THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 34 OF 2008

NATIONAL DRUG AUTHORITY} .....PLAINTIFF

VERSUS

JOHN CHRIS BAKIZA}

T/A KABYESIZA AND CO. ADVOCATES}.....DEFENDANT

BEFORE HON MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiffs claim against the defendant as disclosed in the plaint is for Uganda shillings 99,064,000/= being money collected by the defendant's firm for the plaintiff but which the defendant failed to remit to the plaintiff plus interest at 15% per month from January 2004 December 2007, general damages and costs. The facts disclosed in the pleadings that since 30th of January 2001 the defendant firm was appointed managing agent of property belonging to the plaintiff situated at plot 59 Nkrumah Road. Under the appointment the defendant's responsibility was to collect rent from the tenants on the premises and remit to the plaintiff on agreed commission basis. The plaintiff alleges that on several occasions for the material period the defendant received the rental payments from the tenants but did not remit it to the plaintiff. Subsequently the defendant's agency was terminated with effect from 31 December 2003 and a firm of auditors Messrs Lawrie Prophet and Company was appointed to carry out a verification exercise and confirmed the correct position of the tenant’s balances by 31 December 2003. The auditor's report showed that the defendant was indebted to the plaintiff in the amount of Uganda shillings 40,060,000/= plus accrued interest giving a total of Uganda shillings 99,064,000/=. The auditors findings were communicated to the defendant who failed to give any explanation for the shortcomings. Consequently the plaintiff

suffered financial loss as a result. The plaintiff further seeks general damages and costs of the suit.

The defendants defence as disclosed in the written statement of defence is that Messrs Kabyesiza and company advocates was a sole business law farm belonging to Mr Francis Kabyesiza duly registered under the Business Names Registration Act. That the claim of the plaintiff is oppressive, frivolous and vexatious and brought in bad faith to harass and embarrass the defendant in so far as the same matter was brought in the same court in High Court civil suit number 613 of 2006 but withdrawn. It was again brought before the Parliamentary Standing Committee on Commissions and Statutory Authorities and State Enterprises which investigated the matter and their report was being awaited. Furthermore the defendant avers that the plaintiff's employees or agents negligently or in connivance accepted cash payments for rent from the suit premises when the defendant had issued express written instructions to every tenant to pay only by cheques through the rent collector. The negligently changed the rent collection instructions without recourse or notice to the defendant's firm. Thirdly the negligently accepted payment of rent directly from tenants in cash thereby creating room for tenants to pay any amounts or none at all instead of fixed monthly rentals through cheque payments. Accepting purported accountability for alleges rent payments from tenants presenting receipts purportedly issued by the defendant's firm. If there was any loss at all, it was caused by the plaintiffs own agents. Neither the interest claimed by the plaintiff was agreed upon nor awarded by the court.

The defendant counterclaimed against the plaintiff for payment of costs of Uganda shillings 2,187,000/= arising from HCCS No. 613 of 2006. On 6 October 2006 the defendant filed HCCS No. 613 of 2006 against the defendants inclusive of the first defendant on the same facts as the current suit. On 11th of June 2007 the defendant withdrew the suit with costs. The Bill of costs was taxed and allowed at Uganda shillings 2,187,000/= which has not been settled by the defendant.

In reply to the counterclaim, the plaintiff contends that the previous suit was instituted against two other defendants who were not partners in the defendant. Secondly the hearing before the Parliamentary standing committee does not provide redress to the plaintiff for the loss incurred as a result of the defendant's conduct. Civil suit number 613 of 2006 was only erroneously withdrawn against

the defendant who was not entitled to any costs because he was a partner in Kabyesiza and company advocates. Alternatively the defendant always had the avenue of applying for execution but chose not to utilise it. The counterclaim was improperly before the court as it should be the subject of execution proceedings and not a counterclaim in the suit. The plaintiff denied any collusion of its employees or agents in rent collection and avers that no such complaints were brought to the attention of the plaintiff by the defendant firm. As far as the claim for interest is concerned, the rent recoverable was for commercial purposes and interest was properly charged. Finally the defendant is solely responsible for the loss caused to the plaintiff part of which he admitted in a letter to the Standing Committee on Commissions.

At the hearing of the suit, the plaintiff was represented by Sarah Kisubi of Messieurs Kalenge, Bwanika, Ssawa and Company Advocates while Counsel John Chris Bakiza represented himself.

The parties agreed to certain facts in a joint scheduling memorandum executed by counsels on 22 April 2013. The following facts are agreed:

1. On 30th of January 2001 the plaintiff entered into a management service agreement with Messieurs Kabyesiza and Company Advocates in respect of the plaintiff’s property at plot 59 Nkrumah Road, for collection of rent on behalf of the plaintiff.
2. The agreement was signed by Dr J .C. Lule, the Acting Executive Secretary of the National Drug Authority while Chris John Bakiza signed for and on behalf of Messieurs Kabyesiza and Company Advocates.
3. On 5 November 2003 the plaintiffs Executive Secretary wrote a circular letter to all the tenants on plot 59 Nkrumah road introducing Messieurs Bageine and Company Ltd as the new real estate managing agent.
4. On the 6 November 2003 the plaintiffs Executive Secretary wrote a notice of termination of the service agreement to Messieurs Kabyesiza and company advocate citing the provisions of article 8.0 of the service agreement.
5. The plaintiff appointed Messieurs Lawrie Prophet and company to carry out an audit.
6. On 30th of September 2004 the plaintiff's external auditors Messieurs Lawrie Prophet and company auditors wrote a letter to Messieurs Kabyesiza

and company advocates demanding for accountability for Uganda shillings 41,176,000/= as collected but not remitted rental money.

