Versus Thomas Kato & Another, Misc. Application No. 1190 of 1999 (Arising from Civil Suit No. 685 of 1999).**

Counsel for the Applicant further submitted that the WSD filed by the Respondent also offended Order 6 Rule 10 of the CPR for consisting of an evasive denial. Counsel relied on the text from **Odgers Principles of Pleading and practice, 22nd Edition page 136**, cited in **Nile Bank Ltd & Another Versus Thomas Kato & Another** and **ECO Bank Uganda Limited Versus Kalsons Agrovet (supra)** thus:

"It is not sufficient for a defendant in his defence to deny generally the allegations in the statement of claim, or for the plaintiff in his reply to deny generally the allegations in a counterclaim. Each party must traverse specifically each allegation of fact, which he does not intend to admit. The party pleading must make it clear how much of his opponent's case he disputes".

Counsel submitted that paragraph 2 of the Respondent's WSD avers that the Defendant made substantial payments towards the invoices and that the amount of money claimed by the Applicant is disputed. Counsel argued that this paragraph consists of evasive denials since the Respondent does not indicate how much money was paid, the balance and how much is disputed by the Respondent. Counsel prayed that the WSD should thus be struck out on this ground as well.

Counsel for the Applicant further submitted that under *Order 6 Rule 30 (1) of the CPR*, the court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer or is frivolous or vexatious. Counsel prayed that the WSD should also be struck out on this ground.

Counsel for the Applicant went further to raise two preliminary points of objection directed towards the affidavit in reply filed by the Respondent.

The first point was that the affidavit in reply was incurably defective since it was deponed to by the Accountant of the Respondent who does not hold executive or managerial powers of the company and thus could not swear an affidavit on behalf of the company without a resolution or letter of authority from the Company. Counsel prayed that for this reason, the affidavit in reply should be struck out.

The second point was that the affidavit in reply was tainted with general and evasive denials, and does not disclose a reasonable answer to the affidavit in support of the application. Counsel submitted that the affidavit in reply as well offended the provisions of Order 6 Rules 8, 10 and 30 of the CPR and ought to be struck out.

Respondent's Submissions

In response, the Respondent attributed the nature of the averments in the impugned WSD to a mistake on the part of Counsel who was instructed to file a WSD on behalf of the Respondent/Defendant. It was submitted by Counsel for the Respondent that the Respondent should not be penalized for the fault of his counsel as, under the law, mistake and or error on the art of counsel should not be visited on the litigant. Counsel relied on the case of **Tropical African Bank Limited Versus Grace Were Muhwana, Civil Application No. 03 of 2012.** Counsel submitted that the Respondent instructed a lawyer to draft and file the defence on its behalf simply because they did not know the rules governing the same and as such the lawyer's mistake while drafting the defence is beyond the Respondent's control.

Counsel further submitted that the administration of justice requires that the substance of all disputes should be investigated and decided on their merits and those errors and lapses should not necessarily debar a litigant from pursuit of his rights unless a lack of adherence to the rules renders the process of determining he case difficult and inoperative. Counsel relied on **Ojara Otto Julius Versus Olwera Benson, Misc Application No. 0023 Of 2017.** Counsel further relied on the provisions of Article 126(2)(e) of the Constitution of the Republic of Uganda which provides that substantive justice shall be administered without undue regard to technicalities; and on the case of **National Enterprises Versus Mukisa Foods, CA Civil Appeal No. 42 of**

1997, where the Court of Appeal held that denying a subject a hearing should be the last resort of court.

The Respondent's Counsel submitted that in the instant case, the Respondent is readily available to defend themselves which is clearly portrayed by the fact that they instructed a lawyer who filed a defense within 15 days after the receipt of summons from the applicant. Counsel further argued that if the Applicant had come to court for justice and wants judgement from this court, the Applicant would rather be interested in determining the matter on merit than striking off the Respondent's WSD. Counsel prayed to Court to determine the case on its merit.

