THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

CIVIL SUIT NO 371 OF 2010

CANSTAR RAGS (U) LTD)..... PLAINTIFF

VERSUS

RIYAZ MITHANI)..... DEFENDANT

BEFORE HONOURABLE MR JUSTICE CHRISTOPHER MADRAMA

RULING

This ruling arises from a preliminary objection to the suit by the defendants counsel. The preliminary objection was presented as a point of law in which the defendant contended that the plaintiff has no cause of action against the defendant because the plaintiff was not privy to the agreement it sought to enforce. That the agreement the plaintiff relied on to bring the suit was executed by different parties and the plaintiff was not privy to that contract.

The background to the preliminary objection is that the current suit was filed by the plaintiff against the defendant for special damages of **US $ 713,631**, general damages and costs of this suit. It is pleaded in the plaint that the plaintiff carried out a retail business in second-hand clothes in Kampala and the defendant was the managing director of the plaintiff company at all material times. That the defendant was in charge of sales which involved the supervision of the plaintiff company, procuring and selling second-hand clothes and accounting for the sale proceeds to the plaintiff company. It is pleaded further that defendant in the ordinary course mismanaged the plaintiff company by failing to render a true and correct account of the business to the plaintiff.

Paragraph 4 (d) of the plaint alleges that by an acknowledgement made on the 7th of June 20 the defendant represented to one Mr. Bahadur Karmali one of the shareholders of the plaintiff company that the company had stock in trade worth **United States dollars 2,170,369** and outstanding liabilities of **United States dollars 1,524,240**. That the defendant further represented that the average value of each container was not less than **United States dollars 23,500**. Though the plaint pleads that the acknowledgement is annexed to the plaint as annexure "A", the said annexure is not attached to the plaint. The plaint further pleads that the plaintiff audited its business activities and discovered that the defendant had falsely rendered an incorrect and incomplete account of the stock in trade in that the actual value of the containers was **United States dollars 1,687,657** and not **United States dollars 2,170,370**. Though the audit report is alleged to have been annexed and marked as annexure "B" and copies of invoices of the various

containers were pleaded as marked annexure 1 – 90, none of the said documents were attached to the court copy of the plaint.

The plaint also pleads that the defendant wrongly and in breach of contract continues to hold out or be an agent of the plaintiff and is collecting containers and monies owing to the plaintiff from customers and refused to remit proceeds arising there from to the plaintiff company. That the defendant represented that receivables worth **US $ 270,918** were due to the company but the plaintiff has failed to trace any documents concerning and entitling them to it and holds the defendant liable. The plaint alleges that the defendant converted US $ 713,631 to his own use and that the plaintiff is entitled to this money. The plaintiff claims refund of the said money and interest at the commercial rate of 8% per annum from the date of conversion with costs of this suit and such further relief as the court may deem fit to grant.

In his written statement of defence the defendant denies the plaintiffs claim in the plaint and avers that he was a shareholder in the plaintiff company holding 25% before he was maligned the majority shareholder Mr. Bahadur Karmali. The WSD avers that the then shareholders holders in the plaintiff company had irreconcilable differences leading to a series of unfortunate events including but not limited to the imprisonment of the defendant and a winding up petition filed by the defendant. These alleged unfortunate events were cited in the preamble of a memorandum of understanding to resolve the impasse between the two erstwhile shareholders (Mr. Bahadur Karmali and Riyaz Mithani the defendant). The memorandum of understanding was attached and marked annexure "A". It is not necessary to go into the details of the memorandum of understanding as averred in the written statement of defence. What is material is that the memorandum of understanding is between Mr. Bahadur Karmali and Riyaz Mithani the defendant. The agreement generally dealt with the how the parties were to divest themselves of their interest in three sister companies registered in Uganda, Kenya and the Democratic Republic of the Congo respectively.

The parties to the memorandum agreed that the defendant would relinquish his shareholding in the plaintiff company and the sister company in the Democratic Republic of Congo and withdraw his winding up petition filed in the High Court as company cause No. 22 of 2010. Additionally the defendant would set aside an injunction stopping the plaintiff from selling its property pending resolution of the winding up petition. The defendant undertook not to deal directly or otherwise with suppliers listed in the appendix (3) of the memorandum of understanding and to relinquish all vehicles and documents belonging to the plaintiff company. In return Mr Bahadur Karmali was supposed to relinquish his interest in the plaintiff’s sister company in Kenya in addition to paying the defendant 40,000 United States dollars in form agreed under clause 9 of the memorandum of understanding. The defendant avers that the plaintiff through its director/majority shareholder (Bahadur Karmali) reneged from the terms set out in the memorandum of understanding and instead filed a suit as a ruse to escape its obligations under the terms set out therein. Other averments revolve on the implementation of the terms of the above mentioned memorandum of understanding.

