THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCCS NO. 188 OF 2010

1) KASOZI JOSEPH

2) KAZINDA KASOZI PAUL

3) IDUMU MARCELLELLINUS

4) ISMAIL DABULE &

OVER 50,000 OTHERS}::PLAINTIFFS

VERSUS

UMEME (U) LTD::DEPENDANT

BEFORE : HON.LADY JUSTICE HELLEN OBURA

RULING

This ruling arises from a Preliminary Objection raised by Mr. Noah Mwesigwa, counsel for the defendant challenging the representative order and the propriety of the suit. The gist of the objection was that upon perusing the application for the representative order, that is, Misc. Application No. 27 of 2009, paragraph 3 of the application and paragraphs 3 and 6 of the affidavit in support indicated that 50,000 individuals had interest in the suit. That paragraph 4 of the affidavit indicated that the list of 50,000 individuals was attached as annexture "A". That perusal of annexture "A" showed only 19,427 people and the difference between that figure and 50,000 was not indicated.

Counsel emphasized that this suit could not be categorized as public interest litigation for all Ugandans and as such the application was in respect of 50,000 unknown and unidentifiable persons. He contended that this was highly irregular of a representative action and the order granted by the Registrar was improper. He further contended that the advertisement made by counsel for the plaintiffs pursuant to that order was inconclusive of the people for whom it was being brought in terms of their number, details and particulars. He submitted that for purposes of service under Order 1 rule 8 (1), if it is by way of advertisement, it must go further and provide the list of the names of persons to be represented so as to have an equivalent of personal service.

He further submitted that Order 1 rule 8 (1) is mandatory and must be complied with for service to be proper and for identification of who is being served.

He further submitted that the rationale of this law is captured by the provisions Order 1 rule 8 (2) which allows such a party who has been listed and therefore been served to apply to the court to be a party in his/her own right or to refuse to participate in the suit.

He noted that the advertisement in this case did not have any list attached to it and there was no way any person out there who could be part of the vague and uncertain numbers cited in the advertisement would be said to have been served under O1 r 8 (1) and as such a party to the main suit, HCCS No. 188/2010.

He pointed out that, in the plaint the plaintiffs were listed as 1-4 plus 50,000 others who are not known or discernable from the plaint. Further that paragraph 1 thereof talked of a figure of 20,000 while paragraph 4(a) talked of 50,000 and also a new figure of 19,647. He submitted that, under Order 1 rule 8 all the parties must be served and where there was failure to comply with that rule the suit/plaint would be struck out for non-compliance with the rule.

Counsel submitted in the alternative but without prejudice to his foregoing submission, that at the very least the over 50,000; 20,000 and all unknown plaintiff's who were not listed be struck out of the suit and only the four identified plaintiffs, that is, Kasozi Joseph, Kazinda Kasozi Paul, Idumu Marcellinus and Ismail Dabule be left.

He referred to the case of ***Thomas Okumu-Vs-B.A.T & Mastermind Tobacco HCCS 465 of 2000*** where the issue of notice was considered. He submitted that in that case, Katutsi, J (as he then was) cited the case of ***Dr. James Rwanyarare & Another v AG (Constitutional Petition No.11 of 1997),*** and stated as follows:-

> *"The court can't accept the argument that any spirited person can represent any group of persons without their knowledge or consent. That would be undemocratic and could have far reaching consequences".*

He also referred to the case of ***(1)Ibrahim Buwembo; (2) Emmanuel SSerunjogi (3) Zubairi Muwanika for and on behalf of 800 Others v UTODA Ltd HCCS No. 664 of 2003*** which he observed was almost on all fours with the instant case and I agree with him. He submitted that in that case Kiryabwire, J stated that:-

> *"It would appear to me that the wording of O1 r8 (1) with regard to notice either by personal service or by public advertisement as the court may in each case direct is mandatory. Furthermore, the requirement to give a proper notice cannot be regarded a mere technicality or direction that can be dispensed with. The notice by public advertisement must disclose the nature of the suit as well as*

the reliefs claimed so that the interested parties can go on record in the suit either to support the claim or to defend against it".