In reply to the preliminary objections raised by the Applicant's Counsel, the Respondent's Counsel maintained that Ms. Atim Winnie was an Accountant as well as an Administrator in the Respondent Company with capacity to swear the affidavit in reply. Counsel submitted that the submission of the Applicant's Counsel was academic and would not be helpful in resolving the issue at hand.

In relation to the second point of objection, Counsel for the Respondent submitted that the Respondent had clearly responded to the affidavit in support and the reply discloses a reasonable defense. Counsel prayed that the objection be overruled.

Counsel for the Applicant filed further submissions in rejoinder which I have taken into consideration in the course of resolution of the issue before the Court.

Resolution by the Court

I will begin by considering the preliminary objections raised by Counsel for the Applicant.

The first point of objection raises a matter that is particularly important and which cannot be ignored. Counsel for the Applicant submitted that the affidavit in reply sworn on behalf of the Respondent was defective by reason of being deponed by a person who had no authority to swear an affidavit on behalf of a Company without either a board resolution or letter of authority from the Company. The deponent of the impugned affidavit is described in the affidavit as "the accountant/administrator" of the Respondent Company. Counsel for the Applicant argued that such an officer held no executive or managerial powers in the Company.

In reply, Counsel for the Respondent argued that as accountant as well as administrator in the Respondent Company, the deponent had capacity to swear the affidavit in reply. The Respondent's Counsel further argued that the submission of the Applicant's Counsel on this point was academic and would not be helpful in resolving the issue at hand.

With due respect, I am not in agreement with Counsel for the Respondent that this point of objection was simply academic and unhelpful to the matter before Court. The law is that matters related to affidavits are taken seriously by the court and the rules governing competence of affidavits are often interpreted strictly by the court. It follows therefore that an affidavit that is found to have been made without the requisite capacity would be incompetent and defective. A question as to the capacity of a deponent therefore has to be seriously investigated and determined by the court before such an affidavit can be relied upon by the court.

The question therefore is: Who has capacity to swear an affidavit on behalf of a Company? Let me first consider the provisions of *Order 3 Rule 1 of the CPR.* It provides –

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 court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his or her recognised agent, 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. (Emphasis added)

According to the above provision, the swearing of an affidavit can be categorized as an *"act in any court required or authorized by the law to be made or done by a party in such court"* and such act may *"be made or done by the party in person, or by his or her recognised agent, or by an advocate duly appointed to act on his or her behalf"*. As such, for a deponent to an affidavit on behalf of a Company to have capacity to do so, he/she must be either a representative in person to the Company, or a recognized agent, or an advocate duly appointed to act in that behalf.

In the instant case, clearly the deponent (Ms Atim Winnie) was not an advocate. As to whether she was a recognized agent of the Respondent Company, resort must be had to the provisions of *Order 3 Rule 2 of the CPR*. It provides –

The recognised agents of parties by whom such appearances, applications and acts may be made or done are —

(a) persons holding powers of attorney authorising them to make such appearances and applications and do such acts on behalf of parties; and

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is

expressly authorised to make and do such appearances, applications and acts.

A clear look at the above provision shows that Ms Atim Winnie, the deponent of the impugned affidavit in reply, cannot be categorized as a recognized agent of the Respondent Company. She was neither in possession of a power of attorney issued by the Respondent Company nor was she an agent for a party not resident within the local limits of the jurisdiction of the court where the appearance or conduct was necessary; within the meaning of paragraph (b) of Rule 2 above.

The foregoing therefore leaves one option, that is, that the deponent was acting as a representative in person for the Company. The further question is: How does a company act in person? *Order 29 Rule 1 of the CPR* offers guidance over the conduct of suits or other court matters for and against corporations. It provides –

In a suit by or against a corporation any pleading may be signed on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

This Court has before held that the "signing of a pleading" referred to in the above provision is a matter of substance since it connotes "subscription and verification of a pleading" as can be seen in the head note to the said provision. The Court further held that deposing an affidavit flows from such authority. See: ***Security Group (U) Ltd & Anor Vs Ellis R. Kasolo, Commercial Court Civil Appeal No. 07 Of 2020.***

It is therefore clear that for a person to represent a company in person over a court matter (including endorsement of pleadings), that person must be a director, secretary or other principal officer of the company. The deponent of

the impugned affidavit in reply was neither director nor secretary of the Respondent Company. The record indicates that she was an Accountant/Administrator of the Respondent. The question therefore is whether such an officer qualifies to be a principal officer of a Company.

