

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT - 00 - CC - MA - 312- 2012
[Arising from High Court Civil Suit 83 of 2009]

KILEMBE MINES LIMITED ::::::::::::::::::::::::::::::::::::::

APPLICANT/DEFENDANT

VERSUS

UGANDA GOLD MINES LIMITED ::::::::::::::::::::::::::::::::::::::

RESPONDENT/PLAINTIFF

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

R U L I N G:

This is an application brought under Section 98 of the Civil Procedure Rules (CPA); Orders 7 r 11 (a) (d) (e) and Order 7 r 19 of The Civil Procedure Rules (CPR). It seeks order that

“

- 1. This Honourable Court strikes out the plaint in High Court Civil Suit 83 of 2009 for being bad in law and not disclosing a cause of action.**
- 2. This Honourable Court grants any other relief as it may deem just and appropriate ...”**

The grounds of this application are set out in the affidavit of Mr. Elisha Bafirawala State Attorney. These are generally two. First, that the Respondent is not an incorporated limited liability company and is therefore incapable of suing and being sued. Secondly, that the instant suit is barred by law, a nullity, does not disclose a cause of action and is frivolous and vexatious.

Ms. Patricia Mutesi appeared for the Applicant/Attorney General while Mr. Masembe Kanyerezi together with Mr. Bwogi Kalibala appeared for the Respondents.

Counsel for the Applicant submitted that under the head suit, the Respondent states that is a company incorporated in Uganda. She however states that on inquiry from The Uganda Registration Services Bureau (URSB), the Solicitor-General was informed by letter dated 23rd May 2012, that after making a search in the Company and Business name Register, it was established that the Respondent Uganda Gold Mines Limited was not registered with them.

That being the case Counsel for Applicant submitted that the Respondent was not incorporated or a body corporate which can sue or be sued within the meaning of section 15 of the Company Act (Cap 110).

Counsel for the Applicant then referred me to the Kenyan case of

The Fort Hall Bakery Supply Co. V Fredrick Muigai Wangoe [1959] EA 474

where it was held that an unregistered company cannot maintain an action in court because it did not have legal existence.

Counsel for the Applicant submitted this legal position was also taken in the English case of

Banque Internationale De Commerce De Petrograd V Goukassow
[1923] KB 682

Counsel for the Applicant further submitted that where a suit was filed by a none existent party such an error could not be cured by an amendment under Order 1 rule 10 of the CPR for this proposition she referred to the High Court case of

The Trustees of Rubaga Miracle Centre V Mulangira Ssimbwa

Miscellaneous Application No. 576 of 2006. She pointed out that the above decision was cited with approval by the constitutional court in the petition.

Uganda Freight Forwarders Association & Anor V Attorney General &

Anor Petition 22 of 2009.

where it was held that such a suit would be nullity.

Counsel for the Applicant submitted that the fact of non registration of the Applicant had not been controverted in which case the head suit was bad in law and hence a nullity. She further stated that the head suit discloses no cause of action and is therefore frivolous and should therefore be struck out. On costs Counsel for the Applicant submitted that on the authorities cited no prayer for costs could be sustained against a non existent company.

For the Respondent it was submitted that incorporation is a question of fact. Counsel for the Respondent submitted that under the head suit, the Respondent/Plaintiff is stated to be incorporated but erroneously incorporated in Uganda. He submitted that the Applicant/Defendant was aware of this and that it was a misnomer as a result of which no one had been misled. Counsel for the Respondent relied on the affidavit in reply of Mr. Apollo Makubuya which states that the Respondent is a foreign company – incorporated under the laws of the Province of British Columbia and Alberta (Canada). In this regard, I was referred to the copies of the Respondent’s certificate of incorporation dated 27th March, 1996 and its Article of Incorporation both annexed to Mr. Makubuya’s affidavit.

Counsel for the Respondent stated that the head suit had a history of which the Applicants were aware. He submitted that the dispute between the parties involved a Mineral Exploration and Feasibility Study Agreement between Kilembe Mines Limited and Uganda Gold Mining Limited dated the 27th September, 2004 (hereinafter referred to as “The Agreement”).

Counsel for the Respondent further submitted that the dispute involving the Agreement had progressed through an Arbitration before The Hon. (Rtd) Justice S. W. W. Wambuzi who made an arbitral award that was upheld by The Hon. Justice Irene Mulyagonja of this court.

He further pointed that the Respondent had subsequently changed its name twice. First to CANAFRICAN Metals and Mining Corporation on the 7th June, 2006. Secondly, to its current name CANAF Group Incorporated on the 3rd May, 2007. In this regard, Counsel for the Respondent submitted that an amendment to the plaint would be sought to reflect the current name CANAF Group incorporate.

Counsel for the Respondent submitted that their client through incorporated outside Uganda intends to register in Uganda as a company incorporated outside Uganda under Part X of The Company Act when they establish a place of business after the litigation of the dispute.

