

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

**HCT - 00 - CC - CS - 1255 - 1998**

**ALCON INTERNATIONAL LIMITED ::::::::::::::::::::::::::::::**  
**PLAINTIFF**

**VERSUS**

**N.S.S.F. & ANOTHER ::::::::::::::::::::::::::::::::::::::**  
**DEFENDANT**

**BEFORE: THE HON. JUSTICE DAVID WANGUTUSI**

**R U L I N G:**

This ruling is in respect of two firms each claiming to have been instructed by Alcon International Ltd, the Plaintiff in Civil Suit 1255/1998.

The background to these proceedings can briefly be said to arise from a contract between National Social Security Fund, the Defendants in these proceedings and Alcon International Ltd herein called the Plaintiffs, entered into on 21<sup>st</sup> July 1994.

Alcon International Limited which entered into the contract with the Defendant was a company incorporated in the Republic of Kenya. It is now clear that although the contract was between Alcon International

Limited (Kenya) and the Defendant it is Alcon International Limited (Uganda) which executed the building works that, formed the subject of the contract.

During the execution of this contract, conflicts arose between the parties and the Defendants terminated the contract prompting Alcon International Limited to sue.

HCCS No. 1255/1998 went through the high Court, a stint of Arbitration, on appeal to the Court of Appeal as No. 2/2004 and eventually to the Supreme Court as No. 15 of 2009.

In the Supreme Court the Appeal in which the Defendant was the Appellant was allowed, the judgment and orders of the Court of Appeal, High Court and Arbitral award set aside and the case was remitted back to the high Court for retrial.

When the case came up for hearing, Mr. Kabatsi addressed Court and said the firm Kampala Associated Advocates under which he traded were the rightful representative of the Plaintiff instead of M/S Tumusiime, Kabega & Co. Advocates. He submitted that the reason why National Social Security Fund won the appeal in the Supreme Court was because Alcon International Limited (Uganda) was at all times the wrong party. He went on to state that he was not Counsel for Alcon International Limited (Uganda). Further that it was not actually Alcon International Limited (Uganda) in Court but Alcon International Limited (Kenya).

Justifying his assertion that it was Alcon International Limited (Kenya) which had sued the Defendant, Counsel referred this Court to the judgment of Justice Katureebe where the learned Justice had considered the parties to the suit at length. He quoted Justice Katureebe on Page 1 of the judgment;

*“This case raises an interesting, but equally disturbing question. How can a person that was never a party to the contract for the building of the Worker’s House, that, on the record, did not plead to be such a party or to be claiming under the party to the contract, now be the one that claims to have won the Award in Arbitration and seeks to enforce the award? One needs to go back to the pleadings over which there is no dispute. A company called ALCON INTERNATIONAL LIMITED filed in the High Court of Uganda a Civil Suit No. 1255 of 1998. As is required by the rules of pleading (see Order II Rule 1, Order VII Rule 1(b)(e) that company described not only itself, but described the facts giving rise to its Cause of Action.”*

Mr. Kabatsi added that the pleadings described M/S Tumusiime, Kabega & Co. Advocates as the ones who had filed the suit. He said it was so because M/S Tumusiime, Kabega & Co. Advocates were the ones who represented Alcon International Limited (Kenya) at the time. He added that it must have been Alcon International Limited (Kenya) which instructed them because in the plaint it claimed to be the one that had entered into the contract. In the facts giving rise to the Cause of Action, the Plaintiff wrote:

*“On the 21<sup>st</sup> July 1994, the Plaintiff and the 1<sup>st</sup> Defendant entered into a contract whereby the Plaintiff was contracted to erect and complete a partially constructed structure in reinforced concrete on Plot No. 1 Pilkington Road Kampala for the 1<sup>st</sup> Defendant (a copy of the building contract is annexed hereto and marked Annexure ‘A’.”*

Annexure ‘A’ were Articles of the agreement. In those articles, Alcon International Limited was shown as a company incorporated in the Republic of Kenya. Furthermore, in the reference that went for Arbitration, the Plaintiff referred to themselves as a limited liability company carrying on business in Kampala whose address for purposes of the Arbitration was M/S Tumusiime, Kabega & Co. Advocates.

In his submission, Counsel stated that M/S Tumusiime, Kabega & Co. Advocates were mentioned in the pleadings before Court and in the Arbitration because at the time they were representing Alcon International Limited (Kenya).