He pointed out that in that case a notice had also been run without listing the 800 people and the plaintiffs belatedly tried to put an annnexture to the plaint just like in this case. That the court noted that trying to attach the list to the plaint was rather belated and the learned judge made the following observations:-

"How can any of the 800 persons said to be represented (or any of the ones exhibited to the plaint) complain when they have not been served notice with their names being mentioned by way of public advertisement".

That, in conclusion the learned judge held that he was inclined to agree that the defect meant that the original three named plaintiffs were the proper parties to the suit, and the 800 unnamed persons were not.

Counsel submitted that on the basis of the provisions of the law and decided cases, the representative order in this suit having not listed the over 50,000 plaintiffs was defective and therefore the over 50,000 plaintiffs must be struck off as they are not parties to this suit.

He further submitted that this suit as could be seen from paragraph 1 of the plaint was brought as a representative action on behalf of those people and was pleaded along that line. He contended that as pleaded it could not be cured by an amendment. He prayed that, in line with his submission that Order 1 rule 8 was not complied with, it should be struck off.

Counsel also challenged the procedure of bringing this matter by a representative action. He submitted that a representative suit must be in respect of people who share the same claim and the same interest. He contended that the plaint in this suit did not show that the parties had the same interest or that the allegations and claims in the suit applied to all the parties. He argued that it was difficult to establish whether party "X" had a faulty meter, or party "y" had been over estimated, or party "Z" was claiming that the defendant was unjustly enriched.

Further that the plaint sought declarations which could not apply to a common interest. That, for instance, by looking at prayer "F" of the plaint, there could not be an assessment of a general common interest of mental suffering and injustice of over 50,000 people by the court. He submitted that it was a matter that was peculiar to each individual that could not be addressed in a representative suit and for that reason it should be struck off.

1 Lastly, and without prejudice to the objection, counsel submitted that under S.6 of the Civil Procedure Act it is provided that no court shall proceed with the trial of a matter which is substantially in issue in another proceeding before the Court. He noted that the key words are *"substantially in issue"*

and submitted that there was a pending civil suit by ***Idumu*** **Marcellellinus**

-vs.-UMEME HCCS 24/10 before Lady Justice Irene Mulyagonja.

He pointed out that Mr. Idumu was listed as plaintiff No.3 on the plaint in this suit. Further that a review of the plaint in HCCS No. 24/10 indicated that, that plaint was more or less a template of the plaint in this suit. That the claim in that suit was also contained in the present suit. He referred to paragraphs 4(d) and 19 of that plaint which he contended talked about the same thing in paragraph 14(c) of the plaint in this suit and annexture "C" in the other suit which is annexture "H4" in this suit.

Further that annexture "E" in that suit is annexture "H1" in this one, while annexture "E2" is annexture "H2" in this one. That annexture "F" in the other suit had been reproduced and tendered in the bound volume of this suit starting at page 11. He prayed that notwithstanding his earlier prayer, Mr. Idumu could not proceed in this suit under S.6 of CPA.

In conclusion counsel reiterated his prayer that;

1 . The suit be struck out.
2 . In the alternative but without prejudice, the 50,000 unknown plaintiffs be struck off.
3 . In the further alternative that because of Mr. M. Idumu's claim in this suit, it should be stayed pending the disposal of HCCS No. 24/2010 or his aspect of the claim be withdrawn by the plaintiffs' counsel.
4 . Costs of this Preliminary Objection.

Mr. Omongole for the plaintiff responded to the Preliminary Objection by first raising a general response in regard to procedure and secondly by answering specifically what was raised. He submitted that under the practice and laws applicable in this country suits seeking declaratory judgments/orders are not open to preliminary objection of whatever nature. He submitted that, Order 2 rule 9 of the CPR which was directly borrowed from **Halsbury's Laws of England Vol. 37, 4th Edition as per Hailsham of Saint Marylebone page 197 in paragraph 252** does not allow objection on the ground that a merely declaratory judgment or order was sought by the suit.