Alternatively the defendant claims that the figures in the memorandum of understanding were approved by the majority shareholder and the plaintiff was barred by the doctrine of estoppels from raising it. The defendant denies having received any money as averred in the plaint. The defendant finally averred that it would raise a preliminary objection to the suit for not disclosing a cause of action against the defendant.

The defendant counterclaimed against the plaintiff and Mr Bahadur Karmali as second defendant to the counterclaim for specific performance of the memorandum of understanding including but not limited to recovery of United States dollars 40,000 arising from the memorandum of understanding, general damages, interest thereon and costs of the suit.

The counterclaimant alleges that he performed his obligations under the memorandum of understanding but the second counter defendant reneged on his obligations to relinquish his interest in the first counter defendant sister company CANSTAR Rags (K) Ltd, refusing to pay the counterclaimant United States dollars 40,000 in the mode agreed under the agreement. That the first and second counter defendant's breach of the memorandum of understanding has denied the counterclaimant a means of livelihood caused him anguish for which he seeks general damages. The counterclaimant further seeks recovery of his United States dollars 40,000 under the MOU, interest thereon at 25% from the date of breach until payment in full plus the costs of the suit and counterclaim.

In reply to the counterclaim the plaintiff/first defendant to the counterclaim filed a defence to the counterclaim and avers that the defendant/counterclaimant in the MOU agreed inter alia to guarantee that he shall immediately handover all documents relating to the goods of the company in his possession and provide full disclosure of all other documents relating to the company and also give full disclosure of all information relating to goods of the company that may presently be in transit. That he further guaranteed that the average value of each of the containers present in stock was no less than United States dollars 23,500. That he had further warranted that the only liabilities of the company at the date of signing the memorandum of understanding were those listed and that he would personally indemnify the company. That he acknowledged that each party had not relied on any representation or warranty apart from those expressly set out the MOU.

The plaintiff/defendant to the counterclaim further contended that the defendant was in breach of those guarantees and warranties as he did not make a full disclosure yet he was in possession of the relevant documents and by virtue of his position as the managing director when the plaintiff was a majority shareholder and as such could not have acted inadvertently or approve the value of the stock in trade.

The plaintiff further contends that value of stock in trade in the preamble was a valid representation and errors in this presentation constitute a misrepresentation and not a mistake on the part of the defendant who should be liable for misrepresenting its true value. The plaintiff

further contended that it never guaranteed the averred figure of United States dollars 2,170,369 by virtue of being a shareholder. As far as the counterclaim of United States dollars 40,000 is concerned he averred that the defendant would be put to strict proof that he had provided consideration for the shares allotted to him. Lastly and in the further alternative but without prejudice the plaintiff states that the sum of United States dollars 40,000 was deducted as spelt out in the audit report annexed and marked in the plaint as annexure "A". The plaintiff prayed that the counterclaim be dismissed with costs.

At the proceedings the plaintiff was represented by Counsel Yesse Mugenyi while the defendant was represented by Counsel Richard Oketcha. Furthermore the plaintiff company was represented in the proceedings by its general manager Mr. Hussein while the defendant/counterclaimant appeared in person.

Richard Oketcha, counsel for the defendant/plaintiff objected to the suit on a point of law. He contended that the suit is brought by Canstar Rags (U) Ltd which is a limited liability company. Secondly the suit is premised on a memorandum of understanding executed between Mr. Bahadur Karmali and the defendant. He pointed out that the plaintiff Messrs Canstar Rags (U) Ltd is not a party to the said memorandum of understanding. He contended that many judicial authorities hold that only a party to an agreement or contract can sue to enforce it or base a cause of action on it. He conceded that this point of law affects the defence because the defendant has also filed a counterclaim.

