THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA

AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 43 OF 2010

V.G KESHWALA AND SONS}.....PLAINTIFF

VS

M.M. SHEIKH DAWOOD}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

This ruling arises from an application to withdraw the suit by the Plaintiff's Counsel. The Plaintiff was represented by Counsel Brian Kabayiza assisted by Counsel Kagoro Robert Friday of Messieurs Muwema and Mugerwa and Company Advocates while the Defendant was represented by Counsel Peters Musoke of Messieurs Shonubi Musoke and Company Advocates.

The grounds for withdrawal of the suit is that it became apparent during preparation for pre-trial conferencing that the party who filed this suit does not exist in law. It was filed by VG Keshwala and Sons. Counsel submitted that the entity does not have legal personality and has never been registered as such. Those were facts established by the Plaintiff's Counsel and they were left in an awkward position. The Plaintiff's Counsel relied on rule 7 of the **Advocates (Professional Conduct) Regulations** which makes it an obligation of an advocate not to permit the Court to be misled by remaining silent about a matter within his knowledge. He submitted that he was obliged to bring the irregularity to the attention of the Court and also make an application for withdrawal of the suit. This is because the suit cannot be sustained on the basis of that information. He had discussed with the Defendant's Counsel and they were in agreement.

In reply the Defendant's Counsel expressed happiness with the concession and submitted that the issue had been apparent for a long time. Secondly he submitted that the court has already made a finding on the issue. He contended that in the process of reaching this concession by the Plaintiff, a lot of money has been spent by the Defendant trying to defend itself. The Defendant had no problems with the application for withdrawal of the suit provided the costs expended by the Defendant refunded. Secondly there is a counterclaim based on the underlying issue of trademarks in the Plaintiff's suit. He submitted that the counterclaim stands unchallenged against

whoever is trading under the wrong trademark which is VG Keshwala and Sons. He contended that it is VG Keshwala and sons which owns the trademark the subject matter of the counterclaim. Since the do not exist in law as submitted by the Plaintiff's Counsel, he prayed that the trademark "Toto" ceases to exist in the market because it is owned by a nonentity and that the trademark of his client "Baby" continues to operate in the market.

In reply Counsel Brian Kabayiza addressed the court on the consequences of the withdrawal advanced by the Defendant's Counsel. He agreed that they are on record as having represented that the Plaintiff is non-existent. The law in that regard is that a suit filed by a nonentity is no suit and secondly a nonentity cannot be subjected to orders in costs. Court orders are not made in vain. There may have been an individual who give instructions but that individual could have come to court and sought to be joined in the matter on the basis that he has a business name. The fact that there is no business name by the names of the Plaintiff in this suit means that there is nothing to be rectified. Consequently the nonentity cannot be condemned in costs. He relied on the case of Fort **Hall Bakery versus Frederick Muigai Wangoe [1959] 1 EA 474** that a nonentity can neither pay nor receive costs. Counsel further relied on other authorities in the case of the **Trustees of Rubaga Miracle Centre versus Mulangira Ssimbwa a.k.a Afidra Milton HCMA No 576 of 2006** where Hon Justice Remmy Kasule applied the ratio in the case of **Fort Hall Bakery** (supra) that a non-existent party cannot be paid costs. Counsel emphasised that if there were individuals behind a non-existent party, they were never brought on-board and the Defendant cannot sue them for costs. Secondly on the question of the counterclaim, a suit against a nonentity is a nullity because it is a suit against nobody. In those circumstances the Defendant cannot claim costs. On the question of whether the trade name existing in the name of the Plaintiff is an illegality, the counterclaim alleges a number of things. The remedy sought by the Defendant's Counsel is premature because the Registrar of Trademarks is a party to the counterclaim and ought to be heard before an order can be made.

With leave of court Counsel Peters Musoke submitted that there is another aspect which needs to be brought to the courts attention to the effect that the non-existent Plaintiff has won previous suits and the argument that it cannot receive costs cannot be sustained because it had received the costs. On the question of illegality the Plaintiff's Counsel even after being warned went ahead and filed lawsuits and Counsel believed in the existence of the client. They cannot turn back and say there is no client. It is on court record that the registrar found in favour of the Plaintiff who is non-existent and that issue does not require another hearing but is an illegality brought to the attention of court.