He contended that reading from that paragraph of ***Halsbury's Laws of England*** (supra), all objections of whatever nature are not open to suits of a declaratory nature like in this case where paragraph 3 of the plaint sought some declarations. He drew the attention of court to the last part of paragraph 252 of ***Halsbury's Laws of England*** (supra) footnote No. 2 to strengthen his argument that a representative order/declaratory order may name or not name the people. He pointed out that this was the decision in ***Dyson-Vs-AG [1911] 1KB 410***. He also referred to the case of ***Guaranty Trust Co. of New York v Hannay & Co. [1915] KB 536*** and **Gibson v The**

Union Shop Distribution & Allied Workers [1958]2 All ELR which he submitted clearly strengthened the position in ***Halsbury's Laws of England*** (supra) on objection in declaratory orders. He further submitted that the same thinking was borrowed in Uganda in the case of ***Oluka & Others v AG C.S No. 12/10*** in which Kabito, J agreed with the position in ***Halbury's Laws of England*** (supra).

The 2nd general reply made by counsel was on the procedure of the Preliminary Objection. He contended that the procedure for a Preliminary Objection is by an application to the same court that issued the representative order. He argued that the defendant should have either opted for a review in the same court and if not satisfied they would have appealed the decision of the Registrar as it was in most of the cases that counsel for the defendant cited. He submitted that, that position was first laid down in the case of ***Johnson v Moss & Others [1969] EALR*** at page 654 where the judge was worried about his jurisdiction/power to handle an objection to the representative order which was issued under Order 1 rule 8. Further that the judge only agreed to handle the objection on discovering that it was issued by a judge of the same court and not the Registrar.

Counsel contended that Order 1 rule 22 of the CPR lays down the procedure for any applications under the said order and it is by chamber summons and the exception is given only for rule 16 for oral applications. He submitted that despite this suit not being open to objection, it was his contention that even the procedure for objection was wrong and therefore should not be sustained by this court because of the concern of procedure. That it should have come to this court by way of an appeal.

Counsel responded to the specific objections in the alternative and without prejudice to the foregoing as follows. As regards the number of plaintiffs whether they were 19,427; 50,000 or the 4 named in the plaint, he contended that there was no requirement under the law for specific listing of the plaintiffs and their particulars. He argued that the correct reading of Order 1 rule 8 states the requirement for notice of institution of the suit but does not talk of names and particulars. Further that this rule which merely gives power to any person whether named or not to apply to be party to the suit had not changed by practice.

He further argued that that rule also addresses the issue of same interest and in this case most of the parties were known as consumers of electricity supplied by the defendant. That therefore the advertisement was open to all the consumers of electricity supplied by the defendant and that explains why estimates are used in the plaint. He contended that there was therefore no need to name the people as long as a definite group having similar interest was known as consumers of electricity supplied by the defendants. Further, that the suit could not be on behalf of all Ugandans as alleged because the plaint talked about consumers of electricity, specifically those affected by what was specified in paragraphs 3 and 4 of the plaint.

He strengthened his argument by referring to the authority of ***Johnson v Moss*** (supra), a High Court decision which he claimed became a classical case in action for representative orders which has never been overruled or challenged by a higher court in this county and the law created therein has remained applicable. That in interpreting Order 1rule 8, the court held that it was not necessary to give particulars in the application of the number of persons having the same interest in the suit and it was held that the defendants and all other members of the club had the same interest in the suit.

As regards the authorities cited by counsel for the defendant, he submitted that they were of parallel courts which did not address their minds to the decision of ***Johnson v Moss*** (supra). He however, prayed that this court be persuaded by that case and be pleased to agree with its findings because of the thoroughness and details in it.

As regards the issue of personal service and attaching the list, counsel contended that there was no need for it because Order 1 rule 8 (1) and (2) and the decisions of ***Johnson v Moss*** (supra) and ***Dyson*** (supra) do not refer to that requirement. He submitted that there was therefore no legal basis for counsel for the defendant's prayer that the suit be struck out.

He argued that at worst what would happen to the suit would be to restrict it to 19,427 plaintiffs who are known. He pointed out that the figure of 19,647 was a typographical error. He submitted that the number was not important. He reiterated the argument in **Halsbury's Laws of England** (supra) to the effect that you could not strike out a plaint which seeks declaratory order as it was not open to any technical objection because of the nature of the order that is sought.

He distinguished the case of ***Okumu v B.A.T*** & ***Mastermind Tobacco*** (supra) from this case by stating that in that case the consent of the people represented was not sought unlike in this case where because of its nature, consent was sought through advertisement because personal services on each of them was not possible . Further that in the last paragraph of the advertisement, it was very specific as required by practice that whoever was not interested in pursuing the intended suit should go to their chambers or notify them of the same. That therefore this suit fulfilled the requirement of Order 1 rule 8 of the CPR regarding notice. On this point he concluded that in the ***Okumu v B.A.T*** & ***Mastermind Tobacco*** (supra) there was no representative order and the judge's holding was in that context.