7. On 6 October 2006 the plaintiff filed High Court civil suit number 613 of 2006 against Chris Bakiza, Bemanyisa, Twikirize all trading as Messieurs Kabyesiza and company advocates and claimed recovery of Uganda shillings 40,060,000/= being money collected by the defendants but not remitted to the plaintiff.
8. A decree in civil suit number 613 of 2006 was granted on 11th of June 2007 upon the plaintiff's withdrawal of the suit.
9. The Bill of costs in civil suit number 613 of 2006 was taxed and allowed at Uganda shillings 2,187,000/= in favour of the defendant.
10. The plaintiff or its advocates have not been paid the costs awarded.

The following issues were agreed upon for resolution by the court namely:

1. Whether the suit raises any cause of action against the defendant personally?
2. Whether the defendant was liable under the service agreement and if so, to what extent (quantum)?
3. Whether the defendant received the rent payments from the tenants but did not remit them to the plaintiff?
4. Whether any of the parties breached any terms of the service agreement?
5. Whether the counterclaim is tenable in law?
6. What remedies are available to the parties?

By further agreement dated 29th of April 2013, counsels agreed to file witness statement of the witnesses and have the witnesses subjected to cross examination and re-examination only.

The plaintiff produced two witnesses while the defendant represented himself and testified alone. Subsequently counsels filed written submissions.

Whether the suit raises any cause of action against the defendant personally? Secondly whether the defendant was liable under the service agreement and if so, to what extent.

The plaintiff's Counsel addressed the court on the first issue separately while the defendant addressed the court on the first and second issues together.

The plaintiff's counsel relied on the testimony of DW1 to the effect that the defendant joined Messieurs Kabyesiza and Company Advocates in 1998 when it was a sole proprietorship owned by Francis Kabyesiza. Francis Kabyesiza died in 1999 and the defendant continued to operate under the name and style of Kabyesiza and Company Advocates. The defendant stated on cross examination that he executed the service agreement with the plaintiff on 30 January 2001, three years after the death of Francis Kabyesiza. Counsel submitted that the defendant represented to the plaintiff that he was a senior partner carrying on business under the name and style of Kabyesiza and Company Advocates.

The law firm which is ordinarily created by way of partnership is constituted by its members and cannot be liable in isolation from its members because it is not a separate legal entity like a company. Quoting from **Charles D. Drake's Law of Partnership 3rd edition** at page 63 it was incorrect to say that a firm carries on business. What is correct is that it is the members of the firm who carry on the business in partnership under the name and style of the firm. The defendant admitted that he signed the service agreement as a Senior Partner in Kabyesiza and Company Advocates, which representation put him outside the ambit of any employee in the firm and place him under the category of a member of the firm carrying on business in partnership under the name and style of the firm.

The estate of the deceased partner cannot be held liable for partnership debts contracted after his or her death and section 16 (2) of the Partnership Act 2010. Both the service agreement which formed the basis of the plaintiffs claim and the work done under it were executed and done after the demise of Francis Kabyesiza and the estate cannot be held liable under the deed. Counsel further submitted that though the defendant testified that there was no partnership between himself and the late Francis Kabyesiza, he is bound by his representation to the plaintiff as "Senior Partner in the Firm" as a result of which he became personally liable for the losses incurred by virtue of his representation. Plaintiff’s counsel further relied on the doctrine of estoppels against the denial of liability by the defendant on the basis of his representation to the plaintiff. Furthermore the plaintiff’s counsel relied on the case of **Auto Garage and Another versus Motokov [1971] EA at page 514** particularly page 519 where Spry VP summarises the ingredients of a cause of action to be that the plaint must show that the plaintiff enjoyed a right, that the right has been violated and the defendant is liable. She contended that the plaintiff

enjoyed a right under the service agreement to have its rent collected and remitted to it by the defendant. The defendant while practising under the name and style of Kabyesiza and Company Advocates and as a senior partner thereof, failed to remit Uganda shillings 40,060,000/= to the plaintiff thereby violating the plaintiffs right. The defendant having held out to the plaintiff as a senior partner in Kabyesiza and Company Advocates is personally liable to the plaintiff under section 16 of the Partnership Act 2010. On the basis of the above submission, the plaintiff's suit discloses a cause of action against the defendant personally.

The second issue is whether the defendant was liable under the service agreement and if so what extent? The plaintiff reiterated submissions on the first issue to the effect that the defendant was a Senior Partner who executed the service agreement and represented himself as such. Under clause 2.0 of the service agreement, the firm undertook to provide the services according to the attached terms and general conditions. By executing the service agreement in his capacity as a senior partner with Kabyesiza and company advocates, the defendant undertook to honour the obligations in the service agreement. Counsel relied on the doctrine of estoppels by conduct as held in the case of **Chamute Agencies Co Ltd versus Mbale District Administration HCCS number 34 of 1996** for the proposition that in a contractual relationship, one party makes to the other unequivocal representation with the intention that it is acted upon and the other party acts in the belief that the representation is true, the party making the representation would be estopped from denying the contract. The plaintiff's counsel further relied on section 114 of the Evidence Act which incorporates the doctrine of estoppels. Counsel reiterated submissions that the defendant represented himself to the plaintiff as a senior partner of Kabyesiza and company advocates with the intention that the plaintiff goes ahead to deal with him in that capacity and believing that the representation was true, the plaintiff went ahead and executed the agreement. Furthermore DW1 testified that he was advised by one J.C Lule, the Executive Secretary of the plaintiff to endorse the service agreement as a senior partner. In any case the plaintiff is a senior advocate of the High Court of Uganda and ought to be the one to advise his client namely the plaintiff. He allowed himself to be misrepresented. Counsel again relied on section 16 of the Partnership Act 2010. Because at the time of execution of the service agreement, Francis Kabyesiza had passed away, the defendant was the sole surviving partner trading under the name and style of

Kabyesiza and company and remained wholly liable for the duties and obligations of the firm.

In reply the defendant, who represented himself, also filed written submissions. In the submissions he argues issues number 1 and 2 together. Issue number one is whether this suit raises any cause of action against the defendant personally. The second issue is whether the defendant was liable under the service agreement and if so to what extent?

