THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISCELLANEOUS APPLICATION NO. 687 OF 2021

(Arising from HCCS No. 660 of 2002)

JETHRO JONES OPOLLOT & 93 ORS :: APPLICANTS

VERSUS

ATTORNEY GENERAL ::: RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed this application under Section 33 of the Judicature Act, Section 14 and 22 of the Government Proceedings Act, Section 98 of the Civil Procedure Act and Section 14 and 22 of the Government Proceedings Act and Order 22, Rule 12 of the Civil Procedure Rules for the following orders that;

1. The respondent/ judgement debtor is ordered to produce before this honourable Court the full list of former employees of the National Enterprise Corporation as directed by this Honourable Court in HCCS 660 of 2002 for the purpose of comprehensive and final identification of beneficiaries to the judgement of the court.

2. This Honourable Court be pleased to declare that the applicants, all of whom are former employees of National Enterprise Corporation, are individually and collectively entitled to the benefit of the aforesaid judgement as directed by the court.

3. That the court be pleased to direct the amendment of the aforementioned list of beneficiaries and cause the inclusion of all of all the applicants' names omitted from the compilation of the court ordered document for purposes of giving the full intended effect to the court judgement.

4. This Honourable Court be pleased to grant consequential orders for the computation, certification and payment of all the individual applicants' gratuity, general damages and interest by the respondent/ judgement debtor as per the aforesaid judgement and orders of this Honourable court.

5. That the applicants be granted costs of this application.

The grounds in support of this application are stated very briefly in the Notice of Motion and in the affidavits of Mwesigwa Samuel, Peter Bavuma, Kittata Sozi Edward and Kedi Stephen which are detailed but briefly are;

i) This Honourable Court passed judgement against the respondent in favour of all former employees of the respondent in HCCS No. 660 of 2002 on the 9th May, 2012.

ii) For purposes of giving effect to its judgement and in order to avoid any confusion as to the proper beneficiaries of its judgement, the court ordered the respondent to compile a comprehensive list of beneficiaries

to its judgement including all former employees who had not been paid pursuant to an earlier judgement of the court in HCCS No. 948 of 2003 delivered by His Lordship Justice Musoke Kibuuka.

iii) Contrary to the direction of the court, the respondent compiled an incomplete list of former employees and, either by commission or omission, excluded the present applicants' names thereby affecting their established right to benefit from the benefit of the court.

iv) As a consequence, thereof, all the applicants have never received their due entitlement under the judgement of the court despite many years of pursuing their respective right to be paid as ordered by the court.

v) That it is in the interest of justice that further consequential orders be made for the amendment of the list of former employees/ beneficiaries to include the names of the applicants so that they can also be enabled to receive payment of gratuity, general damages and interest as ordered by court.

The respondent opposed this application and filed an affidavit in reply sworn by Nabasa Charity who stated that the decretal sum under the Civil Suit No. 660 of 2002 worth Ugx. 44,124,423,246/= was paid out in various tranches to the Davis Ndyomugambe & Co. Advocates who acknowledged receipt of the same and distributed among the plaintiffs. The respondent further stated that the applicants were not party to Civil Suit No. 660 of 2002 and as such are not entitled to benefit from the judgement and orders of court in the said suit.

At the hearing of this application the parties were advised to file written submissions which I have had the occasion of reading and considered in the determination of this application.

Three issues were framed for court's determination;

1. *Whether the application is competent.*
2. *Whether the applicants are beneficiaries to the judgement in Civil Suit No. 660 of 2002.*
3. *Whether the applicants are entitled to the orders and declarations sought.*

The applicants were represented by *Mr. Byenkya Ebert* whereas the respondent was represented by *Mr. Kamukama Allan.*

The respondent raised a preliminary point of law that I will dispose of before I can delve into the other issues raised by the parties.

Resolution

Issue 1: Whether the application is competent.

The respondent submitted that the applicants were not party to Civil Suit No. 660 of 2002 and as such, are not entitled to benefit from the judgement and orders of the court in the said suit. Counsel noted that the instant application is brought under Section 14 and 22 of the Government Proceedings Act and Order 22 Rue 12 of the Civil Procedure Rules.