Counsel for the defendant relied on the case of **Scrutons vs. Midland Silicones Ltd [1962] 1 ALL ER 1** and specifically quoting from page 6 of the judgement where it was held that it was an elementary principle of common law that only a party to a contract can sue on it. He contended that the plaintiff in this suit was not a party to the contract that forms the basis of the so called misrepresentation in the suit and it therefore cannot sue on it. Secondly counsel cited **Shiv Construction Ltd vs. Endesha Enterprises Ltd [1999] EA** page 329 where the Supreme Court of Uganda agreed with the principle that if a contract is executed for the benefit of a 3rd party, to enforce it, parties who have entered it can seek to enforce the benefit of a 3rd party in the agreement. The principle of law does not enable 3rd parties to assert rights arising from the contract even though they may be beneficiaries under it. The contract remains enforceable and binding between the promissor and promisee. The promisee can seek a remedy of specific performance. He submitted that the plaintiff cannot enforce terms of the memorandum of understanding entered between the Defendant and Mr. Bahadur Karmali. Counsel was of the further opinion that the counterclaim would suffer the same fate.

In reply Counsel Yesse Mugenyi submitted that the plaintiff’s pleadings are clear. Paragraphs 4 (a), (b), (c) (d), (e), (f), (g), (h), (i) and (j) of the plaint show that the plaintiff does not rely on the contract only. The paragraphs plead that the defendant mismanaged the plaintiff’s business and failed to manage the plaintiffs company. Paragraph “F” annexes an audit report. He contended that the audit report raises a number of questions relating to mismanagement of the plaintiff

company. He contended that paragraph G of the plaint alleges further that the defendant collected monies owing to the defendants company and has refused to remit the money to the plaintiff company.

Counsel also pointed out that paragraphs “I” and “J” create causes of action for conversion and are questions on evidence. He disagreed with his learned friend’s contention that the suit was based solely on contract. He further pointed out that he had submitted two audit reports and they are on the court record though he has thus far had no opportunity to avail to the court the memorandum and articles of association of the plaintiff company. He submitted that the said memorandum and articles of association of the plaintiff company vest the Managing Director of the company with powers to operate, administer the plaintiff company.

Counsel contended that the MOU in question was signed in two capacities. The first paragraph of the plaint avers that the parties are shareholders in the plaintiff. Paragraph 3 further avers that the second party is the Managing Director and had signed as a shareholder and MD of the plaintiff. He contended that there was a fiduciary relationship that is established between the management of a company to manage the company properly and to render a proper account thereof.

The plaintiff’s counsel referred to the case, of **Trevor Price and Raymond Kelsall (1957) EA 752** and submitted that in that case the Court of Appeal in the judgment read by Sir Kenneth O’Connor JJA discussed whether a director’s conduct creates a constructive or resulting trust. The background to the case was that the appellant and respondent were directors and substantial shareholders in the appellant company. Before the company was incorporated they had agreed that a lease should be created in favour of the company that was being incorporated. Unfortunately when the company was incorporated one of the directors created a lease in his own name and concealed that fact from the company. The Court of Appeal held that the respondent was in a fiduciary position vis a vis the company from the start. He was in breach of that duty when he acquired a title in his own names after incorporation of the company. Counsel referred to pages 764 paragraphs G – I where the court refers to the principles of constructive trust and when it operates. The court went further to hold at 765 paragraphs B that the directors of a company are its executive officers. Also at page 776, The Ag Vice President of the court of appeal, said that the contract was sufficient to prove and the case could be property disposed of on the basis of a trust springing from those contracts. But if he was wrong in that view and no enforceable contract existed between the respondent and the company, the company would still be entitled to succeed on the basis of a trust arising from the conduct and the relationship between the parties.

Counsel contended that even without a contract the court could have implied a trust and the company should not have been dismissed from the suit. He further cited **Bishop Gate Investment Management Ltd vs. Maxwell [1994]** 1 All ER page 261. In this case the Court of Appeal of England discusses the doctrine of constructive trust and found that the defendant was in breach of its duties and it held that the defendant had given away company assets for no

consideration to a private family company for which it was a director. The cause of action was not constituted by failing to make inquiry but by the improper transfers which had caused the company a loss. In the case of **Stein Vs Blake and Others [1998] 1 ALL ER** page 724, whereby the Court of Appeal held that the loss sustained by a shareholder by a diminution in the value of shares by reason or misappropriation of the company assets was a loss recoverable only by the company and not by a shareholder who had suffered no loss distinct from that suffered by the company. Only the company could bring an action and not the plaintiff.