As regards the case of ***Ibrahim Buwembo*** (supra), counsel submitted that it was also distinguishable in that the list was also being merely attached to the plaint without the fulfillment of Order 1rule 8. He contended that in this case Order 1rule 8 was fully complied with. He invited court to look at this case on its own facts.

As regards the issue of same interest, counsel contended that this was shown in paragraphs 3 and 4 of the plaint in relation to the cause of action and the facts. On counsel for the defendant's submission that because of the nature of the remedies sought it would be difficult to award them in a representative matter, he submitted that first, the order sought are largely declaratory so the consequential aspects are not very important. Secondly, that they were at the discretion of this court whether to award or not and so it should not be struck out until the substantial issues in this suit are put before this court in evidence for it to exercise that discretion. That therefore this could not be an issue for a preliminary objection because it goes to the substantial issues for trial before this court so the plaint should not be struck out.

Finally, on counsel for the defendant's submission in respect of S.6 of the CPA whereby he prayed for a stay of this suit or removal of Mr. M. Idumu as a party, counsel for the plaintiffs submitted that S.6 of the CPA was not applicable in the circumstances of this case as regards Mr. Idumu generally. That this is because the case before Justice Irene Mulyagonja had a different party as opposed to this case which has numerous parties in a representative action while the other one had only Mr. Idumu suing the defendant. That therefore that did not satisfy the first aspect of S.6 of the CPA in that the other suit and this one are not directly and substantially in

issue between the parties. He argued that the Key aspect was that the parties had to be exactly the same.

He contended that in the two suits the claims were different in that while in HCCS No. 24/10 the claim was for special damage in this suit the plaintiffs were seeking declaratory orders. As regards the annextures that were alleged to be the same, counsel submitted that they were for evidential purposes in that suit as well as in this one. That it did not in any way prejudice the defendant's case. He prayed that the Preliminary Objection be overruled with costs as it merely sought to waste court's time as it had no serious legal issues.

Mr Mwesigwa in rejoinder, first of all reiterated his earlier submission and submitted that the arguments made in reply were totally misconceived. As regards the general reply made by counsel for the plaintiff that declaratory matters were not open to preliminary objections, he submitted that the rule was inapplicable to this matter. He submitted that firstly, Order 2 rule 9 does not fall under rules that apply to representative suits. Secondly, that by simply reading the provisions of Order 2 rule 9 and the reference in ***Halsbury's Laws of England*** (supra), it restricts raising an objection merely on the ground that a declaratory judgment or order was sought. He pointed out that the operative words in that rule were "*on the ground that a merely declaratory judgment or order was sought by the suit*".

He argued and I agree with him, that what that order stopped was raising a preliminary objection that the suit should be struck out because its prayer sought only declaratory orders. He submitted that their preliminary objection had nothing to do with that as they had not sought that the suit be struck out on the basis that merely declaratory orders were sought. That, that was not their objection and therefore the authority was irrelevant for purposes of these proceedings.

I completely agree with this position and I will not delve much into it in this ruling. The objection raised in this matter is not on the basis that merely declaratory orders were being sought and therefore the argument of counsel for the plaintiffs is misconceived and the authorities he relied upon are not applicable in the circumstances of this case.

As regards the 2nd general reply by counsel for the plaintiff that raising these issues by way of a preliminary objection instead of an appeal against the decision of the Registrar to grant a representative order was a wrong procedure, counsel contended that appealing against the order

would be a wrong procedure because the application for a representative order was made ex parte. That the defendant was not a party to that ex parte proceeding and was never meant to be a party to it. Further that it is the practice of this court that a defendant who is not a party and meant not to be a party cannot appeal against an ex parte order arising from that proceeding.

