**THE REPUBLIC OF UGANDA,**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL DIVISION)**

**MISCELLANEOUS APPLICATION NO 517 OF 2015**

**(ARISING FROM CIVIL SUIT NO. 121 OF 2012)**

**BANKSHIRE TECHNOLOGIES LTD}.......................................APPLICANT/PLAINTIFF**

**VS**

**DERR LOGISTICS LTD}.................................................RESPONDENT/DEFENDANT**

**ENHAS LTD}....................................................................................THIRD PARTY**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**RULING**

The Applicant filed this application under the provisions of section 98 of the Civil Procedure Act, Order 13 rules 6 of the Civil Procedure Rules for judgment on admission against the Respondent/Defendant and for costs of the application.

There are seven grounds of the application by notice of motion. The first ground is that the Applicant sued the Respondent in HCCS No 121 of 2012 for recovery of electrical goods worth R. 308,108 (equivalent to US$44,015 .44). The suit is also for breach of contract for the international carriage of goods, general damages for loss of business, inconvenience and pain caused by the Defendant, interest at commercial rate of 30% per annum and costs of the suit.

Secondly the Applicant avers that in paragraph 2 (a) of the Respondent's written statement of defence, the Defendant/Respondent admitted that it was instructed to deliver a consignment of electrical equipment from Kampala to South Africa.

Thirdly the Respondent also admitted receiving the goods from the Applicant for delivery to South Africa.

The Respondent in paragraph 2 (e) admits that two of the packages specifications (54x36x31) and (63x52 x24) were missing and the same has never been recovered.

Fifthly the Defendants/Respondents admit receiving the goods from the Applicant and the same has been misplaced.

Sixthly the lost attempts have never been recovered up to date.

Lastly on the seventh ground it is averred that is fair, reasonable and in the interest of justice that judgment on admission is entered against the Respondent/Defendant.

The application is supported by the affidavit of Elizabeth Nampola of Messieurs, Omongole and Company Advocates. She deposes that she is an adult Ugandan of sound mind, a lawyer working with the said firm conversant with the facts. She deposes that on 4 April 2012 the Applicant filed a suit against the Respondent for recovery of goods as averred in the notice of motion above. She verified the facts averred in the notice of motion on oath.

Neither the Respondent/Defendant nor the third-party filed an affidavit in reply to the application. It came for hearing on 24 August 2015. The Applicant/Plaintiff was represented by Counsel Richard Omongole while the third party was represented by Paul **Rutisya**. No one appeared for the Defendant/Respondent and there is evidence that the Defendants Counsel had been served with the notice of motion according to the affidavit filed as proof of service on the Respondent of Iroka Martin of Messieurs Omongole and Company Advocates.

Before the application could be heard on the merits, Counsel for the third party, Paul Rutisya objected to the application. He submitted that the affidavit in support of the application is incompetent and should be struck out with costs. He contended that it was sworn by an advocate of the High Court who works with Omongole and Company Advocates, Counsel representing the Applicant/Plaintiff in this matter. He relied on the case of **Mugoya Construction and Engineering versus Central Electrical Ltd Miscellaneous Application 699 of 2011 arising from HCCS 203 of 2009**. The first ground of objection is that an advocate cannot swear an affidavit in a contentious matter. He submitted that this is an application for judgment on admission. Secondly with reference to page 6 second paragraph of the authority relied upon, the court held that an advocate is forbidden from swearing an affidavit in contentious matters and conducting the suit as well. To do so offends regulation 15 of the Advocates (Professional Conduct) Regulations. He contended that the application is incompetent and offensive for relying on an affidavit sworn by an advocate who has conduct of the matter.

In reply Counsel Omongole Richard prayed that the objection is overruled on the ground that the Respondent in the written statement of defence admitted the Plaintiff’s suit by having admitted that the goods were received from the Applicant for transportation to South Africa and also the two packages in question with the specifications disclosed in the pleadings were missing. This being an application for judgment on admission, it was brought by way of notice of motion supported by the affidavit of Nampola Elizabeth who is a lawyer working with Messieurs Omongole and Company Advocates, the law firm representing the Applicant.

A preliminary objection supported by the case of **Mugoya Construction and Engineering Ltd versus Central Electricals International Ltd** has no merit. Firstly the lawyer was sure the deponent is not an advocate having personal conduct of the matter. Secondly she is not an advocate of the High Court yet because she is not enrolled to practice as an advocate. Consequently she is not governed by the provisions of the Advocates Act. In the case of **Mugoya Construction and Engineering Ltd** (supra) the lawyer who swore the affidavit was an advocate of the High Court whereas in this case she is not an advocate but a lawyer who is not yet an enrolled advocate. He relied on the definition of an advocate under section 1 (a) of the Advocates Act Cap 267 as a person whose name is duly entered upon the roll. From that definition, the deponent is not an advocate within the meaning of the section and maybe a legal assistant as defined by section 1 (h) of the Advocates Act. In the alternative even if the deponent was an advocate, which is not the case, the affidavit would still be competent as long as the advocate is not in personal conduct of the matter and it would not offend **Order 19 rule 3 (1) of the Civil Procedure Rules** which provides that affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove except on interlocutory applications in which statements of his or her belief may be admitted, provided that the grounds thereof are indicated.