Counsel submitted that in this case the pleadings of the plaintiffs company are very clear. He referred to the audit report page 3 which indicates that there was certain asserts due to the company. He submitted that there is also an acknowledgement by the defendant when he executed the contract. That contract put the defendant in a position of constructive trust. That the defendant did not sign only as a shareholder but also as a managing director as stated in the preamble. Consequently it can be inferred from his from his conduct and the relationship between the parties that the defendant held certain assets of the company in trust and if he was in breach of that trust he was in breach of the fiduciary duty to the company. Referring again to HALSBURY'S Laws of England 3rd Edition at page 307 he submitted that the principle of law is that a director is liable to compensate a company for any losses caused by him. The plaint alleges loses caused by the defendant who was a managing director. He prayed that it is only proper that court allows the case to be determined on its merits.

In rejoinder counsel Oketcha contended that his learned friend had misrepresented that there were two audit reports before the court. Paragraph 4 (f) of the plaint refers to an audit report marked "B" but when the defendant was served this annexure was not attached. He further contended that this annexure was examined by him during the last hearing and is a document dated 10th February 2010. This date was way before the memorandum of understanding in issue was executed. The memorandum is dated 23rd of July 2010 and is the basis of the suit referred to in paragraph 4 (e) of the plaint and was entered into with the full knowledge of the audit in paragraph 4 (f). He further contended that this is the only audit report properly before the court and which the court can look into. The second misrepresentation is that the first party in the memorandum of understanding signed in more than one capacity.

Counsel submitted that nowhere in the MOU or its preamble, body or signing page is this indicated. In the preamble the MOU gives a background that led to the signing of the MOU.

The defendants counsel further submitted that the authorities cited by is learned friend were distinguishable in that there is no doubt that those directors in the cases cited had a duty and the company can sue them. The current case is distinguishable in that the cause of action is clearly stated in paragraph 4 of the plaint and is based on a memorandum of understanding which his learned colleague rightly called a contract between two parties.

The contention of the defendant is that the plaintiff is not a party to that transaction and cannot sue based on the two authorities cited earlier. As far as the preamble to the MOU is concerned counsel submitted that the same preamble at paragraph 4 and 5 and the last paragraph of the MOU gave a background to the MOU. The plaintiff cannot sue on the basis of this MOU. Even if the court examined the audit report counsel submitted that it would show that it is not the basis on which the suit is brought. He invited the court to look at findings in the audit report. Briefly on the last page of the audit report page 5 1.2.15 refers to goods on transit. It simply says that goods on transit worth 2.5 million were not verified. Auditors concluded that Mr. Riyaz should account for the goods and any accounts after that period. A reading of report is that he was to answer queries and it cannot form the basis of a suit against him.

Finally the defendants counsel submitted that in paragraph 4 of the plaint counsel submitted that the plaintiff keeps referring to representations allegedly made on receivables. These were representations made in the MOU and not in the audit report. Based on what the plaintiff calls representation in the MOU are what formed the basis of this suit. Counsel reiterated his submissions that only a party to a contract can sue on it but not even a beneficiary can sue who is not a party.

I have carefully gone through the pleadings which I have detailed above. I have also considered the spirited submissions of the counsels on the question of whether the plaintiff's suit can be maintained on the ground of locus standi.

I first of all would like to comment on the pleadings of the parties. The plaintiffs plaint filed in court refers to annexure "A", "B", invoices of containers marked annexure 1 – 90. The plaint further refers to a copy of a letter annexure "B" attached to paragraph 4 (g) of the plaint but none of the said documents are on court record. Order 7 rules 14 of the Civil Procedure Rules requires the plaintiff to present the plaint in court together with documents upon which he or she sues or to enter the document in a list attached to the plaint which documents will be produced during the trial. Order 7 rules 14 above has to be read in conjunction with order 7 rule 18 of the Civil Procedure Rules which forbids the admissibility of any document in evidence not attached to the plaint or listed therein without leave of court. In practical terms and in considering this objection the court is limited by the very fact of omission to attached the document relied on and has to look only at the averments yet paragraphs 4 (e), (f), (g) all refer to documents which are supposed to be part of the pleading. For instance paragraph 4 (e) refers to the acknowledgement of the defendant dated 7th June 20. In what document is this alleged acknowledgement embodied? This is the crux of the problem confronting the court. In examining a preliminary point of law without calling evidence the court has to examine the plaint and attachments to it only and assume that everything averred in it is true. The court does not look at the defence. Neither can documents not attached or adduced or listed be relied on without leave of court in arguing a preliminary point of law. This is the case where evidence has not been adduced. A point of law of this nature may fall under order 7 rule 11 or order 15 rules 2 of the Civil Procedure Rules.

An objection on a point of law may be made under order 7 rule 11 (a) of the Civil Procedure Rules which provides that a plaint shall be rejected for "(a) disclosing no cause of action". Or order 7 rules 11 (d) which also provide that the plaint shall be rejected "where the suit appears from the statement in the plaint to be barred by any law".