That they described themselves as a company incorporated in Kenya was also observed by Learned Justice Katureebe on Page 16 Line 18 of his judgment.

Counsel therefore, in conclusion submitted that the company that had given instructions to M/S Tumusiime, Kabega & Co. Advocates was Alcon International Limited (Kenya).

In reply, Mr. Tumusiime of M/S Tumusiime, Kabega & Co. Advocates submitted that the issue of who represented the Plaintiff was resolved in Court of Appeal Civil Application No. 50 of 2007.

He submitted that the Plaintiff had at no time described itself as Alcon International Limited (Kenya) and that both the Supreme Court and Court of Appeal had clearly ruled that it was Alcon International Limited (Uganda) that was in Court and it was indeed on that basis that the appeal filed by the Defendant was allowed. He emphasized that during the hearing of Civil Application No. 50 of 2007, the only issue before Court was who should represent Alcon International Limited in Court in Civil Appeal No. 2 of 2004. That no instructions had ever been withdrawn from them by Alcon International Limited (Uganda). He brought it to the notice of the Court that when Civil Application No. 50 of 2007 was decided declaring M/S Tumusiime, Kabega & Co. Advocates as the rightful advocates, they filed a notice of Appeal in the Supreme Court which appeal they have never prosecuted.

Lastly, that since the Supreme Court has taken a decision that it is not Alcon International Limited (Kenya) in all these Courts, M/S Kampala Associated Advocates had no instructions from the Plaintiff.

Ms. Mutesi who represented the Defendants in the Supreme Court submitted that the issue of whether Alcon International Limited were the ones who had filed the suit in the first place, did not arise. That instead the question that was before the Supreme Court was whether the Plaintiff had a cause of action.

She submitted that the ruling of the Court of Appeal in Civil Application No. 50 of 2007 was never over turned and that it was Alcon

International Limited (Uganda) that was in the Supreme Court and that the Defendant's filing of their appeal was done on the basis that since the Court of Appeal had found that Alcon International Limited (Uganda) that had filed the pleadings had no contract with the Defendant and therefore could not file and recover under the contract, they should not have upheld the arbitral award which was in favour of Alcon International Limited (Uganda) which in the circumstances had no cause of action.

The issue for determination here is whether the instructions to sue were given by Alcon International Limited (Uganda) or Alcon International Limited (Kenya).

It is not in dispute that it is M/S Tumusiime, Kabega & Co. Advocates who filed CS 1255/1998 **Alcon International Limited V National Social Security Fund and W. H. Ssentongo**. The foregoing is clearly reflected in the plaint on 30<sup>th</sup> November 1998 and as amended on 4<sup>th</sup> June 1999. Both these pieces of pleadings show on their last pages, at the bottom the firm filing;

DRAWN & FILED BY  
M/S TIMUSIIME, KABEGA & CO. ADVOCATES  
RWENZORI HOUSE, GROUND FLOOR  
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KAMPALA

It is also not in dispute that at the time they were filing, they filed their suit in respect of a company carrying on business of construction in Kampala, Uganda.

It is this very case that went through to Appeal in the Court of Appeal as Civil Appeal No. 2 of 2004 and eventually to the Supreme Court as Civil Appeal No. 15 of 2009.

Further evidence is got from the submission of Mr. Kabatsi when he submitted that initially the Plaintiff was represented by Tumusiime, Kabega & Co. Advocates. If Mr. Kabatsi has stated that the instructions to file the suit were first given to Tumusiime, Kabega & Co. Advocates, at what stage did they change?

When the Appeal came up for hearing on 23<sup>rd</sup> May 2006 an Indian of Kenyan nationality called Davinder Singh Hanspal a representative of Alcon International Limited (Kenya) claimed before Court and stated that Alcon International Limited had never instructed Tumusiime, Kabega & Co. Advocates to appear on its behalf in Court! The matter was adjourned and shortly thereafter M/S Kampala Associated Advocates filed a Notice of Change of Advocates indicating that they had been instructed to continue with the appeal. This prompted M/S Tumusiime, Kabega & Co. Advocates to file Application No. 50 of 2007 whose only issue was the question, 'who should represent Alcon International Limited in Court in Civil Appeal No. 2 of 2004?'

Mr. Davinder Hanspal's denial that Alcon International Limited had never instructed Tumusiime, Kabega & Co. Advocates is in complete conflict with the submission with Mr. Kabatsi who stated in Court that in the beginning Alcon International Limited had instructed Tumusiime, Kabega & Co. Advocates.