The respondent raised a preliminary point of law that the instant application is incurably defective and ought to be dismissed with costs. Counsel noted that although the applicants in the instant application are 94 in number only six of them filed affidavits in support of the instant application and there is no evidence that they authorised any of the other deponents to depone on their behalf. He stated that the only indication that the deponents were deponing their affidavits on behalf of the rest of the applicants can be deduced from a paragraph which appears uniformly in all their affidavits in support of the application.

In respect of the above, counsel cited the case of Kaheru & Anor vs Zinorumuri HCMA No. 82 of 2017 where it was held that; the principle is that save in representative suits where the party who obtained the order to file the suit can swear affidavits binding others on whose behalf this suit is brought, it does not apply otherwise. Where an affidavit is sworn on one's behalf and on behalf of others, there is need to prove that the others authorized the deponent to swear on their behalf. Proof of such authorization is by written document attached to the affidavit.

He therefore stated that in the instant case, there is no evidence in support of the application before the court from the 88 applicants and that the same be struck off as a motion which is not supported by an affidavit is incurably defective.

In reply, the applicants submitted that this preliminary objection is misconceived and noted that the application is for execution under Order 22 Rule 12 of Civil Procedure Rules which completely disposes off the respondent's objection. Counsel noted that the provision expressly eliminates the need for applications

for representative authority to act on behalf of the other beneficiaries of a decree. Counsel submitted that the case of Kaheru & Anor vs Zinorumuri as cited by the Respondent is therefore distinguishable with the present case since the one before this court deals with execution proceedings and the representative authority to act on behalf of the other beneficiaries arises from the Rule cited.

Counsel further noted that Order 1 Rule 8 of the Civil Procedure Rule is not relevant to the present case since it applies to filing originating suits and not post decree execution proceedings. While relying on the case of Otim Talib & 3 Ors vs Uganda Revenue Authority & Anor M.A. No. 94 of 2017, counsel submitted that there is no required number of affidavits to support an application if the would be deponents are going to be talking about the same thing.

Analysis

There is a wealth of authorities on the law on affidavits. The **Black Law Dictionary 8th Edition Pg. 178** defines an affidavit as a voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths, such as a notary public. It is a statement or declaration in writing on oath or affirmation before a person having authority to administer oath or affirmation. It is supposed to contain only what the author knows as actual facts and any second hand information or information that is not witnessed or known by the person is inadmissible. Thus, what is required in affidavits is the knowledge or belief of the deponent and not any other person. An affidavit is therefore used as evidence.

Any person is competent to swear an affidavit under the law since what is required in affidavits is the knowledge or belief of the deponent in accordance with the Rules of Procedure.

The respondent contended that the instant application is incurably defective and ought to be dismissed with costs since only six of the applicants out of the 94 filed affidavits in support of the instant application and there is no evidence that they authorised any of the other deponents to depone on their behalf.

It is clear that this application is filed under Order 22, Rule 12 of the Civil Procedure Rules and Section 14 and 22 of the Government Proceedings Act for execution of a decree by way of Notice of Motion which must be accompanied by an affidavit in support. Indeed, the application was supported by affidavits from only six of the applicants to include Abel Kaahwa, Jethro Jones Opolot, Mwesigwa Samuel, Peter Bavuma, Kittata Sozi Edward and Kedi Stephen.

It is also important to note that this application is not a representative action under filed under Order 1, Rule 8 of the Civil Procedure Rules where a person with knowledge of facts can swear an affidavit in a representative capacity.

The circumstances herein are indeed distinguishable from a suit brought under Order 1, Rule 8 of the Civil Procedure Rules that requires authority for one to act for others in representative capacity and to swear an affidavit on one's behalf and on behalf of others would require need to prove that the others authorised the deponent to swear on their behalf. This court in ***Namutebi Matilda vs Ssemanda Simon & 2 Ors Misc. Applic. No. 0430 of 2021*** before His Lordship

Hon. Justice Stephen Mubiru at great length discussed the law on affidavits and stated as follows;