A similar question was dealt with in the above cited case of ***Security Group (U) Ltd & Anor Vs Ellis R. Kasolo (supra)*** in which it was held as follows:

> ***"... a principal officer [of a company] must be a primary or high ranking officer of the company and may include the Chief Executive Officer of the corporation, the Manager or any such officer with a binding management say for the Company. It is such an officer that if he/she signed a document or made an agreement on behalf of the Company, such would be binding to the Company"***.

In ***Spencon Services Ltd Vs Onencan Habib H.C.C.A No. 092 of 2016***, a case that I found of great persuasive value before drawing my conclusions in ***Security Group (U) Ltd & Anor (supra),*** **Mubiru J.,** while assigning meaning to the phrase "principal officer of a corporation" as used under *Order 29 Rule 2 of the CPR* in regard to service of process upon a corporation, he had this to say:

> ***"The rule though does not define who a "principal officer of the corporation" is. However, considering the mischief aimed at by the provision, it seems to me that the determination of who in the corporation qualifies as such must be determined on basis of the nature of the duties the person performs in the corporation. It is a functional determination. Interpreting the provision on ejusdem generis basis, it includes such persons in the corporation who are authorised to exercise substantial executive or managerial powers, such as signing contracts and making major business and administrative decisions as distinguished from regular employees."***

In that case, the person served with court process was the Administrator of the company. The learned Judge held that there was nothing to show that the position of Administrator involved exercise of substantial executive or managerial powers in the applicant corporation. The Judge further held that without disclosure of the functional role of an administrator in the applicant company, there was no basis for a finding that service was effected on a Principal Officer of the company.

Further guidance was derived from the decision in ***Friecca Pharmacy Ltd vs Anthony Natif HC M.A No. 498 of 2019.*** In that case, an affidavit that had been sworn by the Company Secretary was objected to on basis of lack of special authorisation by the Company. **Ssekaana J.,** held the view that **"it would be taking it too far to find that every employee of the company should have authorisation to swear on matters of the company. The law presumes that certain categories of employees have ostensible authority to act for the company"**.

In the instant case, there was no disclosure by the Respondent of the functional role of Ms Atim Winnie as Accountant/Administrator in the Respondent company. By designation, such an officer has no substantial executive or managerial powers in a company and neither is she empowered with a binding management say for the company. As well, she ordinarily does not fall in that category of employees that are endowed with ostensible authority to act for and bind a company. For instance, she is ordinarily not capable of signing contracts and making major business and administrative decisions. In case of a possibility of such employee being empowered to play an exceptional role in a particular company, such ought to be expressly disclosed; which was not, in the instant case.

In the circumstances therefore, on the facts before me, it has not been shown that Ms Atim Winnie, the deponent of the impugned affidavit in reply, was a principal officer of the Respondent. As such, she had no capacity to swear an affidavit on behalf of the Respondent without special authorization, either through a board resolution or by way of a letter of authority, clearly attached to the said affidavit.

An affidavit sworn by a person without the requisite capacity is incompetent and fatally defective. It cannot be cured by any stretch of the application of the principles of substantive justice. In the premises therefore, the affidavit in reply to the present application is struck out.

In that regard, the second leg of the objection towards the said affidavit is inconsequential.

I will now deal with the merits of the application, even in absence of any reply from the Respondent. The issue for determination by the Court is: **Whether or not the Written Statement of Defense filed by the Defendant/Respondent offends Order 6 Rules 8, 10 and 30 of the Civil Procedure Rules**.