Having listened to the submissions of Mr. Kabatsi one forms an unassailable belief that even Mr. Kabatsi himself knows that the party which was in Court was Alcon International Limited (Uganda).

I say so because in his submissions, and I quote him:

*“The reasons I want to bring to Your Lordship’s notice the reason why National Social Security Fund won the appeal in the Supreme Court and that is the Supreme Court decision was that Alcon International Limited (Uganda) was always the wrong party.”*

This statement by Mr. Kabatsi can only be useful to his firm if the question to be resolved is whether Alcon International Limited (Uganda) was right to sue. The question before this Court is however, “who sued and who was instructed?” By referring to Alcon International Limited (Uganda) as having been the wrong party Counsel could only have meant that it was the one which sued and yet it should not have. In his submission, Mr. Kabatsi went at length to tell Court that he had no instructions from Alcon International Limited (Uganda). He submitted;

*“My Lord that is very true. I have no instructions to be here if Alcon International Limited (Uganda) was in Court. I have no instructions from Alcon International Limited (Uganda), absolutely none. And if anyone says; I should not be, if Alcon International Limited (Uganda) is here, is right.”*

Having said in his opening statement that the reason why National Social Security Fund won the appeal in the Supreme Court and that that was the Supreme Court decision, was that Alcon International



Limited (Uganda) was the wrong party. He can now not claim that the party which was sent back for retrial was Alcon International Limited (Kenya).

That it was the suit filed by Tumusiime that eventually went on Appeal upto the Supreme Court is also buttressed in various parts of the Supreme Court judgment.

First of all, the National Social Security Fund in the Supreme Court knew that the party that had taken them to Court was Alcon International (U) Ltd.

This position is also clearly borne out in the decision of the Court of Appeal Civil Application No. 50 of 2007.

In this application that was filed by Alcon International Limited who were then the Respondents in Civil Appeal No. 2 of 2004 sought orders that M/S Kampala Associated Advocates be struck off the record in Civil Appeal No. 2 of 2004 in which they purported to represent the Applicant. The resultant ruling, dated 18<sup>th</sup> February 2008, was in favour of the Applicant which the Deputy Chief Justice concluded in these words:

*“From the above analysis it is obvious to us that Alcon International Limited (Kenya) has no locus standi in Civil Appeal No. 2 of 2004 or indeed any of the more than 30 cases filed on behalf of Alcon International Limited (Uganda) still pending in our Courts. Alcon International Limited (Kenya) therefore has no power to instruct any firm of advocates to take them on now.*

*It is Alcon International Limited (Uganda) which can do that. We therefore uphold M/S Tumusiime, Kabega & Co. Advocates on behalf of Alcon International Limited (Uganda) that this Application will be allowed and is hereby allowed.*

*Alcon International Limited (Kenya) is struck off the record of Civil Appeal No. 2 of 2004. It is ordered that the company pays the costs of this Application.”*

On 28<sup>th</sup> February 2008, M/S Kampala Associated Advocates filed a Notice of Appeal which it intended to serve upon Tumusiime, Kabega & Co. Advocates. The notice indicated that Kampala Associated Advocates were dissatisfied with whole decision of the Court of Appeal in Civil Application No. 50 of 2007 and intended to appeal to the Supreme Court.

On the same date, Kampala Associated Advocates wrote to the Registrar of the Court of Appeal asking him to avail them with a certified copy of the record of proceedings to enable them lodge the appeal.

There is no evidence that Kampala Associated Advocates followed up this appeal.

The proceedings in the Court of Appeal indicate that from then onwards and as had been in the High Court, Tumusiime, Kabega & Co. Advocates continued as the sole representatives of the Respondent, Alcon International Limited.

Indeed when the Appellants, National Social Security Fund and Ssentongo filed their appeal No. 15 of 2009, on 21<sup>st</sup> March 2012, it is M/S Tumusiime, Kabega & Co. Advocates who were served with the Memorandum of Appeal.

In my view, M/S Kampala Associated Advocates did not pursue the appeal because they had accepted or resigned to the ruling that ousted them from the arena of combat between Alcon International Limited and National Social Security Fund and W. H. Ssentongo.