He argued and I agree with him, that it is important to note that at the point of the ex parte application there was in fact no claim whatsoever by way of a suit against the defendant. That the point at which the defendant had a claim against it was when the main suit, that is, HCCS No.188 of 2010 was filed and it was only then that the defendant obtained locus to challenge the claim including the representative order. He submitted that the authorities he relied upon in his submission showed that the Preliminary Objections were raised at the early stages of the suits. To buttress his submission, counsel relied on the cases of **Registered Trustee of the Catholic Diocese of Nyeri & Anor v Standard Ltd and Others EALR 2003 at pg 257** and ***Johnson v Moss*** (supra) at page 655 under paragraph 1 where it was held that an appeal was not necessary.

On the specific issues raised by counsel for the plaintiff in his reply regarding listing names of the parties which he said was not necessary, counsel reiterated his earlier submission that the list of claimants should have been attached to the advertisement. That the plaintiff having mentioned the number of people and used the words *"in particular"* was enjoined to list the names of those people. On counsel for the plaintiff's submission that the suit related to all consumers of electricity, counsel submitted that this particular action was not brought within a general ambit under public interest litigation which applies to everyone. He reiterated his submission that having failed to list them those plaintiffs other than the four who were listed should be struck off the suit as was held in the case of ***Ibrahim Buwembo*** (supra) and ***Johnson and Moss*** (supra) which he said emphasized that giving of notice is a statutory right.

On counsel for the plaintiff's submission that if court was to strike out the plaintiffs, it should leave the 19,427, counsel submitted that their objection in respect to the notice equally applied to the 19,427 because they were not listed in the advertisement just like the over 50,000 were not. He argued that it was not sufficient to just say those 19,427 whose names and accounts appeared in the New Vision Newspaper of Monday 22/10/2009 when that newspaper list was in respect of a debt demand by the defendant's lawyer. Further that for there to have been personal service the plaintiff's counsel should have reproduced and run the list together with the advertisement.

In relation to the issue of common/same interest in a representative action, counsel reiterated his earlier submission that some of the prayers, for example, damages caused by mental suffering, could not be generalised without each individual maintaining its own separate action and bringing their own peculiar evidence to prove their claim.

On the issue regarding the case of Mr. M. **Idumu v UMEME** (CS No. 24/2010), counsel reiterated his earlier prayer.

Lastly, with regard to counsel for the plaintiff's attempt to distinguish the cases the defendant relied upon, counsel submitted that the case of **Okumu v B.A.T** & ***Mastermind Tobacco*** (supra) was very much applicable to the instant case as it laid down the principles related to representative action including emphasizing the requirement for notice. Further that it also goes ahead to clearly show that this court has jurisdiction to entertain an objection such as this. As regards the ***Ibrahim Buwembo*** case (supra), he submitted that it is on all fours with this one as the wrongs committed in that suit are similar to the ones in this one.

I have heard the submissions of both counsels and critically examined all the authorities referred to therein. I wish to first of deal with the procedure of raising these issues by way of a preliminary objection as opposed to an appeal before I delve into the merits of the objections. I agree with counsel for the defendant's submission that before this suit was filed the defendant did not have locus to challenge the order that was obtained ex parte. In fact in the ***Buwembo*** case (supra) the issue of listing of the intended plaintiffs was one of the substantive issues for determination. Counsel had applied to have it determined earlier but the trial judge ruled that it would be considered with the other substantive issues. I personally do not see anything wrong with dealing with this objection first because it could save court and the parties a lot of time if it is found that the rules were not fully complied with. In the circumstances, I find and rule that the procedure of raising these issues by way of a preliminary objection was proper.

Secondly, I wish to point out from the onset that after counsels' submissions on the preliminary objection were closed, this court received a letter from M/S Mubiru Kasozi & Co. Advocates dated 24th May 2011 informing court that they had been instructed by Kasozi Joseph (plaintiff number 1); Kazinda Kasozi (plaintiff number2) and Kahanguzi Kahuta to withdraw from this suit in preference to amicable settlement of their claims. The letter was not copied to any of the party's counsels. If the withdrawal is effective it would leave only Idumu Marcellinus and Ismail Dabule as the representatives of the plaintiffs.