> *"….one golden thread is always to be seen; that what is required in affidavits is the knowledge or belief of the deponent, rather than authorization by a party to the litigation. Their content is dictated by substantive rules of evidence and their form by the rules of procedure. I have considered the available decisions positing the principle that a person is not to swear an affidavit in a representative capacity unless he or she is an advocate or holder of power of attorney or duly authorised.*

In light of the above, there is nothing in the instant case to show that the six applicants to include Abel Kaahwa, Jethro Jones Opolot, Mwesigwa Samuel, Peter Bavuma, Kittata Sozi Edward and Kedi Stephen were swearing their affidavits on behalf the other applicants. It is clear that they deposed the affidavits as witnesses who had knowledge of the facts upon which the applicants' joint action was based. They did not state in the affidavits that they were swearing the affidavits on behalf of the other Applicants in representative capacity. I therefore agree with the Applicants' counsel that the case of Kaheru & Anor vs Zinorumuri HCMA No. 82 of 2017 is distinguishable from the circumstances of this application and are therefore, not applicable.

I concur with counsel for the applicant that this objection is misconceived since there is indeed no required number of affidavits to support an application as long as the affidavit is the knowledge of the facts.

In light of the above, I am inclined to find that since there are affidavits in support of this application filed in accordance with the Rules, the application cannot be struck off for not being incurably defective.

This issue is therefore found in the negative.

<u>Issue 2:</u> **Whether the applicants are beneficiaries to the judgement in Civil Suit No. 60 of 2002.**

For the applicants, it was submitted that the judgement of Justice Mwangutsya in his judgement held that evidence was adduced that the auditor general commissioned a firm of auditors to compute the claims of all former workers of Uganda Rayon Textiles and Mukisa Foods Ltd. It was also submitted that the learned judge stated that the former employees of the two organizations are known and the question of ghosts merging should not arise. The Applicants stated that the orders made by His Lordship resulted in a decree that was partly preliminary and partly final within the meaning of Section 2 (2) of the Civil Procedure Act.

Counsel stated that based on the judgement made under Civil Suit No. 660 of 2002, the court entered a final decree with regard to general liability of the Attorney General, the quantum of general damages and interest due to each individual in accordance with the Auditor General's report which covered all former workers of NEC. In this regard, counsel cited Jogo Tabu vs the Registered Trustees of the Church of the Province of Uganda HCCA No. 16 of 2017 to explain the meaning of a preliminary decree as one that declares the rights and

liabilities of parties leaving the actual result to be worked out in further proceedings.

It was submitted that looking at the judge's reference, in particular the possibility of ghosts being included among the lists of the plaintiffs in the suit, the judge envisaged a possibility of names being dropped from the plaintiffs' list if they were found to represent non-existent person and possibility of names being substituted or added equally remained open to the court. He stated that this is because the court was considering the unique circumstances that resulted into a multiplicity of proceedings and could lead to further proliferation of claims arising from the same set of facts.

Counsel further submitted that Charity Nabasa in her affidavit acknowledged that HCCS No. 660 of 2002 was originally filed with a total of 1017 plaintiffs and the same was identified as such in Justice Mwangusya's judgement. He noted that this contradicted the references made in the judgement to the plaintiffs being 914 in number and the said contradiction can best be understood by analysing the court records of proceedings.

Counsel therefore submitted that Justice Mwangusya must have made the observations in his judgement that the true identity of the employees of NEC was a matter within the knowledge of the respondent and asked his office to produce a list upon which he could make final orders. Having failed to do this, the respondent is estopped from challenging the applicants as being not qualified to participate in or benefit from the judgement.

The applicants further submitted that it is not tenable for the respondent to allege as in paragraph 10 of its affidavit in reply that the applicants were edited out of the plaint to their prejudice without any formal order of the court. He noted that if no court order was ever made to strike out the applicants' names, then they never seized to be parties to the suit. He therefore submitted that this court is fully seized with the jurisdiction to resolve the question of the beneficiaries to the judgement of the court under Order 1 Rules 10 (2) and 13 of the Civil Procedure rules.

For the respondent, counsel submitted that Civil Suit No. 660 of 2002 was initially filed by 1017 plaintiffs. However, as the suit progressed, some of the plaintiffs withdrew their instructions from M/s Ndyomugabe & Co. Advocates who had filed the suit in court. As a consequence, an amended plaint containing the names of 914 plaintiffs who had elected to continue being represented was filed in court.