The preliminary objection of the defendant may as well be that the suit is barred by law. It is a contention that only a party to a contract may sue on it and therefore it may be argued on the premises that no cause of action is disclosed under order 7 rules 11 (d) of the Civil Procedure Rules.

Thirdly where the court is of the opinion that an issue of law would dispose of the suit entirely or substantially, the court shall try those issues first in accordance with order 15 rules 2 of the Civil Procedure Rules. As far as the examination of a plaint is concerned the case of **Auto Garage versus Motokov (1971) EA 514** settles the law that the provision that a plaint be rejected for disclosing no cause of action is mandatory and that a plaint which discloses no cause of action is a nullity and cannot be amended. In determining whether a plaint discloses a cause of action the court examines whether the plaint alleges that the plaintiff enjoyed a right, that the said rights has been violated and the defendant is liable for the violation. Where the above three elements are pleaded and the facts are assumed to be true, a plaint will be held to disclose a cause of action. In the case of **Kiggundu v. Attorney General Civil Appeal NO 27 of 1993** it was held that there is a distinction between an application to reject a plaint and setting down a point of law as an issue for argument as a preliminary point of law. The distinction is that under order 7 rule 11 (a) an inherent defect of the plaint is shown while in the latter case, it would be argued on a point of law that the suit cannot be maintained. This distinction is sometimes mixed up because the point of law may fall under order 7 rule 11 (d) or order 15 rules 2 of the Civil Procedure Rules. Sometimes applications are filed to argue a point of law under order 6 rules 28 and 29 of the Civil Procedure Rules which provides as follows:

> "28. Points of law may be raised by pleading.
>
> Any party shall be entitled to raise by his or her pleading any point of law, and any point so raised shall be disposed of by the court at or after the hearing; except that by consent of the parties, or by order of the court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing.
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> 29. Dismissal of suit.
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> If, in the opinion of the court, the decision of the point of law substantially disposes of the whole suit, or of any distinct cause of action, ground of defence, setoff, counterclaim, or reply therein, the court may thereupon dismiss the suit or make such other order in the suit as may be just."

In the above quoted rules, evidence or facts could have been agreed or attached in a formal application by affidavit evidence. In the case of **Opio v Attorney General (1990 – 1991) 1 KALR 66** it was held that a suit which is time barred must be rejected. This follows the case of **Iga v Makerere University [1972] EA 65** on the same point. In the case of **Attorney General versus Oluoch 1972 EA 392** the East African Court of Appeal, per Spry Ag. President decided that in determining whether or not a suit discloses a cause of action, one looks, ordinarily, only at the plaint and assumes that the facts alleged in it are true. However the court determined a preliminary point of law by relying on a provision of the Government Proceedings Act and held that no suit lies against the Government in respect of acts done in the discharge or purported discharge of judicial functions. In other words the suit was barred by law.

In the plaintiffs plaint all the essential ingredients of a cause of action have been pleaded. The plaintiff company sues the defendant for accountability as a director and also for conversion. It is not apparent from the pleadings that the suit is based solely on the memorandum of understanding relied on by the defendants counsel to raise the preliminary objection. Consequently the question of necessary parties to the suit which is premised on the memorandum of understanding cannot be argued without adducing additional evidence about the memorandum of understanding in issue. Moreover the memorandum of understanding is annexed to the written statement of defence and not the plaint. The authorities on cause of action require that the facts for the point of law be pleaded in the plaint which facts are assumed to be true. If it is to be argued as a point of law under order 15 rules or order 7 rules 11 (d), the facts should be agreed or indeed averred clearly in the plaint. The list of documents in the plaint refers to a memorandum of understanding dated 27th of July 2010. However in the absence of its being admitted in evidence or annexed, it cannot be relied on to argue the point of law raised by the defendant. Perusal of the plaint as it is does not have the said document. The document could have been admitted during the scheduling conference of the parties or agreed together with the necessary facts. This was not done.

Notwithstanding the point of law, the plaint alleges that the defendant was its managing director who was in charge of sales of its goods and involved in the supervision of the Company by procuring second-hand clothes, selling them and collecting the sale or proceeds due to the plaintiff from the customers, remitting the proceeds to the plaintiff and rendering an account to the plaintiff. The plaint avers that in the course of the business the defendant mismanaged the plaintiff company and failed to render a true and correct account of the business of the plaintiff.