Counsel for the Respondent submitted that the Arbitral Award in favour of his client has now been registered as a Decree of this court and should be respected. In particular the said Decree allows the Respondent to re-enter Kilembe Mines with a 70% stake. However, he stated that the learned Attorney General was unhappy with the Decree and has treated it with contempt and proceeded irrespective of the Decree to divest the mines. He thus prayed that the application be dismissed.

I have addressed my mind to the chamber summons the affidavits for and in reply and the submissions of both counsel for which I am grateful.

The question for determination at its core is whether the head suit is properly before court. An issue has been raised as to the identity of one of the parties to suit namely; the Plaintiff. Perhaps the most basic and first step in founding a suit is the identification of who are the parties to the suit. A suit brought by or against a wrong party may embarrass or cause the delay in trial. In the case of embarrassment the suit may well be a non starter altogether. Delay on the other

hand may arise out of the need to amend which general power is provided for under Section 100 of the CPA for the purpose of determining the real question or issue raised by or depending on such proceedings. Indeed some genuine errors may arise in identifying the correct parties to suit. In the past misjoinder of Plaintiff was a ground for a “non suit” while misjoinder of a Plaintiff was the subject of a plea in abatement (see Odgers’ Principles of Pleadings and Practice in Civil Actions in the High Court of Justice. Casson & Dennis 22 ed Stevens P. 20). Today that position has been relaxed and order 1 rule 9 of the CPR provides that no suit shall be defeated by reason of the misjoinder or non joinder of parties.

That of course does not mean that the party to a suit should not be identifiable. Serious consequences flow from litigation and care should be taken to identify the correct parties so that the consequences of litigation do not fall on the wrong party. Conversely the benefits of litigation should accrue to the correct party as well. Order 7 rule 1(b) provides that the plaint shall contain

“(b) the name, description and place of residence of the Plaintiff and an address for service ...”

In this matter the plaint in the head suit states that the Plaintiff is Uganda Gold Mines Ltd and describes the Plaintiff as

“ ... The Plaintiff is a limited liability company incorporated in Uganda whose address for purposes of this suit is c/o Masembe, Makubuya, Adriko, Karugaba & Ssekatawa [MMAKS ADVOCATES], 3rd Floor Diamond Trust Building P. O. Box 7166 Kampala ...”

The reference to Uganda Gold Mines Ltd is repeated in paragraphs 2 and 8 (1) of the said plaint.

On the evidence before Court there is no company known as Uganda Gold Mines Ltd that is incorporated in Uganda as submitted by Counsel for the Applicant. For the Respondents this is said to be a mere misnomer. Paragraph 3 of affidavit of Mr. Makubuya reads in part and states the misnomer as follows

“... The reference in the plaint to incorporation having been in Uganda is a mere misnomer ...”

In other words, the misnomer is with respect to the place of incorporation the correct place of incorporation being the Province of British Columbia and Alberta in Canada.

Counsel for the Respondent in his submissions widened the misnomer (and correctly so) to cover the difference between the word “mines” in the plaint and “mining” in the documents of incorporation.

To my mind if a company is not incorporated in Uganda as it is alleged to be, then, that means that it does not exist in Uganda as a body corporate. The leading case as to effect of non-registration or incorporation in the region appears to be the decision of the Supreme Court of Kenya in **The Fort Hall Bakery** case (1959 supra). In that case the Plaintiffs brought an action for the recovery of a certain sum of money from the Defendant. During the hearing, evidence disclosed that the Plaintiffs were not registered under the Registration of Business Names Ordinance and it was submitted by the Defendant that the action was therefore not properly before the court. Justice Templeton in that case held that the Plaintiffs could not be recognized as having any legal existence, were incapable of maintaining an action and therefore court could not allow the action to proceed thus striking it out with no order to costs as the Plaintiff did not exist in law.

This case was followed in Uganda by the High Court in the **Trustees of Rubaga Miracle Centre** case (2006 supra). In that case Ag. Justice Remmy Kasule (as he then was) went further to hold

“... The law is now settled. A suit in the names of a wrong Plaintiff or Defendant cannot be cured by amendment ... the Defendant described as The Board of Trustees Miracle Centre Cathedral does not exist in law. The attempt to add Pastor Robert Kayanja, is really an attempt to substitute a non existing Defendant. The law does not allow that as in reality there is no valid plaint in the suit ...”

The Fort Hall Bakery case (supra) was also followed by the Court of Appeal sitting as the Constitutional Court in **Uganda Freight Forwarders Association case** (2009 supra) where it was held

“... It is an elementary principle of law that an unincorporated association is not a legal entity capable of suing or being sued. A suit by an unincorporated body is a nullity ...”

This also appears to be the position of the Gauhati High Court in India in the case of

The Thoubai District Farmers Association for Natural Calamities V The State of Manipur & 2 ors writ No. 978 of 2004

which was cited with approval by the Ugandan Constitutional Court.

on the other hand, Counsel for the Respondents states that this error in naming the Plaintiff in the head suit is a mere misnomer which the Applicant is aware of and can be corrected by amendment. A misnomer is defined in Black’s Law Dictionary 7th ed by Bryan A Garner at P. 1015 as follows:-

“... A mistake in naming a person, place or thing especially in a legal instrument. In federal pleading - as well as in most states - misnomer of the party can be corrected by an

amendment, which will relate back to the date of the original pleading ...”