It is an agreed fact that on 30 January 2011 the plaintiff entered into a management service agreement with Messieurs Kabyesiza and Company Advocates as set out above. In paragraph 4 (a) of the plaint, the plaintiff avers that since 30th January 2001, the defendant firm was appointed managing agent of property belonging to the plaintiff situated at plot 59 Nkrumah road. The defendant joined Kabyesiza and company advocates in 1998 as a Legal Associate but enrolled as an advocate on 22 February 2000. By the time the defendant joined Kabyesiza and company advocates, there were other practising advocates working with the said firm. Francis Kabyesiza died sometime in late 1999 and was the sole proprietor of Kabyesiza and company advocates, a fact which was within the knowledge of the plaintiffs agents or officials. The defendant is simply an individual associated with Kabyesiza and company advocates at the time when the service agreement was executed. Counsel submitted that for there to be a contract, the parties must first of all identify and know one another. There has to be mutual consent between the contracting parties and there must be consensus ad idem.

In the defendant’s case, the contract had long been negotiated by the late Francis Kabyesiza before he passed away. The defendant did not negotiate the contract but simply executed the same as an employee of the contracting firm. If the plaintiff had wanted to hold the defendant liable, it should first have ascertained the defendant's capacity to endorse the contract and his actual relationship with the contracting firm. The plaintiff is not excused by calling the defendant a "Senior Partner in the Firm" without establishing his relationship with the said firm. The plaintiff had an option not to enter into the contract and should not be allowed to plead misrepresentation. In any case particulars of misrepresentation have not been pleaded, thereby denying the defendant an opportunity to offer an explanation at an earlier stage.

The plaintiff's counsel erroneously relied on the provisions of section 16 (2) of the Partnership Act 2010. Counsel contends that the section is premised on the existence of a partnership and one of the partners dies. The law recognises the fact that when a partner or the principal in a law firm dies, it may operate the law firm but the death of the principal or partner shall not of itself make his or her executors or administrators of the estate and effects liable for any partnership debts contracted after his or her death. The defendant was neither a partner in the law firm nor was he an executor, administrator or successor in title of the late Francis Kabyesiza, the sole proprietor.

Counsel submitted that section 16 of the Partnership Act is distinguishable from the facts of the case. There is therefore no cause of action against the defendant and the principle in **Auto Garage and another vs. Motokov [1971] EA at page 514 quoted page 519** was inapplicable. This is because the defendant was a Legal Associate or officer in the contracting firm. The plaintiff failed or neglected to ascertain the locus standi of the defendant being a signatory to the service agreement. It cannot be said that the defendant was either an agent or a contracting party to be personally bound by the terms of the service agreement. Secondly counsel submitted that it cannot be said that the service agreement had been assigned to the defendant. In the case of **National Social Security Fund and Another versus Alcon International Ltd Supreme Court civil appeal number 15 of 2009**, their Lordships considered the issue of whether there was a valid assignment of contract. While assignment is permitted by the law, there has to be a fulfilment of the elements necessary for a valid contract. There must be offer and acceptance between the parties, and there must be an intention to create legal relations. The principle upholds the doctrine of privity of contract. In the case of **Linden Gardens Trust Ltd versus Lenesta Sludge Disposals Ltd and others [1994] AC at page 85 [1993] 3 All ER 417** the Court of Appeal held that an attempted assignment of contractual rights in breach of contractual prohibition is in effective to transfer such contractual rights. The object of the law was to ensure that the original parties to the contract were not brought into direct, contractual relations with third parties.

In the defendant's case, the original contracting party is Kabyesiza and Company Advocates and article 7 of the service agreement provided that the firm shall not assign, transfer, pledge or make other disposition of the contract or any part thereof

or rights, claims, obligations under the contract without the prior written approval of the Authority. There was no written approval from the plaintiff accepting transfer of the contractual obligations under the service agreement to the defendant. The plaintiff cannot therefore purport to conduct business as if there was an effective transfer of contractual obligations to the defendant personally.

Counsel further submitted that the plaintiff has failed to prove its right of claim was allegedly violated by the defendant. In the written submissions counsel for the plaintiff claims that the defendant failed to remit Uganda shillings 40,060,000/= while in the plaint it is claimed that the defendant failed to remit Uganda shillings 99,064,000/= being money collected by the defendant for the plaintiff. This submission is not only a departure from the pleadings but an irreconcilable contradiction in the pleadings at the same time. The court has no option but to dismiss the claim.

I have carefully considered the first two issues as set out above. As far as the issues are concerned, there are no factual controversies and the case revolves on the interpretation of facts.

The primary contention is whether the defendant is liable personally under the service agreement. The service agreement is dated 30th of January 2001 and is made between the plaintiff namely, National Drug Authority on the one part and Messieurs Kabyesiza and Company Advocates on the other part. It was to obtain management services for the estate of the plaintiff. Kabyesiza and Company Advocates undertook to provide services according to the terms and general conditions commencing 30th of January 2001. Kabyesiza and Company Advocates undertook to deliver to the Authority monthly reports setting forth in detail the work done under the contract. The final report was supposed to be submitted by the firm at the end of the contract period to the Executive Secretary/Registrar of the Authority. The contract was signed on behalf of the plaintiff by Dr JC Lule, the acting Executive Secretary. On the other hand it was signed on the behalf of Kabyesiza and Company Advocates by the defendant in the following manner:

> "Agreed and accepted for and on behalf of Kabyesiza and Company Advocates
>
> Name of Official: Chris John Bakiza

Designation: Senior Partner

Signature:…"

The obligations of Kabyesiza and Company Advocates included among other things the obligation to carry out all services under the contract with due diligence and efficiency and with the highest standards of professional and ethical competence and integrity (see article 2.1 of the General Terms and Conditions of Contract). Under clause 2.8 Kabyesiza and Company Advocates undertook: "*Preparing monthly and/or quarterly rental statements and thereafter remitting the monies to the NDA.*"

It is an a proven fact that the service agreement was executed after the demise of the sole proprietor of Messieurs Kabyesiza and Company Advocates according to the registration documents of the firm. Particulars of registration of the firm show that the sole proprietor was Francis B. Kabyesiza. The firm was a registered under the Business Names Registration Act. Francis Kabyesiza passed away in 1999 while the service agreement was executed in January 2001 about one year later. The plaintiff suit is entitled as a suit against John Chris Bakiza Trading As Kabyesiza and Company Advocates. The plaint in paragraph 4 (a) describes the defendant as a firm which was appointed the managing agent of property belonging to the plaintiff.