I will first set out the provisions of Order 6 Rules 8, 10 and 30 of the CPR. *Rule 8 thereof* provides –

> ***Denial to be specific***
>
> *It shall not be sufficient for a defendant in his or her written statement to deny generally the grounds alleged by the statement of claim, or for the plaintiff in his or her written statement in reply to deny generally the grounds alleged in a defense by way of counterclaim, but each party must deal specifically with each allegation of fact which he or she does not admit the truth, except damages.*

Rule 10 thereof provides –

Evasive denial

When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he or she must not do so evasively, but answer the point of substance. Thus, if it is alleged that he or she received a certain sum of money, it shall not be sufficient to deny that he or she received that particular amount, but he or she must deny that he or she received that sum or any part of it, or else set out how much he or she received. If the allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

Rule 30(1) thereof provides –

Striking out pleading

(1) The court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer and, in any such case, or in case of the suit or defense being shown by the pleadings to be frivolous or vexatious, may order the suit to be stayed or dismissed or judgement be entered accordingly, as may be just.

Regarding the allegation of lack of a specific denial, the court needs to examine the plaintiff's allegations as contained in the plaint vis a vis the traverses in the WSD.

In paragraph 3 of the plaint, the plaintiff stated that their claim against the defendant was for recovery of UGX 85,206,250/=, for a declaration that the defendant was in breach of contract, interest at a commercial rate, damages and costs of the suit. In paragraph 2 of the WSD, the defendant set out the following traverse:

"The Defendant denies the contents of paragraph 3 of the plaint and the prayers/remedies sought therein and that: (a) The Defendant made a

substantial payments (sic) towards the invoices that the Plaintiff raised. (b) The amount of money claimed by the Plaintiff is disputed and the Defendant shall provide proof thereon."

In paragraph 4 of the plaint, the plaintiff sets out the facts constituting the cause of action against the defendant as follows:

a) The plaintiff is a duly incorporated company in Uganda which carries out business of supply of spare parts for Caterpillar machines, repairing caterpillar machines, among others.
b) The plaintiff supplied to the defendant with assorted spare parts for caterpillar machines, that is, Bull dozer, Excavators, Back hoe, Motor Grader and Compactor machines; as verified on several invoices issued and served onto the defendant. Copies of the unpaid for invoices were attached.
c) The defendant had adamantly and without any colour of right failed to pay the plaintiff's money amounting to UGX 85,206,250/=.
d) Several meetings had been arranged with the defendant but the defendant had presented all forms of excuses and disinterest; all designed to deprive the plaintiff of his rightful payment.
e) The plaintiff issued and served a demand notice to the defendant but the same was ignored.
f) The plaintiff set out particulars of breach of contract on the part of the defendant.

To all the above averments set out in paragraph 4 of the plaint, the defendant replied: "The defendant admits the contents of paragraph 4 but denies that it failed to pay for the invoices submitted."

The plaintiff stated in paragraph 5 of the plaint that the defendant had ignored the numerous reminders given to them by the plaintiff towards payment of the outstanding balance. The defendant made no response to this averment.

In paragraph 6 of the plaint, the plaintiff stated that to the date of the suit, the defendant had willfully and maliciously breached the contract of supply of goods. To this too, the defendant made no response.

In paragraph 7, the plaint stated that the defendant's actions had caused great inconvenience, mental anguish, financial exasperation, which forms the basis for the claim of general damages, interest and costs of the suit. To this, the defendant replied in paragraph 4 of the WSD that the defendant could not be held liable for the alleged breach of contract, great inconvenience, mental anguish, financial exasperation, damages, interest and costs.

The plaintiff reiterated the prayers as laid out in paragraph 3 of the plaint (already set out herein above). The defendant stated in paragraph 5 of the WSD that in so far as the plaintiff's averments and contentions differ from the defendant, the plaintiff's averments, contentions and cause of action were denied. In paragraph 6 of the WSD that it was denied that the plaintiff was entitled to the prayer sought and damages, interest and costs whether as alleged or at all. The defendant prayed for dismissal of the suit with costs to the defendant.

As such, to all the plaintiff's averments in the plaint, the only line of defence put up is that the defendant made substantial payments towards the invoices that the plaintiff had raised; that the amount of money claimed by the plaintiff was disputed and the defendant would provide proof. The rest are bare denials. Upon examination of this defence as against the plaintiff's averments in the plaint, it is clear to me that it is not specific at all. It does not say which

payments were made towards the invoices, when and where. It attaches no proof of such payment, if at all any existed. It is simply a general denial of indebtedness contrary to the express provisions of Order 6 Rule 8 CPR.