The Applicant's Counsel submitted that the deponent swears to facts that were within her knowledge as a lawyer who read the admission in the written statement of defence and as such the affidavit is competent and valid. He relied on the case of **R versus NEAMA [2005] EA 269** where it was held that an advocate can deponent to facts which are within that advocate’s knowledge. It was held that an advocate can depose to issues relating to archives and court records as such matters are within an advocate’s knowledge. He submitted that the admission in the written statement of defence was based on the court record and a lawyer or an advocate is competent to swear such an affidavit.

As far as the contention that the lawyer is swearing to a contentious matter is concerned, the Applicant’s Counsel submitted that the deponent is not an advocate. Secondly the matter in respect of which the affidavit was sworn was not contentious and the deponent was not conducting the suit in person and does not even qualify to conduct the suit as she is not an advocate with personal conduct of the matter. It is not in violation of rule 9 of the Advocates (Professional Conduct) Regulations. Furthermore the case of **Namakula vs. Kyaterekera Growers Cooperative Society Ltd [1993] III KALR** it was held that where parties to the suit are available, it is desirable that they themselves swear the relevant affidavits. However in that case Counsel's affidavit was not defective since she deposed to matters that were within his knowledge and which were not contentious. He contended that the affidavit in support of the application is not defective.

In rejoinder the third party's Counsel reiterated earlier submissions and contended that the authority under which the deponent swears the affidavit on behalf of the Applicant is not disclosed that all. Whereas she claims to be a lawyer working with the firm representing the Applicant, her authority to swear the affidavit is not provided. On that basis the scenario is similar to the circumstances in **Mugoya Construction and Engineering Ltd Versus Central Electricals** (supra). He submitted that her conduct of not being an advocate by swearing an affidavit without express authority offends the clear provisions of Order 3 rule 2 of the Civil Procedure Rules. She did not have authority to swear the affidavit and the source of her knowledge to make the assertions is not disclosed. She does not state whether she came to the conclusion is by virtue of her legal training or on being informed by someone who can decipher legal documents such as a written statement of defence. It was also submitted that the deponent need not be an advocate physically conducting the matter for the conduct to be an offensive. In the **Mugoya Construction Case** (supra), the deponent to the affidavit and another advocate appeared in court to handle the matter. The common denominator in the case was that they were both from the same law firm which represented the party.

**Ruling**

I have carefully considered the objection to the application. The basis of the objection is that the deponent to the affidavit in support of the application does not demonstrate that she has authority of the Applicant to swear the affidavit. Secondly it is submitted that the deponent as an advocate barred from deposing to contentious matters.

The basis of the application is that the deponent is a lawyer with Messieurs Omongole and company advocates conversant with the facts in the matter. The Respondent never filed an affidavit in opposition to the application neither did the third-party. The Respondent is the Defendant and the Applicant's suit is against the Defendant. The third-party was brought on board by the Defendant. The suit was initially filed against the Respondent/Defendant and it is the Defendant who applied for the issuance of third-party notice

Third Party proceedings can be considered independently of the Plaintiff's suit against the Defendant. Order 1 rule 18 of the Civil Procedure Rules provides that where the Third Party has entered appearance pursuant to a Third Party notice, the Defendant giving the notice may apply to the court by chamber summons for directions and the matter is primarily between the Defendant and the Third Party. Where the court is satisfied that there is a proper question to be tried as to the liability of the third-party to make contribution or indemnity claim, in whole or in part, it may order that the question of such liability as between the third-party and the Defendant should be tried in such manner at or after the trial of the suit as the court may direct.

In **Stott v West Yorkshire Road Car Co Ltd and another (Home Bakeries Ltd and another, third parties) [1971] 3 All ER 534** and at page 537 Lord Denning MR considered Third Party proceedings as independent of the main action. He held that Third Party proceedings may continue even after a settlement between the Plaintiff and the Defendant and whether the settlement is on the merits or not. He said:

“I turn now to the point of procedure. It was said that in consequence of the settlement, the original action is dead, and being dead, there is nothing on which the Third Party proceedings can bite. I cannot agree with this contention. ... once the action itself is settled, the Third Party proceedings can proceed in just the selfsame way as if they had been started by a separate action. It is not necessary to bring a new action.”

Salmon L.J at 539 further added that proceedings between the Plaintiff and Defendant do not necessarily prejudice trial of proceedings between the Defendant and Third Party. He held:

‘It is obvious that when these third party proceedings are fought out, the views which I have expressed cannot conceivably prejudice the third parties. They will be fully entitled to raise in their defence to third party proceedings that the Defendants were not to blame at all. They can also raise the defence that they, the third parties, were not to blame. They could, I suppose, if they liked, say that they were wholly to blame for the accident and that therefore there was no negligence whatever on the part of the Defendants.”