The first contention is whether the defendant held himself out as a partner in Messieurs Kabyesiza and Company Advocates. In the plaint, there is no mention of the defendant as a partner in Messieurs Kabyesiza and Company Advocates. The question of whether the defendant is a Partner arose from the title used to describe the defendant in the service agreement. However the entitlement of the plaint itself is based on the Business Names Registration Act which we shall examine in due course. Going by the evidence of the defendant, the service agreement was executed after the demise of Mr Francis Kabyesiza. If there was any partnership, it would have been dissolved under the provisions of section 36 of the Partnership Act Cap 114. These provisions provide that subject to an agreement between the partners, "every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner."

Both parties submitted on the provisions of section 16 of the Partnership Act 2010. The Partnership Act 2010 is inapplicable to a transaction executed in the year 2001. It cannot be deemed to have a retrospective effect to the transaction of the service agreement. The dissolution of the partnership if any notwithstanding, it would be necessary to establish whether there was a partnership in Messieurs Kabyesiza and Company Advocates.

By the year 2001 the Partnership Act cap 114 and section 2 thereof defines a partnership. Section 2 (1) defines a partnership as: "*Partnership is the relation with subsists between persons carrying on business in common with a view of profit*." The definition presupposes that a partnership can only subsists when there are two or more persons carrying on business in common with a view to profit from the business. **Words and Phrases Legally Defined** third edition defines a partnership as involving a contract partners who engage in business with a view to profit. It has to be a joint operation for the sake of gain. There are rules for determining the existence of the partnership under section 3 of the Partnership Act cap 114. In other words section 3 of the Partnership Act gives the rules for determining whether a partnership exists or does not exist. Underlying all the definitions is the existence of more than one person in a relationship. Secondly there is the aspect of the sharing of profit. The receipt of a share in the profits is prima facie evidence that he or she is a partner in the business (see section 3 (c) of the Partnership Act cap 114). Consequently, a partnership can be based on an agreement or it can be implied by law.

By the time Messieurs Kabyesiza and Company Advocates was registered, it was a sole proprietorship and not a partnership. The ramifications of the sole proprietorship have to be determined by an examination of the Business Names Registration Act. The Business Names Registration Act cap 109 laws of Uganda and section 1 (d) thereof defines a "firm" to mean an "incorporated 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." Whereas the definition includes the registration of a business by a sole proprietor, it also incorporates a partnership which is clearly defined as two or more individuals or legal persons coming together to carry on business for profit.

Section 4 of the Business Names Registration Act gives the manner and particulars of registration. Most importantly, the requirements for a sole proprietorship or a partnership are essentially the same. Section 7 provides that whenever there is a change made or a change occurs in any of the particulars registered in respect of any firm or person, the firm or person shall within 14 days after the change or such longer period as the Minister may allow and upon application furnish the registrar with a statement in the prescribed form specifying the nature and the date of the change. Under section 8, it is an offence not to furnish without reasonable excuse a statement of particulars as required by the Act. In this particular case, the plaintiff has not rebutted the evidence that Francis Kabyesiza was the sole proprietor. In any case, if there was any change in proprietorship, that change ought to have been notified to the registrar of business names. Failure to do so within the prescribed time of 14 days is an offence. In other words the burden is on the plaintiff to prove the particulars of the firm members.

Upon the demise of the sole proprietor, and in the absence of probate or letters of administration, the defendant had no authority to execute any document on behalf of the estate of the sole proprietor Mr Francis Kabyesiza. There is a clear distinction between the business name for a sole proprietor and a firm. Section 1 of the Business Names Registration Act defines a "business name" to mean "the name or style under which any business is carried on, whether in partnership or otherwise." On the other hand the word "firm" means an 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 another with a view to carrying on business for profit. In other words a sole individual cannot register a firm. Only two or more individuals may register a firm. Or one or more individuals and one or more corporations may register a firm. The defendant was therefore not a firm because it was the sole proprietorship trading under the business name of Kabyesiza and Company Advocates.

By the time the defendant executed the service agreement with the plaintiff, Mr Francis Kabyesiza, the sole proprietor had died. First and foremost, it was not a partnership, neither was it a firm. Secondly what was registered was a business name of an individual advocate. Therefore by the time of execution of the service agreement, the defendant acted under the name and style of Messieurs Kabyesiza and Company Advocates. At the material time, the defendant was just using the

name and the question is whether his acts were binding on the estate of the deceased.

In the case of an individual ceases to carry out the business under the business name, section 14 of the Act require the removal of the name from the register. Section 14 of the Business Names Registration Act provides as follows:

> "14. Removal of names from register.
>
> (1) If any firm or individual registered under this Act ceases to carry on business, it shall be the duty of the persons who were partners in the firm at the time when it ceased to carry on business or of the individual, or if he or she is dead of his or her personal representative, within three months after the business has ceased to be carried on, to send by post or deliver to the registrar notice in the prescribed form that the firm or individual has ceased to carry on business; and if any person whose duty it is to give that notice fails to do so within such time as aforesaid, he or she commits an offence and is liable on conviction to a fine not exceeding one thousand shillings; but the Minister may in his or her absolute discretion, on reasonable cause therefore being shown, extend such time as aforesaid to such time as he or she may think fit.
>
> (2) On receipt of the notice required by subsection (1), the registrar may remove the firm or individual from the register.
>
> (3) Where the registrar has reasonable cause to believe that any firm or individual registered under this Act is not carrying on business, he or she may send to the firm or individual by registered post a notice that, unless an answer is received to the notice within one month from the date thereof, the firm or individual may be removed from the register.
>
> (4) If the registrar either receives an answer from the firm or individual to the effect that the firm or individual is not carrying on business or does not within one month after sending the notice receive an answer, he or she may remove the firm or individual from the register."