In reply to the further submission of the Defendant's Counsel, the Plaintiff's Counsel Brian Kabayiza emphasised that the fact that the non-party had been awarded costs in previous matters is outside the ambit of the suit and ought not to be entertained as a matter in this suit by the court. In the current suit, costs were ever awarded in favour of the Defendant and never in favour of the

Plaintiff. On the question of illegality, Counsel reiterated submissions that the registrar is a party to the counterclaim and ought to be given a hearing.

Ruling

I have carefully considered the submissions of both parties on the question of costs and illegality brought to the attention of court. The question of costs arose as a result of an application for withdrawal of the Plaintiff's suit by the Plaintiff's Counsel to which the Defendant's Counsel agreed.

Withdrawals of suits and at instance of the Plaintiff are governed by **Order 25 rule 1 of the Civil Procedure Rules**. The wording of the rule 1 (1) explicitly provides that the Plaintiff may at any time before delivery of the Defendants defence or after receipt of that defence before taking any other proceeding in the suit (except any application in Chambers) by notice in writing wholly discontinue his or her suit against all or any of the Defendants. The second part of the rule (1 (2)) provides that it shall not be competent for the Plaintiff to withdraw or discontinue a suit without leave of the court but the court may after hearing upon such terms as to costs and as to any other suit order that the action be discontinued or any part of the alleged cause of complaint be struck out. Withdrawals may also be by consent of the parties under Order 25 Rule 2 of the Civil Procedure Rules. It however provides for written consent prior to the hearing filed on the court record by all the parties.

In the course of the application for withdrawal of the action, it became clear that the only applicable rule would have been Order 25 rule 1 (2) of the Civil Procedure Rules which deals with an application of the Plaintiff to the court for withdrawal of the suit leaving the question of costs to the exercise of the court's discretion under that rule though none of the parties referred to the Civil Procedure Rules. Because the Plaintiff's Counsel applied for withdrawal, the grounds for withdrawal for the exercise of the courts discretion as to whether to award costs introduced a significant fact supported by authorities cited that the Plaintiff is a nonentity. In other words the Plaintiff does not exist. A non-existent party cannot withdraw from a suit which it could not have filed. The case of **Fort Hall Bakery Supply Company versus Frederick Muigai Wangoe [1959] 1 EA 474** was decided by the HM Supreme Court of Kenya at Nairobi. It was a judgment of the High Court and an original suit. In that case Templeton J considered the question of the Plaintiff being a name representing or purporting to represent an association consisting of 45 persons trading in partnership for gain but not registered under the Registration of Business Names Ordinance of Kenya. The Defendant's Counsel submitted that the action was not properly before the court because the Association was illegal as section 338 of the Companies Ordinance prohibited an Association or partnership consisting of more than twenty persons formed for the purpose of business (other than banking) and with the object of acquisition of gain unless registered as a company under the Ordinance. Templeton J noted after citing the case of **Smith versus Anderson [1880] 15 CH 247** that the section which was in *pari materia* with an English 1948 Act was intended to prevent the mischief arising from large trading undertakings being

carried out by large fluctuating bodies so that persons dealing with them did not know with whom they were contracting and so that they might not be put to great difficulty and expense. On the basis of the law the entity cannot be recognised as having any legal existence. He concluded that a non-existent person cannot sue and once the court is made aware that the Plaintiff is non-existent, and therefore incapable of maintaining the action, it cannot allow the action to proceed. The relevant part relied on by the Plaintiff's Counsel is at page 475 as follows:

> *"The order of the court is that the action be struck out, as the alleged Plaintiff has no existence. Since a non-existent Plaintiff neither pays nor receives costs there can be no order as to costs."*