Counsel relied on Order 1 Rule 10 of the Civil Procedure Rules that provides for addition and removal of parties and noted that 103 of the plaintiffs exercised their right to withdraw instructions from the advocates presenting the suit upon which Justice Eldad Mwanguhya made a pronouncement as to the payment of terminal benefits.

He noted that the learned judge was alive to the fact that the plaintiffs at the time of rendering the judgement were 914 and it is clear from the orders of the court that the remedies granted were in favour of those plaintiffs and not the applicants who at the time were unknown to court. In the premises, the

applicants are not beneficiaries of the judgement and have deliberately misinterpreted the judgement and orders of the court and asserted that the judgement of Justice Eldad Mwanguhyya was a judgement in rem intended to settle the question of the of the rights of all former employees of NEC.

Counsel defined a judgement in rem to denote the status or condition of property and operated directly on the property itself as opposed to judgement in personam which only imposes personal liability on a defendant as per the Black's Law Dictionary.

Counsel further relied on the case of Saroji Gandesha vs Transroad Ltd Civil Appeal 13 of 2009 on the effect of a judgement in rem that it binds all person even when they are not parties to the proceedings and are stopped from averring that the status or things, or right to title to property are other than what the court has by its judgement declared it to be. He therefore submitted that the judgement in Civil Suit 660 of 2002 was in favour of only 914 plaintiffs to the suit and was not intended to bind others not party to it.

He further submitted that the respondent's evidence that an amended plaint baring only 914 plaintiffs was filed in court was not contested and thus is taken to be admitted as per the case of Prof Oloka Onyango & Ors vs AG; Constitution Petition No. 06 of 2014. He therefore submitted that the applicants cannot seek to benefit from and execute a judgement that was not entered in their favour and was procured without their instructions and contribution.

Analysis

I have carefully reviewed the evidence on record and the submissions of counsel and agree that it is important to determine whether the applicants were indeed parties to Civil Suit No. 660 of 2002 from which they seek to benefit from the fruits of the judgement delivered.

As such, I have looked at the annextures of the plaint, amended plaint and judgement of Hon. Justice Eldad Mwanguhyya in Civil Suit No. 660 of 2002. Indeed, the plaint as attached to the application and affidavit in reply under paragraph 4 shows that 1017 plaintiffs were claiming against the respondent under Civil Suit No. 660 of 2002.

The respondent under paragraph 10 of the affidavit in reply under paragraph 10 stated that the applicants were consequently edited out of the plaint and an amended plaint with the names of those who elected to continue being represented by M/s Davis Ndyomugabi & Co. Advocates was filed in court and it was upon this that the learned judge made orders from which the applicants herein seek to benefit.

From the said judgement vide Civil Suit No. 660 of 2002, the title there in captures all the 1017 plaintiffs as originally filed before this court. The judgement on the face of it does not suggest that the plaintiffs were 914 as submitted by the respondent. It is important to note that Order 7, Rule 1 of the Civil Procedure Rules provided for the particulars to be contained in the plaint to include the name, description and place of residence of the plaintiff which in the circumstances was ably done.

It was the respondents' contention that the plaint was amended thereby editing out some of the plaintiffs thus maintaining a number of 914 plaintiffs upon withdraw of instructions by some of the claimants from M/s Davis Ndyomugabe Advocates. It is important to note that the law on amendment of pleadings which is provided for under Order 6, Rule 19 of the Civil Procedure Rules furthermore, the Civil Procedure Rule under Order 1, Rule 13 provide for an application to add, strike out or substitute a plaintiff or defendant which may be made to the court at any time before trial by motion or summons or at the trial of the suit in a summary manner.

In as much as the respondent contended that the applicants were struck out of the suit upon amendment of the plaint, there is indeed no court order to that effect save for its argument that the applicants' names were edited out upon withdrawal of instructions from M/s Davis Ndyomugabe Advocates. I'm inclined to wonder if withdraw of instructions means withdraw of parties from a suit. I would think not since the procedure to strike or substitute a party from a suit is provided for under **Order 1, Rule 13 of the Rules** which provides that any application to add or strike out or substitute a plaintiff or defendant may be made to the court at any time before trial by motion or summons or at the trial of the suit in a summary manner.