The issue is whether the letter written to court as indicated above led to effective withdrawal of the two plaintiffs from this suit. My answer is that it did not because there should have been a

formal application for leave to withdraw by the two plaintiffs. They together with the other plaintiffs brought the defendant to court and so they could not be seen to stealthily withdraw from the suit without even notifying their own advocate let alone those of the defendant. There might be cost implications for the intended withdrawal which counsel for the defendant might wish to address court on. In the premises and in exercise of the inherent power of this court under section 98 of the CPA, I order that Mr. Kasozi Joseph and Mr. Kazinda Kasozi should apply for leave to withdraw from this suit if they still wish to withdraw. This order does not apply to Mr. Kahanguzi Kahuta whose fate as to whether he is a plaintiff or not, is yet to be determined by this ruling.

Now, turning to the objections, I wish to first of all point out that the provisions of Order 1 rule 8 of the CPR, as stated in the various cases where it has been considered, is couched in mandatory terms and must be fully complied with. To this end, Ntabgoba, PJ (as he then was) stated in the case of ***Tarlogan Singh v. Jaspal Phaguda and Others [1997-2001] UCLR 408 at page 410***, that:-

> *"In my opinion, the taking of the steps necessary to enable the plaintiff institute a suit in a representative capacity is taking the procedure under Order 1 rule 8 of the Civil Procedure Rules: and Order 7 Rule 4 which is rendered in mandatory terms. With respect, therefore, the non compliance with Order 1 Rule 8 and Order 7 Rule 4 cannot be said to be a mere matter of mis-joinder or non-joinder. It is a matter that must be complied with and failure to so comply renders the suit incurably defective..."*

A similar statement was made by Kiryabwire, J in the case of ***Ibrahim Buwembo*** (supra) as already quoted herein above.

Mulla , The Code of Civil Procedure, 17th Edition Volume 2, at page 37 also states that where such a permission has been granted to file a suit in the representative capacity then it is mandatory to give notice of the institution of suit to all persons interested either by personal service or by advertisement as directed by the court. It is further stated at page 46 that strict compliance with rule 8 of Order 1 is necessary for a suit in representative capacity. He cited the Indian case of ***Subhash Market Association v Municipal Corpn, Dehli AIR 2005 Del 209*** where in a representative suit filed in the name of Market Association the process was filed for issuance of notice by court which was sufficient for only three-fourth members and no list of 70-80 members was filed and it was held that the requirements of Order 1 rule 8 had not been complied with.

In the instant case, permission was granted by the Registrar of this court to the plaintiffs on 19th April 2010 to institute a representative suit against the defendant on their own behalf and on behalf of other numerous electricity consumers who have the same interest. I have looked at the record of proceedings in MC No. 27/2009 being the application for a representative order and the

order subsequently given by the Registrar on the 20th April 2010. The record of proceedings indicated that counsel for the applicant submitted that:-

> *"There is an attached list of all the intended parties with similar interest with the applicants. The intended applicants are over 50,000.....We intend to advertise the list and whoever does not intend to be a party will opt out".*

The application was granted and a notice was subsequently run in the newspaper in the following words without any list of intended plaintiffs:-

"Notice is hereby given to the general public and consumers of electricity and in particular to over 50,000 individuals and companies whose accounts have been overcharged and overbilled that Kasozi Joseph, Kazinda Kasozi Paul, Idumu Marcellinus and Ismail Dabule have been permitted to sue UMEME Limited in the High Court of Uganda for themselves and on behalf of over 50,000 consumers of electricity in Uganda and those 19,427 persons whose names and account numbers appeared in the New vision newspaper of Monday, 22nd October 2009, that they are entitled to be compensated for the billing by faulty fast running meters, overcharging and over-billing on their accounts and shall file a civil suit through their advocates Messrs Kasozi, Omongole & Co. Advocates, 2nd floor Greenland Towers, Plot 30 Kampala Road, P.O. Box 28511, Kampala. TEL: 0312-370761, 0753-198847.

Whoever is not interested in pursuing the intended civil suit should come to our chambers above and notify us of the same.

For: Kasozi, Omongole & Co. Advocates

Drawn by:

Kasozi, Omongole & Co. Advocates,

2nd floor Greenland Towers,

P.O. Box 28511, Kampala."

My simple understanding of Order 1 rule 8 (1) of the CPA is that it has two parts which must be fully complied with. The first part is to do with obtaining permission from court to bring a representative suit and the second is to do with giving of notice of institution of the suit by the court to all such persons, on whose behalf the suit is brought, either by personal service or by public advertisement where the numerous number of persons involved does not permit personal service. It is the court which is mandated to give the notice and it directs how it should be done in each case.

