

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA,**  
**(COMMERCIAL DIVISION)**  
**MISCELLANEOUS APPLICATION NO 648 OF 2011**  
**(ARISING OUT OF CIVIL SUIT NO. 257 OF 2010)**

**1. NANKYA FARIDAH T/A OFFENDERS}**

**REHABILITATION INTERNATIONAL}..... APPLICANT/2<sup>ND</sup> DEFENDANT**

**VERSUS**

**TINASAH INVESTMENTS LTD}..... RESPONDENT/PLAINITFF**

**BEFORE HON. JUSTICE CHRISTOPHER MADRAMA**

**RULING**

The applicant who is the second defendant filed this application under order 30 rule 8 (2) (b) and 11 of the Civil Procedure Rules and section 98 of the Civil Procedure Act for orders that the her name be struck off the pleadings in as far as she is not and has never been a partner of **Offenders Rehabilitation International** or liable as such and her appearance in the court is not necessary; That service of process on the applicant in Civil Suit No 257 of 2010 be set aside and for costs of the application to be provided for. The grounds of the application are that:

The applicant was sued and served in Civil Suit No. 257 of 2010 as a partner of Offenders Rehabilitation International but the applicant has never carried on business under that name or style of Offenders Rehabilitation International. The applicant was engaged as a casual employee and as Secretary and Office Assistant in the Administration and Finance Department in a company owned by the first defendant under the company name of Offenders Rehabilitation International and her services was discharged on the 27 October 2009. The applicant was surprised later that she was served with summons to enter appearance as second

defendant trading as Offenders Rehabilitation International. The applicants continued appearance in court is not necessary as she is not and has never been a partner and has never traded in the names of Offenders Rehabilitation International. The applicant entered appearance as a person who was served, not as a partner and has never been a partner Of Offenders Rehabilitation International at any material time. Finally that it is just and equitable that this application is granted.

The deposition in opposition by Ssali Tina managing director of the respondent avers in paragraph 3 of her affidavit that the applicant was not served as a partner of Offenders Rehabilitation International. On the contrary it was pleaded in paragraph 6 (a) of the amended plaint that the applicant while in the course of her employment at Offenders Rehabilitation International, issued to the respondent a local purchase order for the supply of various merchandise. The applicant personally received the consignment when the delivery of merchandise was made by the plaintiff. The applicant admitted in paragraph 4 of the affidavit in support that she worked with Offenders Rehabilitation International and has not adduced any evidence to show that the said Offenders Rehabilitation International is a registered company owned by the first defendant. The first defendant categorically denied ever carrying on business under the said Offenders Rehabilitation International in his amended written statement of defence. The deponent in opposition avers that police investigations in the Registry of Companies revealed that the said Offenders Rehabilitation International was not a registered entity. Consequently she avers that the continued appearance of the applicant in this matter will assist the court in determining who ought to be held liable for the merchandise that was supplied by the plaintiff to Offenders Rehabilitation International. On the basis of information from counsel she avers that the applicant was added as a party in accordance with the provisions of order 30 rules 10 of the Civil Procedure Rules. That the applicant's application is frivolous and vexatious and should be dismissed with costs.

At the hearing learned Counsel Frank Owesigire represented the applicant/second defendant and learned Counsel John Kaddu represented the respondent/plaintiff.

The applicant's counsel Mr. Frank Owesigire submitted recited the laws mentioned in the chamber summons and orders sought therein. The main ground of the applicant's application is that the applicant was not and has never been a partner.

Learned Counsel for the applicant submitted that the applicant was sued and served with summons as a partner whereas she is not. Secondly she has never carried out any business under the name of Offenders Rehabilitation International. Thirdly she was engaged as a casual employee in the position of Secretary and Office assistant of Offenders International and her continued appearance in court is not necessary. Counsel submitted that she filed a written statement of defence as a person who had been served as a partner. According to paragraphs 2 and 3 of the affidavit the applicant shows that she was sued and served with summons as Nankya Farida T/A Offender Rehabilitation International. Counsel relied on the amended plaint and specifically on the description of the second defendant therein. He contended that it is the duty of the plaintiff to proceed and comply with the law under order 30 rules 5 of the Civil Procedure Rules which is a mandatory provision and requires notice stating in which capacity a person served with summons was sued. Every person served shall be served by notice in writing whether he or she is served as a partner or as a person having control or management of a partnership business. In default of the notice the person served shall be deemed to be served as a partner. Counsel further submitted that there was a default of this mandatory notice and the second defendant is deemed to be a partner of Offenders Rehabilitation International. Therefore in accordance with order 30 rules 8 (3) of the Civil Procedure Rules the issue for determination is the liability of the applicant as a partner. Counsel contended that the affidavit of the applicant denies being a partner and states that she was in casual employment in the firm. That this fact is admitted by the plaintiff in the amended plaint specifically paragraph 6 (a) and (f) and (g). Counsel contended that a Local Purchase Order (LPO) is a document issued after a contract has been sealed by partners and in this case as established through cross examination the contracting party was one Leonard Ajuk who made an oral contract with the plaintiff. And the LPO was made on terms agreed to between