Because in the ruling relied upon by the Counsel, a non-existent party cannot sue; it follows that it cannot apply for withdrawal. Secondly it cannot give instructions for Counsel to withdraw the suit. I have further noted that Counsel has relied on **rule 17 of the Advocates (Professional Conduct) Regulations Statutory Instrument 267 – 2** for his submission that the matter was brought to the knowledge of the Plaintiff's Counsel and could not be withheld from the court. Particularly the relevant provision is rule 17 (1) which provides that:

> *"An advocate conducting the case or matter shall not allow a court to be misled by remaining silent about a matter within his or her knowledge which a reasonable person would realise, if made known to the court, would affect its proceedings, decision or judgment."*

In other words the submission presupposes that the Plaintiff's Counsel did not act on the instructions of anybody but acted as an officer of the court to make the matter known to the court. The implications on the question of costs are that the Plaintiff's Counsel was instructed by a nonentity to file this suit and the withdrawal application was based on his duties to the court. I shall critically examine such a proposition in considering whether costs should be awarded. Obviously the case of **Fort Hall Bakery Supply Company Ltd** (supra) dealt with section 338 of the Companies Ordinance (cap 288) of Kenya which prohibited an Association of more than 20 persons from operating a business for gain without registration under the Companies Act/Ordinance.

The second authority I have considered is the case of **Mulangira Ssimbwa versus The Board of Trustees Miracle Centre and Another** (supra) where Honourable Justice Remmy Kasule applied the ratio in **Fort Hall Bakery Supply Company Ltd**. It was an application for rejection of the plaint on the ground that the Defendant in this suit described as the Board of Trustees, Rubaga Miracle Centre Cathedral is a non-existent entity with no capacity to sue or be sued. The Judge held that a suit in the names of the wrong Plaintiff or Defendant cannot be cured by amendment. The court held that the Defendant was non-existent and that was the decision of the court. The consequence of the court's decision was that no order would be made as to costs since a non-existent party cannot be paid costs.

I have carefully considered the authorities. In the case of **Fort Hall Bakery Supply Company** (supra) the Association was an illegality having been operating in contravention of section 338 of the Companies Ordinance (cap 288) of Kenya. It was the Plaintiff and an order was sought for it to pay costs. There is no consideration in that suit as to whether any other party or the 45 people could be made to pay costs and the matter was not addressed. In the case of **Trustees of Rubaga Miracle Centre vs. Mulangira Ssimbwa** (Supra) the ruling was made in respect of two applications. Miscellaneous Application 516 of 2005 was for rejection of the Plaint on the ground that the Defendant in the suit namely the Board of Trustees, Rubaga Miracle Centre Cathedral is a non-existent person with no capacity to sue or be sued. This second application Miscellaneous Application Number 655 of 2005 was filed by the applicant Mr Mulangira Ssimbwa for leave to amend the Plaint in HCCS number 768 of 2004 by adding Pastor Robert Kayanja. The court disposed of HCMA No. 516 of 2005 for rejection of the plaint by finding that the suit was filed by a nonentity and was a nullity. It also disposed of the second application for amendment because the court went ahead to hold that a nullity cannot be amended by substitution of a party. What is crucial is that it can be said that the Defendant won the suit against the Plaintiff. The holding of the court was that a nonentity against whom a suit had been struck out could not be awarded costs.

That suit is clearly distinguishable from the current matter before the court. In the first place there are other applications upon which the court has ruled in this matter touching on the question of the status of VG Keshwala and Sons. The suit had reached the level of pre-trial conferencing after the applicant/VG Keshwala in Miscellaneous Application No 501 of 2013 applied for the Defendant's law firm namely Messieurs Shonubi, Musoke and Company Advocates to be barred from handling the case of the Defendant on the ground that they had previously represented VG Keshwala and Sons. The application is supported by somebody describing himself as VG Keshwala. In other words there is somebody who held himself out to be VG Keshwala. In paragraph 2 of the affidavit in support of that application he deposes that he is a resident doing business in Uganda for a long time. In paragraph 1 he deposes that he is a male adult British citizen of sound mind and the Defendant in the respondents counterclaim in HCCS No 43 of 2010. The respondent in that application is also the Defendant and represented by Messieurs Shonubi, Musoke and Company Advocates and Solicitors.