Section 14 (1) of the Business Names Registration Act cap 109 makes it obligatory for a partnership to report the death of one of the members. If it is a sole

proprietorship, the legal representative of the deceased's estate shall make the report within three months. Failure to do so constitutes an offence. However if the business continues, it does so as part of the estate of the deceased and the legal representative of the deceased possessed of probate or letters of administration, ought to notify the registrar of having taken over from the deceased. The Minister has powers to extend the period within which the report may be made. Because Francis Kabyesiza was a sole proprietor, it was the duty of his legal representative to report his demise to the registrar of business names. As I have said the business could have continued if the necessary procedures were used. In this case therefore the contention of the defendant is that he was an employee or an associate together with other people. The question is, whether they could execute a contract on behalf of the estate of the deceased? By signing the service agreement and designating himself as a senior partner, the defendant held out to have the capacity to continue the business in the names and style of Kabyesiza and Company Advocates. They relied on the good will of the deceased and rightly paid some dues to his estate. On whether it was misrepresentation, representing himself as Messrs Kabyesiza and Co Advocates, it is not necessary for the court to consider whether it amounts to misrepresentation. The plaintiff’s case is not based on misrepresentation. It is simply a suit against the defendant trading as Messieurs Kabyesiza and Company Advocates. One must also leave room for the good will of the business name and which has value to survive the deceased.

A perusal of the contract/the service contract seals the argument. The defendant was not admittedly a personal representative or legal representative of the deceased estate and had no authority to notify the registrar about the demise of the deceased. Apparently they continued business as usual and his submission is that the contract had been negotiated before the demise of Mr Francis Kabyesiza. That may well be true, but Francis Kabyesiza passed away in 1999. The new contract was signed more than one year later in January 2001. It was signed with the full knowledge and understanding by both parties that Mr Francis Kabyesiza was no longer available. The plaintiff had constructive notice of the composition or proprietors of Messieurs Kabyesiza and Company Advocates. Section 18 of the Business Names Registration Act permits any person upon payment of the prescribed fee to inspect the register of business names to establish any particulars and to obtain certified copies of the documents registered therein. Under section 18 (2) a copy of any

extract or statement registered under the Act duly certified under the hand of the registrar, shall in all legal proceedings, civil or criminal be received in evidence. Furthermore, section 9 of the Business Names Registration Act does not prejudice the rights of third parties to file suits against a person in default of giving the necessary particulars to the registrar of business names. Whereas such a party who is in default cannot file an action without getting permission from court, third parties can file an action against the person in default. Section 9 provides as follows:

> 9. Disability of persons in default.
>
> (1) Where any firm or person required by this Act to furnish a statement of particulars or of any change in particulars shall have made default in so doing, then the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of that such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished at any time while he or she is in default shall not be enforceable by action or other legal proceeding whether in the business name or otherwise; but—
>
> (a) the defaulter may apply to the court for relief against the disability imposed by this section, and the court, on being satisfied that the default was accidental, or due to inadvertence, or some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may grant such relief either generally, or as respects any particular contracts, on condition of the costs of the application being paid by the defaulter, unless the court otherwise orders, and on such other conditions, if any, as the court may impose, but such relief shall not be granted except on such service and such publication of notice of the application as the court may order, nor shall relief be given in respect of any contract if any party to the contract proves to the satisfaction of the court that, if this Act had been complied with, he or she would not have entered into the contract;
>
> (b) Nothing in this subsection shall prejudice the rights of any other parties as against the defaulter in respect of such contract as aforesaid;

(c) if any action or proceeding shall be commenced by any other party against the defaulter to enforce the rights of that party in respect of such contract, nothing in this subsection shall preclude the defaulter from enforcing in that action or proceeding by way of counterclaim, setoff or otherwise, such rights as he or she may have against that party in respect of the contract.

(2) In this section "court" means the High Court or a judge of the High Court; but without prejudice to the power of the High Court or a judge of the High Court to grant such relief as aforesaid, if any proceeding to enforce any contract is commenced by a defaulter in a magistrate's court, the court may, as respects that contract, grant such relief as aforesaid.

The question is whether the associates can be found to be in default of giving the necessary particulars of the demise of the late Francis Kabyesiza to the registrar of business names. In any case, having traded under the name and style of Messieurs Kabyesiza and Company Advocates, it is deemed that they ought to have ensured that the necessary particulars about determination of the business by the death of the sole proprietor was brought to the attention of the registrar of business names. Or at least the associates should have notified the registrar of business names about possible representation of the estate by a holder of letters of administration or probate, if any. Last but not least any third party who commences an action against the associates trading as Messieurs Kabyesiza and Company Advocates should not be prejudiced by the default of the persons holding out as having the legal power to trade under the name and style of Messieurs Kabyesiza and Company Advocates in the enforcement of any contract or in any action commenced by them against the firm or persons trading under the business name under section 9 (1) (b) of the Business Names Registration Act.

Apart from constructive notice of the contents of the register, the plaintiff also had actual notice based on the letterhead of Messieurs Kabyesiza and Company Advocates of persons working with the business enterprise. In any case the plaintiff attached in its written statement of defence the particulars required to be given pursuant to the Business Names Registration Act in case of a firm. The particulars clearly indicate that the proprietor was Francis Kabyesiza. I further agree with the statement of law submitted on by the plaintiff that unlike a

company, the members of the firm are personally liable. On the other hand a limited liability company is a separate person from its members and its members are not personally liable for the acts of the company.