The Applicant’s application is for judgment on admission. The Applicant is the Plaintiff while the Respondent is the Defendant. The Applicant as far as this suit of the Plaintiff is concerned, never appeared in this application. The Respondent was served and the evidence of service appears in the affidavit of service of Martin Iroka filed on court record on 21 August 2015. Paragraphs 5 and 6 thereof prove service on the Respondent/Defendant. Secondly there is an acknowledgement of service of the notice of motion. The Applicant is entitled to proceed ex parte against the Defendant/Respondent. At the proceedings it is the third party's Counsel who raised the objection. An application for judgment on admission is made under Order 13 rule 6 of the Civil Procedure Rules. The admission is against the Defendant and not the third-party. On the basis of the authority **Stott v West Yorkshire Road Car Co Ltd and another (Home Bakeries Ltd and another, third parties) [1971] 3 All ER 534,** it is my ruling that the Plaintiff cannot be denied the opportunity to proceed ex parte against the Defendant in this application. Moreover the said authority provides that the third-party is not thereby prejudiced. The third party can raise any other matter to the extent of saying that the Defendant is not liable in any proceedings by the Defendant against the third-party even if the Defendant had admitted the claim.

For the moment it is improper for the third-party to object to the Applicant's application. The matter proceeded ex parte against the Defendant and this is the ruling of the court on the application of the Applicant's Counsel to proceed ex parte on 24 August 2015. Thereafter I erroneously allowed the third party's Counsel to object to the application when the Plaintiff has never sued the third party. Even though I allowed the third party's Counsel to make the objection, I'll not take the objection into account and would proceed to consider the application.

It is my further firm ruling that an application for judgment on admission can be made orally depending on the form of the admission. In this case the admission is alleged to be in the pleadings namely in the written statement of defence of the Defendant. My holding is fortified by Order 8 rule 3 of the Civil Procedure Rules. It provides that every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against the person under disability. The court may in its discretion require any facts admitted to be proved otherwise than by such admission.

The rules on admission under the Evidence Act section 57 thereof also provides that facts which are admitted need not be proved unless the court requires the facts to be proved otherwise than by such admission. The conclusion is that an admission in the pleadings does not require a formal application for judgment before the court can be addressed on whether the admission, admits the claim in terms of Order 13 Rule 6 of the Civil Procedure Rules.

Before concluding the matter Order 13 rule 1 of the Civil Procedure Rules provides that any party to a suit may give notice by his or her pleading or otherwise in writing that he or she admits the truth of the whole or any part of the case of any other party. Where the pleadings admit a portion of the whole of the claim, section 57 of the Evidence Act comes into play. Facts which are admitted need not be proved. In other words the Plaintiff's Counsel can address the court on the pleadings without the application and the objection of the third-party in any case serves no useful purpose and is hereby overruled. Order 13 rule 6 provides as follows:

“6. Judgment on admissions.

Any party may at any stage of a suit, where an admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon the admission he or she may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon the application make such order, or give such judgment, as the court may think just.”

The Applicant's Counsel relies on the admission in paragraph 2 (a) of the written statement of defence. The paragraph avers that the Defendant was instructed to deliver a consignment of electrical equipment from Kampala to South Africa. In paragraph 2 of the written statement of defence the Defendant admits as a matter of fact to being in charge of the consignment and also that two of the packages with the description (54\*36\*31\* and 63\*52\*44\*) were missing. It is alleged by the Defendant that the Defendant was assured by the third-party that the cargo could have been misplaced. But to date the cargo has not been found.

I have carefully considered the Plaintiff’s plaint. It is a claim for R. 308,108 (US$ 44,015.44), damages for breach of contract for the international carriage of goods, damages for loss of business, inconvenience and pain caused by the Defendant, interest at commercial rate of 30% per annum, and costs of the suit. The Defendant denied liability. It only admitted facts upon which the Plaintiff relies for a cause of action but denied liability anyway. For the moment the questions of fact so admitted by the Defendant need not be proved.

Subsequently the Defendant took out a third party notice against the third-party.

At the moment the admission is not unequivocal to the extent of admitting the claim of the Plaintiff. It is up to the Plaintiff to submit on matters of law as to whether these admissions of factual matters per se constitute an admission of the claim.

In the premises the application only succeeds in so far as questions of fact are admitted but fails as an admission of the claim. The Plaintiff’s Counsel shall further address the court on the import of the admissions of matters of fact on the Plaintiffs claim against the Defendant. There shall be no order as to costs.

Ruling delivered in court on 14 September 2015

**Christopher Madrama Izama**

**Judge**

Ruling delivered in the presence of:

Dennis Sembuya holding brief for Paul Rutisya for the third party

Counsel for the Applicant is absent

Wandera Boaz: Court Clerk

**Christopher Madrama Izama**

**Judge**

**14th September 2015**