the respondent and one Ajuku Leonard to which the applicant was not privy. Paragraph 6 (f) pleads that when the second defendant was arrested she confessed to being an employee and not a partner. Further under paragraph 6 (g) of the plaint avers that the goods were supplied to the firm and not the applicant who was an employee of the firm. Though paragraph 8 pleads that the defendants are liable for breach of contract, under order 30 rule (8) and (3) the applicant was not privy to the contract or instructions and therefore she was wrongly sued as a party to the contract. She did not have a controlling mind of the company but was a casual employee and her continued attendance in court was not necessary. Counsel prayed that the name of the second defendant be struck off the record and service of summons on her set aside.

In reply Counsel John Kaddu John adopted the contents of the affidavit in reply and stated that being sued as a partner is not the position. The word partner was not used in the amended plaint. Counsel referred to paragraph 4 of the affidavit in reply. It was pleaded in paragraph 6 (a) of amended plaint that the applicant while employed issued to the respondent an LPO and further in 6 (b) of the plaint it is the same applicant who received the consignment on behalf of Offenders Rehabilitation International.

Offenders Rehabilitation International is not a registered entity and order 30 rule 5 of the Civil Procedure Rules on which counsel for the applicant relied is not applicable. It is order 30 rule 10 of the Civil Procedure Rules which would be applicable. Furthermore he contended that the applicant had not adduced any evidence that she was just an employee or that the entity is registered or owned by the first defendant. Counsel submitted that the paragraph 8 of the respondent's affidavit in reply deposes that the applicant denied carrying out business in the names of Offenders Rehabilitation International. Consequently he contended that the applicant ought to satisfy the court who her boss was. He submitted that the continued appearance of the applicant in this matter will assist the court in determining who ought to be held liable. Finally counsel submitted that the first defendant has not been given an opportunity to rebut the allegations made by the applicant that he was indeed her boss and it was therefore in the interest of justice that the applicant is retained as a defendant.

In rejoinder counsel for the applicant submitted that the WSD states that the applicant was not sued as a partner of Offenders Rehabilitation International. Order 30 rule 5 is clear in that where a plaintiff defaults on notice then the person is deemed to be served as a partner. He contended that the title of the suit describes the 2<sup>nd</sup> defendant as a person T/A and that is the capacity he submitted on. Where the plaintiff defaults the rule applies and the second defendant was served as a partner. He submitted that the respondent confirms that she issued an LPO only after a conclusion of a contract between one Leonard Ajuko and the plaintiff. Moreover to say that order 30 rules 5 is not applicable in the suit is to equally disregard the title of the suit with regard to the second defendant. As far as order 30 rule 10 is concerned, it makes no difference. It confirms that the applicant was sued as a partner whereas she is not. The evidence is that she is an employee and the applicant has stated so and there is no need for an employment letter. The burden of proof is on the applicant. Counsel contended that the respondent ought to have taken certain requisite steps to commit the company. This is a matter of evidence (the first defendant's assertions as to the status of the applicant). Rules of evidence apply to compel the applicant to testify against the first defendant. She is a competent and compellable witness. Paragraph 6 (a) (f) and (g) of the amended plaint concludes that her appearance is necessary. She denies that the applicant was not sued as a partner. Finally counsel submitted that order 30 rule 7 of the Civil Procedure Rules brings out a contradiction which this court has to address and reiterated his prayer for the name of the second defendant to be struck off and for an order to be made that applicant appears as a witness.

### **Ruling**

The second defendant's application is an application to strike out her name as second defendant pursuant to the provisions of order 30 rule 8 (2) (b) and 11 of the Civil Procedure Rules and section 98 of the Civil Procedure Act on the grounds of the requirement in the rules for the mode of service of partners in a firm. The title of the plaint describes the second defendant as NANKYA FARIDA T/A as Offenders Rehabilitation International. Paragraph 3 of the plaint describes the second defendant as follows:

“The second defendant is a female adult Ugandan believed to be of sound mind carrying on business under the name of **Offenders Rehabilitation International** and upon whom the plaintiff’s counsel undertakes to effect service of court process.”