Finally, this is a case where the business was carried out in the name and style of Messieurs Kabyesiza and company advocates when the proprietor of the business had passed away and the registrar had not been notified. Because the defendant continued with the business, a partnership has to be inferred under the provisions of the Partnership Act cap 114, particularly under section 3 thereof. In this case there was no partnership deed between the associates of Messieurs Kabyesiza and Company Advocates. There is no evidence of how they would share the profits. They however undertook on the signature of the defendant to carry out the obligations of Messieurs Kabyesiza and Company Advocates under the service agreement, the pertinent provisions of which have been summarised above and particularly the obligations in the standard terms and conditions of the contract. By undertaking the obligations which included the collection of rent, the associates took it upon themselves personally to act as the agents of the plaintiff. Should they be permitted to avoid the contract on the ground that they are not partners of Messieurs Kabyesiza and Company Advocates?

The history of the matter is that the plaintiff initially issued the defendant Mr John Chris Bakiza, Bemanyisa and Twikirize in High Court civil suit number 613 of 2006. The plaintiff claimed against the defendants jointly and severally for Uganda shillings 40,060,000/= which the defendants allegedly failed or refused to remit to the plaintiff. It is pleaded in that suit that the first, second and third defendants were partners in a private law firm trading as Kabyesiza and Company Advocates and engaged in rendering services as legal practitioners in Uganda. They had been appointed managing agents of the property belonging to the plaintiff situated at plot 59 Nkrumah Road. Just as in this case, the plaintiff relied on the audit report of Lawrie and Prophet Company. The defence of the first defendant Mr John Chris Bakiza in paragraph 3 of his written statement of defence was that Messrs Kabyesiza and company advocates was a sole business belonging to the late Francis Kabyesiza duly registered under the Business Names Registration Act.

The evidence of DW 1 is that he was invited by the Acting executive secretary of the plaintiff to sign the service agreement. The contract had already been

negotiated. They were required to collect rentals and make demands for future payments all by cheques in the names of the plaintiff. At the end of each month of collection, there were supposed to reconcile with the accounts department of the plaintiff the total number of cheques remitted whereupon their professional fees specified in the service agreement would be calculated and paid. Payments are supposed to be made in cheques. He explained the proposals to his colleagues in the law firm. They agreed to collect rent for the plaintiff and the reasonable commission payable to the firm. They dedicated some support staff namely clerks with the responsibility of collecting the rental cheques either at the offices or at the premises of the tenants. As far as High Court civil suit number 613 of 2006 is concerned, the plaintiff withdrew the suit with costs. The decree was admitted in evidence and is dated 11th of June 2007. It was decree that ordered that the suit was withdrawn with costs to the defendant's payable by the plaintiff's advocates.

Notwithstanding the withdrawal of the suit, the evidence is clear that the defendants continued carrying on business under the name and style of Messieurs Kabyesiza and Company Advocates after he passed away in 1999. It is not the defendant's defence that the service agreement was an illegality. The defendants counsel submitted on the doctrine of assignment of contracts. However, the doctrine of estoppels provided for under section 114 of the Evidence Act bars the defendant from claiming that he is not liable as a partner. Furthermore, it can be inferred using the provisions of section 3 (c) of the Partnership Act that the associates of Messieurs Kabyesiza and Company Advocates upon taking up the obligations in the service agreement, and acting upon it, became personally liable for the manner in which they carried out their duties. Estoppels are an equitable doctrine as well as a statutory shield. Neither the defendant nor his associates should be permitted to avoid the contract on the basis that it was done on behalf of the estate of the deceased. By the time they undertook to meet the obligations under the service agreement, Mr Francis Kabyesiza was known to be a deceased person by both parties. Because they were providing a professional service, they are liable as advocates to the client for receiving instructions and the manner in which the carried out those instructions. It is not sufficient to look at the technicalities of the service agreement. Advocates carry out professional work for which they are personally liable.

Under the Advocates (Professional Conduct) Regulations under regulation 2 thereof, no advocate shall act on behalf of a client without instructions. It provides as follows:

> "2. Manner of acting on behalf of clients.
>
> (1) No advocate shall act for any person unless he or she has received instructions from that person or his or her duly authorised agent.
>
> (2) An advocate shall not unreasonably delay the carrying out of instructions received from his or her clients and shall conduct business on behalf of clients with due diligence, including, in particular, the answering of correspondence dealing with the affairs of his or her clients."

Secondly an advocate is personally responsible for the client's work. This is found under regulation 6 of the Advocates (Professional Conduct) Regulations. The advocate is bound to supervise the work even if it is done by the clerks. Regulation 6 provides as follows:

> "6. Advocate to be personally responsible for client's work.
>
> An advocate shall be personally responsible for work undertaken on behalf of a client and shall supervise or make arrangements for supervision by another advocate who is a member of the same firm of all work undertaken by nonprofessional employees."

Finally regulations 8 and 29 of the Advocates (Professional Conduct) Regulations make it a duty for an advocate to account for the money of a client promptly and not to benefit from it. The liability of an advocate for the manner in which they carry out their duties is personal. There is a suggestion by the defendant that some members of staff were responsible for not remitting money to the client/plaintiff. Without concluding whether there was some collusion between the plaintiff's staff and some members of staff of the defendant, the general principle is that the advocate is liable for the manner in which his staff carries out their duties.