The Preliminary Objection raised by counsel for the defendant regarding the need for the list of intended plaintiffs are at two levels. Firstly, he contended that the full list should have been

attached to the application. Secondly, he contended that for the service of the notice to amount to personal service as stipulated under the rules, the list of intended plaintiffs should have been put in the advertisement.

As regards the first level, although counsel misled court that he had attached the full list of the over 50,000 intended plaintiffs, and I believe it would be good practice to do so, I am of the opinion that failure to do so was not fatal and did not render the order granted by the Registrar improper as contended by counsel for the defendant. I found the decision in ***Johnson v Moss*** (supra) which considered the issue of naming the intended parties at the application level persuasive and I feel inclined to follow it. I therefore find and rule that the order for a representative suit granted by the Registrar was proper.

On the second level which deals with service of notice on all the persons intended to be party to the suit, I wholly agree with the submission of counsel for the defendant that the list of all such persons should have been advertised in the newspaper so as to enable them respond in accordance with rule 8 (2) of Order 1. I am fully persuaded by the authorities cited by counsel for the defendant particularly the case of ***Ibrahim Buwembo*** (supra) and the passages in ***Mulla, The Code of Civil Procedure*** (supra) that the provisions of Order 1 rule 8 is mandatory and must be fully complied with. In this case, it was only partly complied with by obtaining permission to bring a representative suit. A very fundamental part of it in respect of giving notice was not fully complied with. No intended plaintiff could be said to have been informed about the intended institution of the suit when no specific name was mentioned.

I wish to point out that this was not public interest litigation where the four plaintiffs were suing on behalf of all the electricity consumers in Uganda. Specific mention was made of 50,000 people (in respect of which the representative order was granted) who ought to have been listed in the advertisement. It would also be wrong to assume that the 19,427 people whose names had earlier been put in the newspapers by another law firm for a completely different reason would automatically be incorporated on the list of intended plaintiffs by mere reference to the newspaper advertisement where their names had appeared about six months prior to the date of the notice. The authority of ***Johnson v Moss*** (supra) is inapplicable at this level because it dealt with the issue of naming the parties at the application stage and not in the notice/advertisement.

I find that failure to list the intended plaintiffs whatever their number was contravened the provisions of Order 1 rule 8 and the effect is fatal in that no notice was actually given to them as required by the rules. I believe the Rules Committee by including rule 8 (2) of Order 1 could not have intended that such blanket notice that do not name any person would amount to proper service of notice for purposes of enabling any of them to apply to the court to be made a party to the suit. I find this an unacceptable situation where spirited persons purport to represent a group of persons without their knowledge or consent as described in the case of **Rwanyarare** (supra).

In the circumstances, I find and rule that no effective notice was given to the intended plaintiffs and consequently, Order 1 rule 8 was not fully complied with. In the result I order that all the unnamed plaintiffs, specifically the 50,000 and the 19,427 be struck out of this suit such that the only plaintiffs left are the four who are named in the plaint.

However, in view of the issue raised by counsel for the defendant regarding another suit filed in this court by the 3rd plaintiff, Mr. M. Idumu, I will first consider the submissions of counsels in relation to S. 6 of the CPA before I finally determine which plaintiff should remain in this suit. But before I do that, I first need to deal with another aspect of the objection concerning the issue of same interest.

Both counsels agreed that the issue of same interest is one of the key requirements of Order 1 rule 8 (1) and I do agree with them. To this end, ***Mulla*** (supra) states that; "*the expression "same interest" must be distinguished from the expression "same transaction". What is required under this rule is that the parties must have the same interest; it is not sufficient that their interest arise from the same transaction*".

It therefore follows that a court that is considering an application for permission to bring a representative action must satisfy itself that the interest of the parties sought to be represented by the applicant(s) are the same as that of the applicant(s).

I believe in the instant case the Registrar must have addressed her mind to the submission of counsel for the plaintiffs that they were all consumers of electricity supplied by the defendant and agreed that indeed there was a common interest. At that stage there was no plaint to show the nature of the claim and the prayers. Counsel for the defendant is now contesting the issue of same interest upon looking at the claim and I believe he is justified to do so because he did not have the right to appear at the hearing of the ex parte application to contest the same.