I say this because after that, they proceeded to the Commercial Division of the High Court and filed Civil Suit No. 250 of 2012 in which the parties were **Alcon International Limited (UK) and Alcon International Limited (Kenya) V Alcon International Limited (Uganda), Mr. Rajesh Kent and Mrs. Manjit Kent**. They sought Alcon International Limited (Uganda) to be deregistered and struck off the Register of Companies because as they claimed, the late Kultar Singh Hanspal had incorporated it for the purpose of constructing Worker's House unlawfully and illegally with the intention of claiming the benefits under the contract that rightly belonged to the 2<sup>nd</sup> Plaintiff. Paragraph 7(f) of the plaint read:

*"The Defendant was incorporated (meaning Alcon International Limited (Uganda)) so as to purport to act for and on behalf of the 2<sup>nd</sup> Plaintiff (Alcon International Limited (Kenya)) to enable them to take the benefits that would be derived from the contracts entered into with National Social Security Fund."*

There is no specific reference to the Civil Appeal No. 2 of 2004 of the Court of Appeal or the Supreme Court Civil Appeal No. 15 of 2009.

In my view, the benefits that were complained of would only have been those that the Alcon International Limited (Uganda) was struggling for in the Supreme Court.

In other words, the injunction that was sought by Alcon International Limited (UK) and Alcon International Limited (Kenya) were intended to prevent Alcon International Limited (Uganda) from proceeding. Interestingly enough M/S Kampala Associated Advocates also seem to have abandoned this case 250 of 2012 when the application arising from that case seeking temporary injunction against Alcon International Limited (Uganda) was dismissed on 20<sup>th</sup> February 2013.

Mr. Kabatsi made lengthy submissions referring to the judgment of Justice Odoki CJ (as he then was), Justice Katureebe and the pleadings in HCCS 1255 of 1998. He submitted that since the Plaintiff described itself as a company incorporated in Kenya and that it was a signatory to the contract and since Alcon International Limited (Kenya) was a signatory to the contract, it could only be Alcon International Limited (Kenya) that filed the suit.

He referred Court to Page 16 Line 18 of the judgment of which **Justice Katureebe** which I quote:

*“As earlier observed, the pleadings in HCCS 1255 of 1998 clearly were based on a contract. The Plaintiff, Alcon International Limited described itself as being incorporated in Kenya, and a signatory to the contract. It alleged breach of contract by the Respondents and prayed, inter alia, for damages for breach of contract. It described itself as a company carrying on business of construction in Uganda and*

*elsewhere. Indeed all the evidence on record reveals that Alcon International Limited (Kenya) had construction experience in Kenya and had won a tender to do that in Uganda. On the other and all the evidence shows that Alcon International Limited (Uganda) prior to this contract had no construction experience anywhere not even in Uganda where it had only just been registered."*

He also quoted the learned Justice at length on Page 22 where he said

*"I have already alluded to the scenario where by the party in possession of an Arbitral award is not the party that lodged the claim and proved it. Although the Court of Appeal ruled, in an interlocutory application, that the party who filed HCCS 1255 of 1998 which led the arbitration was Alcon International Limited (Uganda), the pleadings upon which orders or award itself were made did not bring this out. The whole situation was made even more confused by the fact that the order of the Court was made in proceedings in which the Appellants were not even party and were not heard. Therefore they could not respond to the claims of Alcon International Limited (Uganda). I therefore fully concur with My Lord the Chief Justice that ground I should succeed."*

From the foregoing and others, Mr. Kabatsi contended that the Supreme Court had ruled that Alcon International Limited (Uganda) was not the Plaintiff. With the greatest respect, I do not agree with that assertion and in my view, the Supreme Court was dealing with

the issue of whether Alcon International Limited (Uganda) had locus standi to file the suit in the High Court basing on the fact that it had never been a party to the contract between Alcon International Limited (Uganda) and National Social Security Fund.

Furthermore, when it became apparent that Alcon International Limited (Kenya) had not legally assigned the contract to Alcon International Limited (Uganda) that in my view is different from the question who filed HCCS 1255 of 1998.

Indeed, Justice Katureebe dealt with this matter from Line 20 on Page 22 where he wrote:

*“The question still remains as to why Alcon International Limited (Uganda) which now claims to be in possession of the Award went to Court claiming to be Alcon International Limited (Kenya) that had signed the contract with the 1<sup>st</sup> Appellant. It would appear that Alcon International Limited (Uganda) knew that since it was not a party to the contract and its claim of assignment would not stand it chose to claim as Alcon International Limited (Kenya) which indeed was the party that signed the agreements that were annexed both to the plaint in Court and to the claim in Arbitration.”*

By the foregoing, the learned Justice had also recognized that the suit in the High Court which went on Appeal to the Court of Appeal and eventually to the Supreme Court had been filed by Alcon International Limited (Uganda) pretending to be Alcon International Limited (Kenya).