Paragraph 6 of the plaint gives the facts constituting the plaintiff’s cause of action against the defendants. It is pertinent at this stage to set out paragraphs 6 of the plaint which in which facts are pleaded in support of the suit as follows:

- “(a) On 14 October, 2009, the second defendant while in the course of her employment at Offenders Rehabilitation International, issued to the plaintiff a local purchase in order for the supply of 450 pieces of wheel Barrows and 450 rolls of barbed wire at a total cost of Uganda shillings 85,050,000/=.
- (b) On the 21<sup>st</sup> and 22<sup>nd</sup> the of October 2009, the plaintiff delivered to the offices of Offenders Rehabilitation International on MAWANDA road Kampala District the entire consignment of 450 pieces of wheel Barrows and 450 rolls of barbed wire which was received by the second defendant.
- (c) Upon returning to the said offices a few days later to collect payment for merchandise supplied, the plaintiff’s Director Mrs. Tina Ssali was shocked to learn that Offenders’ Rehabilitation International had vacated the premises on MAWANDA road.
- (d) Consequently, the plaintiff’s director filed a complaint at Kira Road police station vide SD 49/09/11/2009.
- (e) Initial police investigations revealed that Offenders Rehabilitation International was an unregistered entity and various attempts were made to trace Nankya FARIDAH who had disappeared without trace.
- (f) On or about February 2010, the second defendant was arrested by the police and she confessed that the first defendant was her employer and that he had terminated her services before closing the offices of Offenders Rehabilitation International.

- (g) It was also discovered in the course of police investigations that before the closure of the offices of Offenders Rehabilitation International, the merchandise supplied by the plaintiff to the Offenders Rehabilitation International had been transported to the third defendant's business premises in Lira and later sold off.
- (h) The first and third defendants who had gone into hiding were later arrested and charged together with the second defendant before Kampala City Council Magistrate's Court with the offence of obtaining goods by false pretences.
- (i) To date the plaintiff has not been paid for the merchandise it supplied to Offenders Rehabilitation International for which it now claims special damages;"

Order 30 of the Civil Procedure Rules makes provision for the procedure to be followed in suits by or against firms or persons conducting businesses under names other than their own names.

Firstly order 30 rule 8 (2) (b) of the Civil Procedure Rules under which the application was filed does not apply to the applicants case. This is because the rule is predicated on the old and abolished rules and practice of entry of appearance after service of summons by a person served as a partner under rule 3 of order 30. The practice of entry of appearance has since been abolished by the Civil Procedure Amendment Rules in 1998. Rule 8 envisages a person served as a partner having the option to either enter appearance as a partner and later file a written statement of defence indicating that he or she is not a partner as a defence to the claim in the plaint or where served with summons as a partner under rule 3 enter appearance and deny that he or she is a partner which appearance may be deemed to be entered for the firm. Thereafter the person who entered appearance and denying therein being a partner may apply to set aside service on him or her under order 30 rule 8 (2) (b) of the Civil Procedure Rules. Instead of applying to set aside his or her name after entry of appearance as aforesaid from the suit, he or she may opt to file a defence in which he or she denies liability as a partner or liability of the defendant firm or both. In the revised

and amended rules there is no provision for entry of appearance and the 2<sup>nd</sup> defendant having file a written statement of defence is deemed to have opted to file a defence upon being served as a partner under order 30 rules 3 of the Civil Procedure Rules. In such a defence she has a right to deny being a partner in addition to any other defence if at all available.

Without departing from my holding above, I will consider the application further. Counsel for the applicant's submission is that no notice under order 30 rules 5 of the Civil Procedure Rules was issued or served on the 2<sup>nd</sup> defendant. His contention is that because such notice has not been served, the latter part of the rule provides that the person served shall be deemed to be served as a partner. Rule 5 provides as follows:

"Where a summons is issued to a firm, and is served in the manner provided by rule 3 of this order, every person upon whom it is served shall be informed by notice in writing given at the time of the service, whether he or she is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of the notice, the person served shall be deemed to be served as a partner."