In **Odgers Principles of Pleading and Practice, 22nd Edition, at page 136,** the principle is laid down as follows:
"It is not sufficient for a defendant in his defence to deny generally the allegations in the statement of claim ... Each party must traverse specifically each allegation of fact, which he does not intend to admit. The party pleading must make it clear how much of his opponent's case he disputes." This is in similar terms to the provisions of Order 6 Rule 8 of the CPR.

In the instant case, despite the clear averments in the plaint verified with evidence of unpaid for invoices, all the defendant responded with was a feeble claim that substantial payments were made, without any attempt to provide any particulars thereof or to attach any evidence of such payment. I find that the defendant's WSD constitute a general denial and does not raise a reasonable answer to the Applicant/Plaintiff's claim. It thus offended the provisions of Order 6 Rule 8 of the CPR in that regard.

Regarding the application of Rule 10 of Order 6 CPR that prohibits evasive denials, Counsel for the Applicant submitted that paragraph 2 of the WSD which refers to substantial payments having been made by the defendant consists of evasive denials since the Respondent does not indicate how much money was paid, the balance and how much is disputed by the Respondent. I am in agreement with this submission by the Applicant's Counsel. According to Rule 10, a party denying an allegation of fact in the previous pleading of the opposite party must not do so evasively but must answer the point of substance. If it is alleged that he received goods from the plaintiff, it is not

sufficient to say that he paid for the goods; he must show the dates of such payment, the amounts paid, by which means, any outstanding balance, or any sum disputed. On the case before me, the averment by the defendant clearly constitutes an evasive denial and offends the provision of Order 6 Rule 10 of the CPR.

Order 6 Rule 30(1) of the CPR empowers the Court to order any pleading in defence to be struck out on the ground that it discloses no reasonable answer or where the defence is shown to be frivolous or vexatious, the Court may order that judgment be entered accordingly as the Court may deem just.

In the case of **Kayondo V Attorney General [1988-1990] HCB 127**, it was held that the court may use its inherent powers to strike out a defective written statement of defence where the defect is apparent on the face of the record and where no amount of amendment will cure the defect. The procedure is intended to stop proceedings which should not have been brought to court in the first place and to protect the parties from the continuance of futile and useless proceedings.

On the case before me, the Applicant has established to Court that the WSD filed by the Respondent constituted general and evasive denials thus offending the provisions of Order 6 Rules 8 and 10 of the CPR. It is immaterial that the Respondent has no answer to this application on account of their affidavit in reply having been struck out for being incompetent. It is immaterial because the WSD had to speak for itself as to whether it passed the test laid out under the above said provisions of the law. It is my finding that the WSD filed by the Respondent did not pass the said test and indeed offended the clear and mandatory provisions of Rules 8 and 10 of Order 6 of the CPR. Consequently, I find it imperative to invoke the provision under Order 6 Rule 30(1) of the CPR

to strike out the impugned WSD and enter judgment in the main suit in favour of the Applicant/Plaintiff.

Given that the claim by the Applicant in the main suit is liquidated and the Applicant in his prayers herein did not express interest in proving any general damages, I will deem that the Applicant forfeited the claim for general damages and I will enter judgment on the liquidated claim with interest and costs.

In the result therefore, this application is allowed with the following orders:

1. The Written Statement of Defence filed by the Defendant in Civil Suit No. 723 of 2018 is struck out for offending the provisions of Order 6 Rules 8 and 10 of the CPR.
2. Consequently, Judgment is entered in the main suit for the Plaintiff against the Defendant for:
   a) The liquidated sum of UGX 85,206,250/=.
   b) Interest at a commercial rate of 24% p.a. from the date of default (4th July 2018 when a demand notice was issued) till full payment.
   c) Costs of the suit and of this application.

It is so ordered.

Boniface Wamala
JUDGE
18/09/2020