To say that the pleadings were not theirs because they had no locus standi and they should not have filed them would be misleading. I say so because many times a Plaintiff files a suit when completely devoid of a cause of action. To also say that because Alcon International Limited (Kenya) had signed the contract and was the rightful claimant automatically became the Plaintiff because an impostor had mentioned it in the plaint would only amount to a mental amendment of the plant with no actuality.

Mr. Kabatsi further submitted that the Court of Appeal ruling in Civil Application No. 50 of 2007 was overturned by the Supreme Court. To support this assertion he referred Court to the judgment of Justice Katureebe on Page 22 Line 4:

*“Although the Court of Appeal ruled in an interlocutory application, that the party who filed HCCS 1255 of 1998 which led to the Arbitration was Alcon International Limited (Uganda), the pleadings upon which orders or the award itself were made did not bring this out. The whole situation was made even more confused by the fact that the order of the Court was made in proceedings in which the Appellants were not even party and were not heard,”*

That, in my opinion, did not amount to overturning the ruling in the Court of Appeal by the Supreme Court. The issue of who represented to parties was never appealed against. The issues before the Supreme Court were really occasioned by the discovery in the Court of Appeal that Alcon International Limited (Uganda) was never a signatory to the contract nor an assignee of the contract by Alcon International Limited (Kenya).

The appeal was therefore more on the question that the Court of Appeal having found that Alcon International Limited (Uganda) was not a party to the contract nor an assignee by Alcon International Limited (Kenya) it could not sue on the contract and that therefore the Court of Appeal erred to uphold the arbitral award when Alcon International Limited (Uganda) did not have a cause of action.

It is in my opinion the reason why, as Ms. Mutesi for the Defendant rightly submitted, that the Supreme Court wrote at Page 21 of Justice Katureebe's judgment;

*"The mere fact that the Court of Appeal ruled that Alcon International Limited (Uganda) had filed Civil Suit No. 1255 of 1998 did not necessarily constitute a cause of action without amending the pleadings. Indeed even a person who is a proper party to a suit would still need to plead facts that give that party a cause of action. Merely being the right party to file a suit is not enough."*

The learned Justice considered this. He analysed the pieces of evidence and came to the conclusion that it was Alcon International Limited (Kenya) which had won the award of the contract and signed it but it was Alcon International Limited (Uganda) which took the matter to court and knowing it was not a party to the contract and could not sustain a suit under the contract masked itself with the face of Alcon International Limited (Kenya),



Lastly, the matter that was referred to this Court for retrial came from the Supreme Court and the copy of the judgment clearly indicates who represented who.

The learned Chief Justice at Page 5 of the judgment listed the advocates and the parties they represented.

He wrote:

*“At the hearing of the appeal the 1<sup>st</sup> Appellant was represented by Mr. G. S. Lule, Mr. Barnabas Tumusinguzi, Mr. David Nambale, Ms. Patricia Mutesi and Ms. Brenda Ntambirweki. The 2<sup>nd</sup> Appellant was represented by Dr. J. Byamugisha. The Respondent was represented by Mr. Enos Tumusiime, Mr. M. Kabega and Mr. Ronald Oine.”*

It is the parties to the Supreme Court Appeal No, 15 of 2009 with the exception of Ssentongo who were sent back to the High Court together with their advocates, none of whom included M/S Kampala Associated Advocates.

It is therefore the finding of this Court that the Plaintiffs who went to Court rightly or wrongly were Alcon International Limited (Uganda).

It is also this Court's finding that the finding by the Supreme Court that they had no locus standi did not substitute Alcon International Limited (Kenya) in their place.

Since it has been admitted by Mr. Kabatsi of Kampala Associated Advocates that their firm has never received instructions from Alcon International Limited (Uganda), they cannot in the circumstances appear in this matter, and are hereby struck off the record of these proceedings.

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**David K. Wangutusi**  
**JUDGE**

**Date: 03/09/2014**

03/09/14  
9:18am

- Mr. Enos Tumusiime, Mr. Kabega for the Plaintiff
- Mr. Bruce Musinguzi for Alcon Kenya present
- Juliet Kamuntu – Court Clerk

Court: Ruling delivered on request by Hon. Justice David  
Wangutusi

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Opesen Thadeus  
**ASST. REGISTRAR**