The authors of “ODGERS ON PLEADINGS AND PRACTICE” (supra) at pages 174 – 175 illustrate this as follows

“... If any party to the action is improperly or imperfectly named on the writ and no change of identity is involved, the misnomer may be corrected in the statement of claim by inserting the right name with a statement that the party misnamed had been sued by the name on the writ e.g. ‘John William Smythe’ sued as ‘J. M. Smith’. The Defendant cannot take advantage of such alteration (pleas in abatement of misnomer were abolished as long as 1834); but difficulty may arise in executing a judgment unless the Plaintiff amends the writ. The author also notes that where a Defendant has executed a deed by a wrong name, it is right to sue him by the name in which he executed it ...”

This also appears to be the position in the United States of America. The authors James Buchwalter JD (et al) in the encyclopedia of US Law **American Jurisprudence**, second edition (62 B Am. Jur. 2d process #96) note that when businesses are sued, it is not uncommon for the Defendant to be stated inaccurately. They write that if the name given approximates the intended party’s correct name and it is unlikely that another company exists bearing the incorrect name or if the name given is that by which the company is commonly known, an amendment can be obtained to correct the error.

As to the tests to be applied there is a fairly detailed discussion in the case of **Davies V Elsby Brothers Ltd** [1960] 3 All ER 672 (CA).

In that case Devlin L. J. held

“... It is a general principle of English law, not merely applicable to cases of misnomer, that the intention which the framer of the document had in mind when he brings it into existence is not material. In that we differ from many continental systems. In English law as a general principle the question is not what the writer of the document intended or meant, but what a reasonable man reading the document would understand it to mean; and that is the test which ought to be applied as a general rule in case of misnomer ...”

A review of the authorities show that most cases of misnomer involve misnaming the Defendant though there are also cases involving the Plaintiff making a mistake as to its own name and legal status. Amendment will ordinarily be made under Order 1 rule 10. In the case of

Reliable African Insurance Agencies V National Insurance Corporation [1979] HCB 59

It was held that amendments of a plaint under Order 1 rule 10 can only be made if they are minor matters of form, not affecting the substance of the identities of the parties to the suit.

The test of form over substance was also applied by the Court of Appeals of Arizona by **Howard J** in the case of

Hedlund V Ford Marketing Corp 629 P. 2 d 1012 (Ariz ct. App 1981).

In this present case we have to deal with Uganda Mines Ltd Incorporated in Uganda and Uganda Mining Ltd incorporated in Canada.

Paragraph 2 of the written statement of defence in the head suit filed on the 14th July 2009 suit reads

“... The Defendant denies knowledge of the existence of the Plaintiff and avers it has never had any dealings as alleged or at all with an entity called Uganda Gold Mines Ltd ...”

I must say it is not clear how this mistake of naming the Plaintiff came about. Certainly it is not a name in common usage like the fast food outlet in Kampala called “Nandos” which legally could for example be “Nandos (U) Ltd”. Could it have in reality been mistake of counsel? That position was not canvassed by Counsel for the Respondent.

Whatever the situation one company by reason of incorporation would be a Ugandan company while the other would be a Canadian Company, the reference to the words “mines” or “mining” notwithstanding.

A reasonable man would not in my view say that a Canadian can be mistaken to be a Ugandan company. That even the Applicant in its pleadings denies. Actually the said Ugandan company does not even exist legally so really cannot be mistaken for any other company.

That to my mind is a matter of substance and not mere form. The Plaintiff in the head suit was not improperly or imperfectly named it simply does not exist.

From a pleadings point of view, this is not a mere misnomer it is an embarrassment.

In the words of **Templeton J in The Fort Hall Bakery** case (supra)

“... A non-existent person cannot sue and once the court is made aware that the Plaintiff is no nonexistent, and therefore incapable of maintaining an action it cannot allow the action to proceed ...”

I agree and this holding is applicable to this matter before me. In the premise I uphold the prayers in the summons and strike out the plaint in High Court Civil Suit 83 of 2009 as being bad in law and therefore disclosing no cause of action.

The Applicant prayed that I grant other reliefs as I deem fit. As a consequential order by reason of this ruling the temporary injunction granted in M. A. 125 of 2009 if no longer tenable and is hereby lifted. All other interlocutory applications under the head suit are to abide outcome of this ruling.

Since the Plaintiff is none existent no order as to costs is made.

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Geoffrey Kiryabwire
JUDGE

Date: 27/06/2012

27/06/12

10:06 a.m.

Ruling read and signed in open court in the presence of;

- Muwanguzi Muggaga h/b for Ms. Mutesi for Applicant
- Bwogi Kalibala h/b for Masembe for Respondent

In Court

- Fred Kyagolya - G/M Kilembe
- Moses Mwase - Head Legal Services PU
- Rose Emeru - Court Clerk.

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Geoffrey Kiryabwire
JUDGE

Date: 27/06/2012