The plaint avers that by an acknowledgement made on the 7th of June 2010 the defendant represented to one Mr. Bahadur Karmali one of the shareholders of the plaintiff company that the company had stock in trade worth United States dollars 2,170,369 and outstanding liabilities of United States dollars 1,524,240. The plaintiff further avers that the defendant further represented that the average value of each container was no less than United States dollars 23,500. The copy of the said acknowledgement is however not attached. Counsel for the defendant strongly submitted that this was contained in the memorandum of understanding. However the

memorandum of understanding was not attached though pleaded in the plaint. The one attached to the written statement of defence is dated 23rd of June 2011 and not 7th of June 2010 as averred in the plaint. Moreover the plaintiff's counsel purports to rely on an audit report. Again this was hotly contested. As to whether the audit report will be admitted in evidence is yet to be determined.

Before I take leave of this matter I must observe that the memorandum of understanding is indeed attached to the written statement of defence. When it is admitted in evidence and facts are agreed, it raised a lot of questions. For instance it refers to a winding up proceeding against the plaintiff which was to be withdrawn. Was this withdrawn? The withdrawal affects the plaintiff company. Admittedly the point of whether the plaintiff has a standing to sue in this matter is a serious question of law and the answer of the plaintiff to the objection as well should not be taken into account in my decision without the necessary evidence.

In conclusion, in the absence of evidence properly adduced or an agreement as to the clear facts from which the preliminary point of law may be argued, the point of law would be premature and I must reserve it as an issue for trial. In other words evidence needs to be adduced to establish facts before the point of law can be raised. In the case of **NAS Airport Services Limited v The Attorney-General of Kenya [1959] 1 EA 53, being the** decision of Court of Appeal sitting at Nairobi comprised of Sir Kenneth O'Connor P, Gould and Windham JJA. It was held that where facts are in dispute a preliminary objection should not be upheld until the factual dispute is resolved. The court states at pages 58 – 59 as far as an equivalent of order 6 rule 29 of the Civil Procedure Rules is concerned:

> "Clearly the object of the rule is expedition. But to achieve that end the point of law must be one which can be decided fairly and squarely, one way or the other, on facts agreed or not in issue on the pleadings, and not one which will not arise if some fact or facts in issue should be proved; ..... It is very rarely that the facts are so clearly and definitely stated in pleadings (in this case supplemented by the clear and precise language of a document in writing–namely, the contract between the parties) that the court can say that it has all the necessary facts before it and can therefore decide the case, without hearing any witnesses or any more about it, on the pleadings and certain admitted documents."

Unless the facts are so clear as to require no evidence is when the point of law of the defendant should be tried as a preliminary point of law. In my judgment it is premature to argue the point of law advanced by the defendant and I will not make comments about it.

Secondly the defendant was of the view that the counterclaim would equally be affected by the point of law. Whereas the plaintiff company replied to the counterclaim, it appears from the body that the second defendant to the counterclaim Mr. Bahadur Karmali did not. The averments suggest that he answered some of the claims but he is not named in the reply to the counterclaim as a party.

Order 8 rule 9 of the Civil Procedure rules provides that a person not already a party to the suit who is served with a defence and counterclaim as aforesaid must appear in the suit as if he or she has been served with summons to appear in the suit. Secondly order 8 rules 11 of the Civil Procedure Rules requires the added party to the counterclaim other than the plaintiff to file a reply within 15 days as if served with a plaint.

As noted above counsel for the defendant had sought leave of court to withdraw the counterclaim against the defendant. However a suit cannot be withdrawn without leave of court where a defence has been filed unless withdrawn by consent under order 25 of the Civil Procedure Rules. In my judgment, the question of whether the counterclaim should be withdrawn should await a proper address when all necessary facts of the dispute are either agreed or adduced. The proposed withdrawal was premised on the arguments of law and is ill founded. The defendants counsel will be given a second chance to present his prayer as I have declined to consider the same at this stage.

In the premises the questions raised in the counterclaim will be scheduled and the point of law advanced in the objection will be argued as an issue in the main suit after the necessary facts have been adduced or agreed by the parties. The suit shall be fixed for scheduling. Each party shall bear his/its own costs.

Judgment delivered in court this 23rd day of September 2011

Hon. Mr. Justice Christopher Madrama

Delivered in the presence of

Yesse Mugenyi for the plaintiff ,

Lutalo Deo holding brief for Mr. Oketcha for the Defendant

Ojambo Court Clerk

Hon. Mr. Justice Christopher Madrama