Rule 5 only applies where summons are issued to a firm, and served in the manner provided for by rule 3 of order 30 of the CPR. Rule 3 applies where persons are sued as partners in the name of their firm. This is made further clearer by rule 6 of order 30 of the Civil Procedure Rules which provides as follows: "where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm." The rule only applies, where partners have been sued in the business name of the partnership. In this case, the first and third defendants are sued in their own personal names and the issue does not arise. The second defendant however, was sued in her own names but trading as Offenders Rehabilitation International.

In MA 543 of 2011 arising out of Civil Suit No. 43 of 2010 between **V.G. KESHWALA T/A VG KESHWALA & SONS vs. MM SHEIK DAWOOD** I addressed a



similar issue in a ruling dated 9<sup>th</sup> December 2011. I noted the definition of a business name under section 1 (1) (b) of the Business Names Registration Act cap 109 as “the name or style under which any business is carried on, whether in *partnership or otherwise*”. On the other hand a “firm” means under section 1 (1) (d) “unincorporated body of two or more individuals, or one or more individuals and one or more corporations, or two or more corporations, who have entered into partnership with one another with a view to carrying on business for profit;” Furthermore section 5 of the Partnership Act cap 114 defines a “firm” to mean: “Persons who have entered into partnership with one another are, for the purposes of this Act, called collectively a firm, and the name under which their business is carried on is called the firm name.” It follows that rule 5 of order 30 of the Civil Procedure Rules apply to suits filed against the name of the partnership. Two points may be made from the amended plaint. The first one is and as submitted by the respondents counsel the plaint nowhere indicates that Offenders Rehabilitation International is a partnership. Where a person trades in a business name, such a name is registered under the Business Names Registration Act. Rule 1 of order 30 makes it very clear that partners may sue in the name of the firm. I agree with the respondents counsel that rule 10 of order 30 of the Civil Procedure Rules deals with a suit by persons carrying on business in names other than his or her own names. This negates the applicants argument that if no notice is served under rule 5 of the order, the person served shall be deemed to be served as a partner. Firstly, rule 5 applies to partnerships. Secondly rule 10 applies to persons carrying on business in other names other than their own. This includes sole proprietorship. For emphasis rule 10 is quoted herein below:

"Any person carrying on business in the name and style other than his or her own name may be sued in the name as if it were a firm name; and, so far as the nature of the case would permit, all rules under this order shall apply."

The plaint mentions that the second defendant is sued as trading in the business name mentioned therein. The plaint further indicates that the name "Offenders Rehabilitation International" does not exist. In paragraph 7, the plaintiff avers that

the defendants jointly/severally conspired to cause loss to the plaintiff for which they should be held individually or severally liable. The fact that the respondent in cross-examination admitted that the applicant was employed by Offenders Rehabilitation International does not mean that it is a partnership. The admission is based on the representations and documentation used in the local purchase order allegedly issued by the second defendant on behalf Of Offenders Rehabilitation International. At worst, entitling the suit against the second defendant as trading as Offenders Rehabilitation International would be a misnomer. However the averment in the plaint that she acted in the course of her employment with Offenders Rehabilitation International does not render the entitlement of the suit against her incompetent per se. Her actual connection with Offenders International if at all needs to be established through the viva voce evidence and not in an application of this nature. She is connected in the facts as a person who issued the LPO. It is alleged that the LPO is issued by an entity that is not registered. It is sufficient for me to observe that rule 10 does not necessarily apply to a partnership. The fact that Offenders Rehabilitation International is alleged in the plaint not to be a registered entity presupposes that the name was used fraudulently or for conspiracy to defraud and therefore the Law of Partnership, The Business Names Registration Act or even order 30 of the Civil Procedure Rules would not directly apply. The issue would therefore be whether the name is a misnomer or not. Since the second defendant was served, and she responded to the summons in her own names as entitled but trading as Offenders Rehabilitation International, no prejudice so far has been occasioned to her and she may defend herself on the merits inclusive of raising the issue of whether she's an employee of anybody as the merits of her case may disclose.

In the premises, the applicant's application to set aside her name as 2<sup>nd</sup> defendant has no merit and is dismissed with costs for the reasons given above. Ruling delivered this 25<sup>th</sup> day of January 2012.

**Hon. Christopher Madrama**

**Judge High Court/Commercial Division**

Ruling delivered in the presence of:

Counsel Frank Owesigire for the applicant/second defendant

Counsel John Kaddu for the respondent/plaintiff.

Ojambo Makoha: Court Clerk

Hon. Mr. Justice Christopher Madrama