

REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)
HCT-00-CC-MA-0431-2005
(Arising from HCT-00-CC-CS-0373-2005)

GAKOU & BROTHERS ENTERPRISES LTD	APPLICANT
VERSUS	
SGS UGANDA LTD	RESPONDENT

BEFORE THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. The applicant, M/S Gakou & Brothers Enterprises Ltd, are the defendants in the head suit. In this application they seek to add or substitute, one Mushagalusa Jerome, as the defendant in the head suit. The grounds upon which this application is made are three. Firstly, that the plaintiff wrongly instituted the head suit against the applicant. Secondly that the said Mushagalusa Jerome was at all material times the owner of the mineral cargo which is the subject matter of the suit. Lastly that it is necessary and just that Mushagalusa Jerome be substituted and or added to enable the court to completely adjudicate and settle all questions involved in the suit.
2. The application is supported by an affidavit sworn by Mohamed Gakou, the managing director of the applicant company, in which he sets out the facts that he alleges show that Mushagalusa Jerome was the proper defendant instead of the applicant. He claims that he introduced Mushagalusa Jerome to the respondent, leaving Mushagalusa Jerome to deal directly with the respondent, which is what occurred. He now alleges that there is a conspiracy between Mushagalusa Jerome and the respondent to make the applicant liable for the transactions between Mushagalusa Jerome and the respondent.
3. The respondent opposed this application, without filing an affidavit in reply.

4. Mr. Mark Luba, learned counsel for the applicant, submitted, that order 1 Rule 10(2) of the Civil Procedure Rules, any one was free to apply to add a party to the suit. The applicant wished to apply that Mr. Jerome Mushagalusa should be added or substituted as the defendant in this case, as he was the person, who ought to have been sued by the defendant. He referred this court to the case of Kololo Curing Co. Ltd v West Mengo Co-operative Union Ltd [1981] H.C.B.60 in support of his submissions.
5. Mr. Peter Kawuma, learned counsel for the respondent, stated that the respondents were opposed to this application. He submitted that it would not be right to strike out a party, against whom a cause of action has been disclosed. He referred to the case of Daphne Parry v Murray Alexander Carson [1962] E.A.515. Secondly the plaintiff had elected which person to sue, and that person, being the applicant was the proper the defendant. He referred to the case of Denis Kimuli Batemuka vs Sarah Biribonwa Anywar [1987] H.C.B.71.
6. Lastly Mr. Kawuma submitted that Order 1 Rule 10(2) of the Civil Procedure Rules is concerned with misjoinder of parties rather than substitution of parties. Substitution of a defendant has the effect of bringing a suit at an end as against the defendant, which is a complete disposal of the suit.
7. This application is based on Order 1 Rule 10 (2) of the Civil Procedure Rules. I shall set it out in full.

“(2) The court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant be struck out and that the name of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the court may be necessary to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”
8. From the wording of the rule, it is clear the rule is about misjoinder and non-joinder of parties. It anticipates a situation where if a party had been improperly joined, such party could be removed, and if someother person, ought to have been party and was not, may be joined as a party to the suit. See Daphne Parry v Murray Alexander Carson, [1962] E.A. 515. Order 1 Rule 10 (2) of the Civil Procedure Rules does not extend to substitution of parties. It does not apply where a defendant who has been sued, claims that he has been wrongly or unjustifiably sued by the plaintiff, and is therefore the wrong party. In such a case the defendant would have to defend the suit, establish his defence, and win

vindification, if he is the successful party. Or he could apply under the relevant rules to strike out the action against himself, if there is no cause of action disclosed against him.

9. It is for the plaintiff to elect which person shall be the defendant in the suit, and the plaintiff cannot be compelled to sue a particular person, as defendant, except in cases of necessity. See Denis Kimuli v Sarah Biribonwa Anywar and Anor [1987] H.C.B. 71.
10. The case of Fernandes v Kara Arjan and Sons [1961] E.A. 693 illustrates the futility of ordering the plaintiff to proceed against a particular person as a defendant without the plaintiff's assent. Mosdel, J., observed,

“ a plaintiff, being dominus litis, cannot be compelled to sue a person, for damages in respect of a tort, who he does not wish to sue. The instant case has demonstrated only too clearly the impossible situations in which an unwilling plaintiff is likely to find himself at the trial where a defendant is forced upon him against his will. Moreover, the instant case has shown forcibly what little benefit such addition would be likely to afford the original defendant. The plaintiff was forced by reason of my order of August 17, 1961, to aver negligence against the third defendant. When evidence for the plaintiff was led not a tittle was extracted either in chief or in cross-examination showing the third defendant was even partially to blame for the accident.” At page 697.

11. Mr. Mark Luba referred to the case of Kololo Curing Co. Ltd v West Mengo Co-operative Union Ltd [1981] H.C.B. 60, in support of his submission. I have read the digest of the case, and unfortunately have not been able to read the full decision. Holding 13 reads,

“As to whether a defendant can apply under O.1 r.10(2) of the Civil Procedure Rules for joining a third party to a suit as a co-plaintiff, not only can any of the parties to a suit avail himself of the provisions of the rule but the court itself can on its own motion, join any party as plaintiff or defendant, if in its judgment, such joinder would facilitate effectively and completely the determination of the suit.”

12. As a general statement of law, the foregoing is largely correct. In that case a defendant was seeking to add a third party as co-plaintiff to the suit. This is different from the position here, where the defendant is seeking to substitute or add a co-defendant, without the consent of the plaintiff.
13. Under Order 1 Rule 10 (2) of the Civil Procedure Rules, it may be possible for the parties to apply to add a party, or at the instance of the court to add a party, in case the presence of such a person is necessary to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. Salim Jamal and others v Uganda Oxygen Limited and others Supreme Court Civil Appeal No.64 of 1995 (Unreported) provided such possibility. An action was brought by a shareholder against the directors and persons controlling the companies in question. After holding that the derivative

action brought by the member had been proved, the trial court, added the company as a defendant to the action so as to be able to effectively deal with the remedies that the company was entitled to on the basis of the plaintiff's successful action. The Supreme Court upheld the joiner of Uganda Oxygen Ltd as a defendant under Order 1 Rule 10(2) of the Civil Procedure Rules as it was essential to the resolution of the dispute between the parties.

14. I have studied the application and its supporting affidavit, and find nothing therein that suggests that the situation envisaged by Order 1 Rule 10(2) of the Civil Procedure Rules, does exist. The question according to the applicant that has to be established is the identity of the owner of the cargo in respect of which the head suit has been brought. It is not really necessary for the presence of Mushagalusa Jerome as a party, to establish who the owner of the cargo in question is.

15. For those reasons I find that this application has no merit. It is dismissed accordingly with costs.

Dated at Kampala this 14th day of July 2005

FMS Egonda-Ntende

Judge