While I agree with counsel for the plaintiff's argument that the plaintiffs have the same interest in so far as they are all consumers of electricity supplied by the defendant who are affected by its acts or omissions, I am persuaded by the submission of counsel for the defendant that some aspects of the claim and prayers would make it difficult for this court to hear and determine this suit in a representative capacity. I am of the considered opinion that peculiar evidence would have to be adduced by each of the plaintiffs to prove some of the claims against the defendant. For example, as argued by counsel for the defendant, it would be difficult for this court to order damages for mental suffering without hearing the peculiar evidence on how each of the plaintiffs was affected.

In the circumstances, I find that while the plaintiffs are stated to be having the same interest in that they are all consumers of electricity supplied by the defendant and as such affected by its actions, the nature of some of the remedy sought did not make this case very appropriate for a representative action. However, in view of my order that the rest of the plaintiffs who were not

named be struck out, this finding will not affect this suit in that it is no longer a representative suit.

Finally, I will now consider the submissions on section 6 of the CPA, which as rightly pointed out by counsel for the defendant, prohibits any court to proceed with trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where that suit or proceeding is pending in the same or any other court having jurisdiction in Uganda to grant the relief claimed.

Counsel for the defendant submitted that the issues in Mr. M. Idumu's claim in HCCS No. 24/2010 were substantially the same as those in this suit. He prayed that either the aspect of Mr. Idumu's claim in this suit be stayed pending the disposal of HCCS No. 24/2010 or be withdrawn by the plaintiffs' counsel.

Counsel for the plaintiffs on his part contended that S.6 of the CPA was not applicable in the circumstances of this case because HCCS No. 24/2010 had a different party as opposed to this case which has numerous parties in a representative action while the other one had only Mr. Idumu suing the defendant. He argued that the Key aspect was that the parties and the issues had to be exactly the same and concluded that this was not the case here.

None of the parties supplied the pleadings in HCCS No. 24/2010 to support their arguments. However, in the interest of ensuring that justice is done in this matter, this court accessed the said file from the court registry and looked at the plaint. Comparison of the two plaints indicate that while Mr. Idumu filed HCCS No. 24/2010 against the defendant for breach of contract, professional negligence, special and general damages for breach of contract and interest, he again joined the plaintiffs in this suit for; declaratory orders and general damages for breach of contract among other things, compensation for overcharges, mental suffering and injustices occasioned to the plaintiffs. In fact Mr. Idumu's case as stated in HCCS No. 24/2010 was singled out in paragraph 14 (c) of the plaint and in a way reproduced in this suit.

I believe this is forum shopping which must be strongly discouraged by this court because it could lead to court coming up with two contradictory judgments over the same issues. I do not think staying this suit as prayed in the alternative by counsel for the defendant will properly address this ill. I would instead first of all order that counsel for the plaintiffs should withdraw the aspect of the claim by Mr. Idumu from this suit.

Secondly, in order to avoid multiplicity of suits and a situation where this court might end up making two contradictory judgments in respect of the same issues, and in exercise of the powers of this court under section 98 of the CPA; section 33 of the Judicature Act and Order 11 rule 1 of the CPR, I order that this suit be consolidated with HCCS No. 24/2010 so that all the issues therein are heard and determined by the same judge to save time and costs.

In the final result, I uphold most of the aspects of the preliminary objections raised by counsel for the defendant as indicated above and order as follows:-

(1) . That the unnamed plaintiffs who are stated to number 50,000 and/or 19,427 be and are hereby stuck out from this suit.

(2) . The aspect of the claim by Mr. Marcellinus Idumu be withdrawn from this suit.

(3) . This suit, that is, HCCS No. 188 of 2010 be consolidated with HCCS No. 24 of 2010.

(4) . Costs of this Preliminary Objection be in the cause.

I so order.

Hellen Obura

JUDGE

23/08/2011

Ruling read in draft in open court in the presence of:

1. Mr. Richard Omongole for the plaintiffs
2. Mr. Paul Mwesigwa and Mr. Joseph Matsiko holding brief for Mr. Jet Tumwesigye for the defendant.

Ms. Ruth Naisamula-Court Clerk.

JUDGE

23/08/2011