0THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO.735 of 2014
(ARISING FROM CIVIL SUIT NO. 560 OF 2014)

N. SHAH & CO. LTD. .....APPLICANT/DEFENDANT

VERSUS

MK FINANCIERS LIMITED ..... RESPONDENT/PLAINTIFF

BEFORE: HON. LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

This ruling arises out of a preliminary objection that was raised in the application.

The application was seeking unconditional leave to be granted to the Applicant to appear and defend the suit.

It was made under 0.36 rr 3 (2) and 4 and 0.52 r 1 C.P.R.

When the application was called for hearing on 19.11.14, Counsel for the Respondent sought to cross examine the deponent of the affidavit filed in support of the application.

The deponent admitted swearing the affidavit and signing it in 19.08.14 at Kampala at his premises, in the presence of his Advocate. However, that, he did not sign in the presence of the Commissioner for Oaths, Mr. Chris Ndozireho.

In re-examination, the deponent maintained that he signed the affidavit, adding that he was told that he would be taken before the Commissioner of Oaths.

Counsel for the Respondent then objected to the application as being none existent as there was no supporting affidavit, applying that it be dismissed and judgment / decree entered in the summary suit.

In support of his prayer, he cited S.2 of the Commissioner of Oaths Act, r.7 of the Commissioner of Oaths rules and S.6 of the Oaths Act, - which require the deponent of an affidavit to go to the Commissioner of Oaths personally and answer before the Commissioner that he/she understands what that are going to sign.

He relied upon the case **of Kakooza John Baptist vs. Electoral Commission and Another S.C. Electoral Petition 01/07**, where the deponent had read through the affidavit and sent it to the Commissioner and affidavit was rejected.

The case of **Mugema Peter vs. Mudyobole Abed Nasser C.A 30/2011** where Justice Remmy Kasule confirmed the position of the Supreme Court was also cited and Counsel maintained his earlier prayers.

In reply, Counsel for the Applicant relied upon S.98 C.P.A – which grants court inherent powers to do anything necessary for the ends of justice.

He argued that if court finds the affidavit incompetent, it can extend time to enable the Applicant to correct the error so that application can be heard on merit.

Counsel urged court not to rely on technicalities but exercise substantive justice under Article 126 of the Constitution.

Counsel for the Respondent contended that S.98 can only be invoked if there is no substantive breach as was in the present application. And further that time for the application had elapsed.

He emphasized that the Applicant was bound by the actions of his Counsel as was held in the case of **Muhammad Kasasa vs. Jasper Buyago C.A. 42/2008** Justice Kitumba.

None of the cases relied upon by Counsel for the Respondent were availed to court.

Bearing the submissions of both Counsel in mind, court finds that the admission of the Applicant (deponent of the supporting affidavit) that he signed the affidavit at his premises in the presence of his Counsel but in absence of the Commissioner for Oaths; was a violation of the mandatory requirement of S.S 5 and 6 of the Commissioner for Oaths (Advocates) Act and rule 7 of the rules made there under – See **Kakooza's Case (Supra)** and the case of **Muhammed Majyambere vs. Bhakresa Khalil HC MA 727/11**.

In the circumstances, it follows that the application before court is incompetent for lack of a supporting affidavit and should be struck out. However, the application to enter judgment will not be allowed for the following reasons:-

Contrary to the submissions of Counsel for the Respondent, the deponent / Applicant in the present case is a lay person who cannot be expected to know that affidavits have to be sworn in the presence of a Commissioner of Oaths. He was relying on the advice of his lawyer and courts have held that a litigant should not be punished for the actions of his lawyer.

As to Counsel for the Applicant submission that the objection is a mere technicality under 126 (2) (e) of the Constitution. I wish to reiterate the decision of the Supreme Court in the case of **UTEX Industrial Ltd vs. Attorney General SCCA. No 52/95** to the effect that ***"the article was never intended to do away with the rules of procedure".***

However, I am mindful of the fact that the same Supreme Court decision in the case of **Byaruhanga & Co. Advocates vs. UDB SCCA 02/2007**, left it to the discretion of the judge in the circumstances of each case to decide

whether in the circumstances of a particular case and the dictates of justice, a strict application of the law, should be avoided.

In the circumstances of this case, though the impunged affidavit was signed in the absence of a Commission for Oaths, and the application is to be struck out, I have found that the Applicant should not be penalized for the actions of his advocate.

I am fortified in my decision by the case of **Banco Arabic Espanol vs. Bank of Uganda SCCA 8/98** – where the Supreme Court emphasized the necessity for the rules to be followed but noted that " on the other hand there is need for courts to control their proceedings and not to be inhibited by rules of procedure, and ***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, lapses should not necessarily debar a litigant from the pursuit of their rights***"... the main purpose of litigation, namely hearing and determination of disputes, should be fostered rather than hindered. This of course does not mean that rules of procedure should be ignored. **Each case must be** decided on the basis of its own circumstances".

Since Counsel for the Applicant in the present, applied for extension of time within which the application should be refiled, court will revert to the provision of S.98 C.P.A – i.e. its inherent powers to prevent abuse of the process of court and S.33 Judicature Act, which empowers the High Court in exercise of its jurisdiction ***"to grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to .... So that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided;"*** and extend time to enable the Applicant to refile the application within ten days from the date of this ruling with an affidavit properly deponed before a Commissioner of Oaths as required by law.

No injustice will be occasioned to the Respondent who will be given a chance to contest the application bearing in mind as already set out above

that courts have consistently held that ***"to deny a party a hearing should be the last resort of the court"*** – which would be the case if judgment is entered without hearing the Applicant, who may have a good defence to the suit but for the negligence of his Counsel.

The application is struck out for all the reasons given herein, but time is hereby extended to enable Applicant file another application with a proper affidavit within ten days from the date of this ruling.

Costs to be in the main application.

FLAVIA SENOGA ANGLIN
JUDGE
26.11.14