In the circumstances herein, there is no evidence striking out the plaintiffs from Civil Suit No. 660 of 2002 save for an amended plaint nor is there any order striking them out of the suit as claimed by the respondent. I am alive to the rules of evidence under **section 101 of the Evidence Act** as to where the burden of

proof lies this being on the person that desires any court to give judgment as to any legal right.

Furthermore, withdrawal of suits and at instance of the plaintiff is governed by **Order 25, Rule 1 of the Civil Procedure Rules** which provides that the plaintiff may at any time before delivery of the defendant's defence or after receipt of that defence before taking any other proceeding in the suit (except any application in Chambers) by notice in writing wholly discontinue his or her suit against all or any of the Defendant. Withdrawals may also be by consent of the parties under **Order 25, Rule 2 of the Civil Procedure Rules**.

In this case, no evidence was adduced to suggest that the plaintiffs/ applicants in Civil Suit No. 660 of 2002 withdrew their suit against the respondent. Save for the amended plaint, the respondent has not adduced any evidence to support its claim that the applicants withdrew from the suit before the court upon withdraw of instructions.

Indeed, the judgement of the learned justice in Civil Suit No. 660 of 2002 has contradictions as to the number of plaintiffs claiming against the respondent as seen in its description; this being 1017 and 914 thereby raising issues if the applicants are beneficiaries of the said judgement having been part of the 1017 plaintiffs in the plaint. I believe this is cured by the judgement where His Lordship stated that;

> *"Finally as was raised as to identity of the Plaintiffs in this suit who may be mixed up with the plaintiffs in Civil Suit No. 248 of 2003; Matovu Luka & Ors decided by His Lordship Musoke Kibuuka. There was even a suggestion that there may be*

some ghost claimants. This is a matter that can easily be sorted out at execution because I do not envisage a situation where a former employee gets paid in one judgement and later claims executions in another judgement.

The former employees of the two organisations are known and the question of ghost emerging should not arise at this stage.

As such, it is clear that the learned trial judge was aware that the former employees of the two organisations were known. As seen above, I'm inclined to believe that the applicants were among the plaintiffs in Civil Suit No. 660 of 2002 since there is no evidence or order that the same withdrew from the suit before the court. As such, they were parties to this judgement and are entitled to the decretal awards in Civil Suit No. 660 of 2002.

The purpose of the original suit was to pursue the claim of for all the 1017 former employees and this should never have been defeated by an irregular editing or removal of the other names for reasons best known to the advocate. The said judgment was *in personam* for all the parties originally listed as parties. It was a judgment against persons who are parties or privies to the particular proceedings before the court.

This issue is therefore answered in the positive.

Issue 3: <u>Whether the applicants are entitled to the orders and declarations sought.</u>

The applicants in their applications sought several orders against the respondent/ judgement debtor as listed above.

Having answered issue 2 in the positive that the applicants herein as parties to the Civil Suit No. 660 of 2002 in the absence of any order or other evidence that they withdrew their action against the respondent, I hereby grant the following orders as sought;

a) The respondent produce before this honourable Court the full list of former employees of the National Enterprise Corporation as directed by this Honourable Court in HCCS 660 of 2002 for the purpose of comprehensive and final identification of beneficiaries to the judgement of the court.
b) The applicants herein as plaintiffs listed under the plaint in Civil Suit No. 660 of 2002 who are former employees of National Enterprise Corporation, are individually entitled to the benefit of the aforesaid judgement as directed by the court.
c) The applicants as listed under the plaint in Civil Suit No. of 660 of 2002 filed before this Court on the 18th October, 2002 and thereby omitted upon amendment be included in the compilation of the court ordered document for purposes of giving the full intended effect to the court judgement.
d) Consequential orders are hereby granted for the computation, certification and payment of all the individual applicants' gratuity, general damages and interest by the respondent/ judgement debtor as per the aforesaid judgement and orders of this Honourable court.

This application is hereby allowed with no order as to costs.

I so Order.

SSEKAANA MUSA
JUDGE
6th April 2023