The liability of a firm of solicitors for the wrongs of a clerk was considered in the case of **Lloyd versus Grace, Smith And Company [1912] AC 716** and I refer particularly to the judgement of Lord Macnaughten. The facts were that a firm of

solicitors allowed their clerk to conduct the business of the firm. In the course of conduct of that business the clerk dishonestly misappropriated the property of Mrs Lloyd for his own benefit by fraudulently presenting documents for her to sign. His Lordship held that the general rule was that the master is answerable for every fraud of the servant or agent as is committed in the course of the service and for the master's benefit though no express command or privity of the master is proved. Lord Macnaughten further agreed with the proposition of law that all deceits and frauds practised by persons who stand in the relation of agent, general or particular, do not fall upon their principals. For, unless the fraud itself falls within the actual or the implied authority of the agent, it is not necessarily the fraud of the principal.

In that case Mr Smith the Solicitor was held liable for the fraud of his agent because in that case Mrs Lloyd put herself in the hands of the firm when she did not know the exact position Mr Sandles (the clerk) who spoke and acted as if he was one of the firm.

The case of the defendant is peculiar in that he alleges that he was a mere employee. However he further asserted that the firm is owned by a sole proprietor who had died. There was therefore no principal and he acted as a professional holding out to provide professional services under the name and style of Messieurs Kabyesiza and Company Advocates. He is liable on the ground of being an advocate holding out to provide professional services. His colleagues would have similarly been liable but the suit against them was withdrawn.

The third issue is **whether the defendant received the rental payments from tenants but did not remit them to the plaintiff**.

The plaintiff's counsel relied on the audit report of Lawrie Prophet and Company which establishes that Uganda shillings 40,060,000/= was collected by Mrs Kabyesiza and Company Advocates and never remitted to the plaintiff. Secondly counsel submits that the defendant in a letter to the auditors dated 25th of October 2004 clearly indicated that some payments are made to the cashiers/clerks by the tenants to the tune of Uganda shillings 35, 195, 450/=. The defendant agreed with categorisation of the figures in the tabulation presented in the letter from the executive secretary dated 17th of December 2007 in which amounts traced in the books of accounts of the firm but not endorsed by a senior person was about

Uganda shillings 10 million. What was attributed to forged receipts by Kabyesiza and company was another shillings 26,773,500/=. Counsel submitted that the amounts attributable to forged receipts by the firm clerks were an internal arrangement over which the plaintiff still had no control. The plaintiff's counsel relied on the doctrine of vicarious liability to pin liability on the defendant.

In reply the defendant denied allegations that he held himself out as a senior partner and therefore became one. The problem came about when in breach of the service agreement the plaintiff started dealing directly with the tenants behind the service providers back. Cash receipts issued to the tenants was to Messieurs Kabyesiza and Company Advocates and cannot be accepted as evidence of payment of cash to the defendant. The defendant's position is that he never received the said rent payments from the tenants and that is no evidence to prove that the same was ever received. He further submitted that under section 63 of the Evidence Act, the receipt must be proved by primary evidence except in the circumstances specifically provided for by the Act.

In rejoinder, the plaintiff's counsel submitted that it was the duty of the defendant, if it actually doubted the photocopies of the receipts, to establish whether they were forgeries or not. The tenants purported that the receipts had been issued by Kabyesiza and Company Advocates. The receipts had been relied upon by the auditors. Advocates must have retained a duplicate copy of the original. In other words the original was in possession of Messieurs Kabyesiza and Company Advocates.

I have carefully considered issue number three. The defendant’s amended written statement of defence has two elements. The first element is that this suit against his colleagues had been withdrawn. The second element is that the matter was investigated before the Parliamentary Standing Committee on Commissions, Statutory Authorities and State Enterprises and the parties were awaiting their report.

As far as the acts of the clerks are concerned, the advocates involved in providing professional services are clearly liable. Secondly the audit report establishes on the balance of probabilities that rentals were received by Messieurs Kabyesiza and Company Advocates. In their letter dated 30th of September 2004 Lawrie Prophet

and Company wrote to Messieurs Kabyesiza and Company Advocates that the verification exercise they carried out revealed a total sum of Uganda shillings 41,176,000/= of rent collected and receipted by Messieurs Kabyesiza and Company Advocates. However there was no evidence that it had been remitted to the plaintiff. In the executive summary of the report it is established that Uganda shillings 40,060,000/= had been collected by Messieurs Kabyesiza and company advocates but no documentary evidence to verify the cash was remitted to the plaintiff. This is the best evidence in the circumstances of the case and it is therefore a question of fact established by the audit report which has not been rebutted by the defence that a total of Uganda shillings 40,060,000/= had been received by Messieurs Kabyesiza and Company Advocates and not remitted to the plaintiff. Out of this amount the defendant acknowledged a sum of Uganda shillings 10,046,500/=. I must add that it is unfortunate that the plaintiff deemed it fit for whatever reason to withdraw the suit against the other two associates of Messieurs Kabyesiza and Company Advocates. Notwithstanding, the third issue is whether the defendant received the rental payments from tenants but did not remit them to the plaintiff. Whereas it cannot be established that the defendant personally received rent from the tenants, it has been established that the business described as a Messieurs Kabyesiza and company advocates acting through the defendant and employees of the defendant namely the clerical staff did receive Uganda shillings 40,060,000/= from the tenants and did not remit the same to the plaintiff. Issue number three is therefore answered in the affirmative.

Issue number four is **whether any of the parties breached any of the terms of the service agreement**.

As far as issue number four is concerned, there is no need to refer to the submissions of both parties as the issue has been resolved in the first three issues by my finding that the rent was collected and not remitted to the plaintiff. Issue number four is answered in favour of the plaintiff.

Issue number five is **whether the counterclaim is tenable in law**.

