THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION 1534 OF 2020

(ARISING FROM CIVIL SUIT NO.634 OF 2020)

NELSON KAWALYA::APPLICANT

VERSUS

SEBANAKITA HAMIS::RESPONDENT

Before: Lady Justice Alexandra Nkonge Rugadya.

Ruling.

The applicant who is the plaintiff in the main suit brought this application under ***Section 98 of the Civil Procedure Act Cap.71, Order 6 rules 6, 10, 29 & 30 and Order 50 rules 1, 2 & 3 of the Civil Procedure Rules S.I 71-1*** for orders that the respondent's defence in the main suit be struck out for containing illegalities. He also sought that judgment be entered in favor of the applicant and costs be provided for.

The application is supported by the affidavit of Joshua Asiimwe, an advocate of the High Court practicing with the ***M/s Kawalya & Co Advocates,*** who are counsel for the applicant. He deponed that the written statement of defence is an evasive denial which alludes to illegalities contrived by the respondent.

That the respondent purports to have purchased an equitable interest in a portion of the applicant's suit land in 2017 without his knowledge and consent, contrary to the Land Act and that the applicant has never recognized the respondent as having any interest whatsoever in his suit land and that no *busuulu* has been paid by the respondent since 1980.

The respondent opposed the application through his affidavit in reply wherein he states that this application is premised on a misinterpretation of *paragraph 4* of the written statement of defence wherein *paragraph 4 (a)* of the plaint was admitted in so far as it refers to the fact that the plaintiff is the registered proprietor of land comprised in ***Kyadondo Block 263 plot 124 land at Bunamwaya*** and that he only admitted the certificate of title as it is but never stated that the *kibanja*is sitting on the land described in the said title.

Further, that he clearly stated that he is the lawful occupant of the suit *kibanja* having purchased the same from the previous owners, and that he has at all material times lived peacefully on the suit *kibanja* until 2020 when the applicant started laying claim on the kibanja.

He further deponed that the matters alluded to in the application are matters of fact which ought to be proved at the trial, and that it is just and equitable that the case be heard on its merits rather than in the manner sought in this application.

Representation.

The applicant is represented by ***M/s Kawalya & Co. Advocates*** while the respondent is represented by ***M/s Mayanja Nakibuule & Co. Advocates.*** Both parties filed written submissions in support of their respective cases as directed by Court.

Consideration by Court.

I have carefully read the pleadings, evidence and submissions of both parties which I have taken into consideration in resolving this application. There are several issues raised in this application against the WSD filed by the respondent.

The applicant alluded to several illegalities, as having been contrived admittedly by the respondent. In brief that the respondent did not seek consent of the applicant before buying the *kibanja* ; did not pay any *busuulu* to the applicant since 1980; did not secure approval of the Physical Planning Authority of Wakiso district before putting up the commercial structure contrary to ***sections 33 and 34 of the Physical Planning Act, 2010;*** and that the defence was palpably evasive; a retraction of his earlier admission, presented more or less as an afterthought.

The respondent on his part claimed that he was lawful occupant of land purchased from previous owners who, as per receipts attached to his defence, used to pay the *busuulu* to Kisingiri, the then registered owner since 1946.

The respondent relies on copies several sale agreements from the previous owners, and claims to have been introduced by the Chairman LC 1 (of the area in which the *kibanja* is situate) to one Kabandwa Augustine, known to him as the land lord, and who had okayed his occupation of the *kibanja*, which he had peacefully enjoyed till 2020..

In short therefore, he denied that his *kibanja* was situated on the land owned by the applicant and therefore was not under any obligation to obtain consent from the applicant before the purchase, as mandated by law.

It is settled law that where a written statement of defense contains general denials to the plaintiff's allegations, offended the provisions of ***O 6 r 8 of the Civil Procedure Rules*** which requires each party to deal with each allegation of fact as denied.

Order 6 rule 8 CPR provides:

> ***"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 defence by way of counterclaim, but each party must deal specifically with each allegation of fact of which he or she does not admit the truth, except damages."***

Rule 10 thereof provides –

> ***Evasive denial***
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> ***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.***

Further, ***order 8 rule 3 of the rules*** stipulates 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 a person under disability; but the court may in its discretion require any facts so admitted to be proved otherwise by that admission."***

Furthermore, ***Order 13 r.6 CPR*** provides:

> ***"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 questions between the parties; and the court may upon the application make such orders, or give such judgment, as the court may think just."***

Rule 30(1) 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 judgment be entered accordingly, as may be just.

In alignment with the above principles, it is not in doubt that every statement of claim must be specifically dealt with in the defence. But it is also important to note that under ***order 8 rule 3 of the CPR*** , an allegation of fact in a plaint which is not specifically denied is taken as admitted. Court however remains with some discretion under that rule to require any facts so admitted to be proved otherwise than by that admission.

Secondly, where admission of facts is made, a judgment on admission may, upon application by a party be entered at any stage of the suit. For court to enter such judgment, the admission has to be clear and unambiguous, stating precisely what is being admitted. The respondent in this case denies some of the admissions purportedly made by him.

Evasive denial by a defendant and consequently his/her admission of some facts may not on their own operate to justify the striking out of the entire defence, especially where there is in no rejoinder to the defence, as happened to be the case in this matter.

Failure to file a rejoinder by the applicant would therefore equally suggest that contents of *paragraph 8* were admitted by the applicant/plaintiff. Where court remains in doubt of certain facts, ***order 8 rule 3 of the CPR*** comes into play to exercise its discretion to leave the matters for trial.

The application, submissions and the pleadings in the head suit in my considered view therefore raise triable issues, key amongst which is the determination of the original ownership of the portion in dispute and whether indeed illegalities as pleaded in this application had been committed by the respondent, to merit the prayers sought in the main suit.

With all due respect therefore also to the point raised that an earlier suit ***HCCS No. 72 of 2010*** had resolved the issue matter between Kabandwa Augustine and the applicant, there is nothing from that decree ***(Annexture A to the affidavit in support)*** to suggest that this was the exact portion of land, the subject of the dispute in this present case.

The issue therefore as to whether the *kibanja* constitutes part of the land formerly owned by Kisingiri and later Augustine Kabandwa (judgment debtor in ***HCCS No. 72 of 2010)*** or constitutes a part of the legal interest claimed by the applicant (in which case consent ought to

have been secured by the respondent prior to the purchase)- all these are key issues to be considered by court in a full trial where the evidence, including the findings from the boundary opening exercise would be subjected to test.

All in all, the matters arising in this application cannot be fully resolved by way of affidavit evidence.

The application is accordingly dismissed. Costs await the outcome of the suit.

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Alexandra Nkonge Rugadya

Judge.

13th April 2021.

Delivered by email 15/4/2021

Alexandra G.