Again there is no need to refer to the submissions of both parties. The counterclaim is based on the Bill of costs for Uganda shillings 2,187,000/=. The costs awarded to the defendant after withdrawal of HCCS number 613 of 2006 instituted by the

plaintiff against the defendant and two others. The defendant's submission agrees that it was a Bill of costs awarded in his favour under HCCS number 613 of 2006. The issue is answered by a perusal of the decree found at page 32 of the trial bundle. The decree clearly indicates that costs to the defendants are payable by the plaintiffs advocates. This is an order of the court wherein the advocates of the plaintiff were held to be liable for the costs. In those circumstances the counterclaim cannot be maintained against the plaintiff. Secondly, it is an order of the court that the costs should be paid to the defendant. Consequently, the money can be recovered through execution process and not by filing a suit. The filing of a suit in respect of such matter is forbidden by section 34 (1) of the Civil Procedure Act. In those circumstances, the counterclaim cannot be maintained against the plaintiff and is dismissed.

The last issue is **what remedies are available to the parties?**

The plaintiff's counsel submits that the plaintiff is entitled to Uganda shillings 40,060,000/= plus accrued interest from the date the cause of action arose and do the date of judgement. She submitted that Uganda shillings 99,064,000/= included the claim for interest. Furthermore counsel submitted that the plaintiff is entitled to general damages for inconveniences suffered due to the defendant's conduct including reimbursement for the costs of engaging external auditors to reconcile the defendant's books. General damages ought to be awarded to the plaintiff for inconvenience and financial loss suffered.

In reply the defendant submitted that the pleadings of the plaintiff show that the rental amount claimed was Uganda shillings 99,064,000/= allegedly collected by the defendants firm. He submitted that the claim was in the nature of special damages which must be particularised and specifically proved. No single authentic receipt had been presented before the court to prove the said amount. Secondly there was inconsistency between what was pleaded and what is alleged in the written submissions. Thirdly in the pleading the plaintiff prays for interest at 15% and cannot now claim interest at 28% in the submissions. Fourthly the service agreement did not provide for any interest upon termination or breach. Consequently the claim of Uganda shillings 99,064,000/= was not tenable in law. Counsel relied on the case of Raymond Katabakya vs. Attorney General HCCS number 318 of 1985 where it was held that the plaintiff cannot claim a higher or

lower figure to be awarded as damages to what was pleaded without amendment of pleadings.

As far as general damages are concerned, the plaintiff has not proved that it has suffered any inconveniences. On the contrary the plaintiff caused the occurrence of the prolonged litigation which ought to have been resolved through arbitration to mitigate loss/damage to the plaintiff. Consequently the plaintiff is partly to blame and should not be awarded general damages.

In rejoinder the plaintiff's counsel submitted that the figure of Uganda shillings 99,064,000/= comprises according to the plaint to be unremitted monies and interest. The plaintiffs claim on the principal is Uganda shillings 40,060,000/= and is based on the audit report which has not been disputed.

I have carefully considered the submissions. As far as special damages are concerned, the case quoted by the defendant is not authority for saying that a lesser amount cannot be proved than that pleaded. Secondly the question of particulars of special damages is a matter of form in that the plaintiff relied on the audit report which is the sole foundation of the claim. In the plaint itself paragraph 4 (e) the plaintiff avers that Lawrie Prophet and company prepared a report in respect of the exercise showing that the defendant was indebted to the plaintiff in the sum of Uganda shillings 40,060,000/=. Secondly the plaintiff sought interest at the rate of 28% per month from the date of judgement till payment in full. The amount of 99,064,000/= is indicated as including interest on the 40,060,000/=. In paragraph 3 of the plaint, the plaintiff pleads that interest is charged at the rate of 15% per month from January 2004 to December 2007.

Firstly the defendant acknowledged part of the claim amounting to Uganda shillings 10,046,500/=. Secondly, the plaintiff withdrew the suit against the two other associates of the defendant. In those circumstances, it would be unjust to penalise the defendant alone for the acts of all the three associates trading under the name and style of Messieurs Kabyesiza and Company Advocates. In those circumstances, basing on the personal liability doctrine for professional work, the plaintiff has not proved that the defendant is liable alone and professionally for the entire amount mentioned in the audit report. Doing the best I can, the plaintiff is awarded a sum of Uganda shillings 15,000,000/= against the defendant personally.

The award is based on the professional duty of the defendant towards the plaintiff under the service agreement. Secondly the entire amount cannot be awarded because the plaintiff ought to have known that the defendant was not the sole associate trading under the name and style of Messieurs Kabyesiza and Company Advocates. Thirdly the plaintiff ought to have known and did know that counsel Francis Kabyesiza had passed away at the time of execution of the service contract. They are deemed to have known that Messieurs Kabyesiza and company advocates were a sole proprietorship registered under the Business Names Registration Act.

As far as the claim for general damages is concerned, the plaintiff indeed suffered inconvenience due to the breach of advocate client relationship or failure of the defendant and his associates to carry out their duties diligently so as to ensure that the service agreement is implemented as agreed. The plaintiff is awarded Uganda shillings 5 million as general damages as against the defendant personally.

On the claim for interest, I am persuaded by the argument that the parties did not make use of the arbitration clause in the service agreement. Secondly the case only proceeded upon the issuance of a notice to show cause why the suit should not be dismissed. This suit had been filed in 2008 and a notice show cause was issued on the 2nd of April 2013. Thereafter the suit was brought under the special session of the commercial court to dispose of long overdue cases. It was only on the initiative of the court to compel the parties to proceed, that this long overdue case was heard. In those circumstances, interest will not be awarded from the date the cause of action arose to the date of judgement and a claim for interest on that basis is disallowed.

Interest will only be awarded from the date of judgement till payment in full under the provisions of section 26 (2) of the Civil Procedure Act which gives the court discretionary powers to award reasonable interest for any time prior to the institution of the suit, from the date of the suit is lodged in court, and after judgment. The plaintiff is awarded interest at 15% per annum from the date of judgement till payment in full.

Costs shall follow the event.

Judgment delivered in open court 5 July 2013

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Sarah Kisubi counsel for the plaintiff

No representative of plaintiff in court

Chris Bakiza appearing together with Blair Atuhaire (defendant represents himself).

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

5 July 2013