My ruling in Miscellaneous Application No. 501 of 2013 is revealing about the issue of the status of VG Keshwala and the question of the business name of the Plaintiff. To avoid repeating myself I will quote my ruling at pages 18 and 19 thereof which ruling was delivered on 27 September 2013.

> *"It is alleged in the written statement of defence in that suit that matters proceeded before the assistant registrar of trademarks in Uganda and the Defendant proceeded with the advice of his lawful attorneys to make another application. The second application was opposed by the Plaintiff on the ground that the trademark "Baby Wax safety*

matches" was similar to the trademark "Toto Wax Safety Matches". I find it puzzling that the said application were commencing after the said death of the applicant's father. There must have been somebody behind the name also referred to as the Plaintiff in the written statement of defence of the Defendant.

Finally the parties relied on regulation 4 of the Advocates (Professional Conduct) Regulations. The head note of this section ...

A critical assessment of the application leads to the conclusion that the crucial question relates to the identity of the applicant. And the obvious question is whether the applicant is VG Keshwala. The ruling of the court in miscellaneous application number 538 of 2011 being an application to file a reply to the counterclaim out of time, makes one crucial observation. Whether the business name is VG Keshwala and sons or another name, so long as it is not a limited liability company, the question of who is liable deals with the individual behind the name. However, who is the proper party to the plaint cannot be a fact which is to be concealed. The fact is relevant to question of who pays the court fees, who is liable for costs and verification of identity or revelation of the identity particularly as to who is the Plaintiff or the partners behind the Plaintiff or the individual behind the Plaintiff is not supposed to prejudice anybody. Because members of the partnerships are personally liable or a sole proprietor is personally liable, revealing the identity cannot be prejudicial. In fact it is necessary for Counsel to investigate the identity of any party to a suit of someone who registers a business name. This is a requirement of law and the information is deemed to be in the public domain under the Business Names Registration Act."

I also decided that the question of whether the applicant is a proprietor of VG Keshwala and Sons is not confidential information but information required by law to be registered with the Registrar of Business Names. Secondly at page 19 I specifically ruled that the question of the identity or revelation of the identity of the person who is behind the Plaintiff is relevant on the question of costs. It follows that the question of the identity of the status of the applicant who was a real person in that application and filed an affidavit in support of the application reveals that there was somebody acting and the using the names of VG Keshwala and Sons.

Miscellaneous Application 501 of 2013 is not the only application filed by the Plaintiff/the person who made or swore an affidavit in support thereof. In yet another application Miscellaneous Application No 538 of 2011 for extension of time to file and serve a reply to the respondents/Defendants counterclaim in HCCS 43 of 2010 the same issue arose. In that application the Defendant's Counsel attacked the affidavit in support of the applicant's application on the ground that it was fatally defective. He had submitted that the VG Keshwala trading as Keshwala and Sons is not a party to this suit. And that the person who filed the suit is VG Keshwala and Sons described as a company registered in Uganda and carrying on business in its names though not incorporated. At page 3 of the ruling the matter was addressed by the

court on the question of the competence of the affidavit in support of that application and I will quote from that ruling delivered on 21 February 2013 as follows:

> *"The matter of law is the basis of the respondent's objection to the affidavit. The issue of law deals with the names of the applicant and not the fact of the person behind the names. The affidavit on the other hand could only deal with the actual person who gave instructions and not the name. In those circumstances the affidavit in support of the application paragraph 2 thereof cannot be a falsehood since it contains averments of fact. It is not the name that gives instructions but the individual behind the name. The affidavit in support of the application is therefore not fatally defective. I must emphasise that the applicant is not a company which is incorporated in a name that gives it artificial legal personality.*
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> *The same argument goes for the objection to the application on the ground that it was not filed by the same party. There is no mistake as to who the parties are since the names are more or less the same. This is made more pertinent by the fact that it is not a company and therefore it is the individual behind the name who is liable. It is also something that can be addressed in the trial of the suit on merits."*

I allowed the application for extension of time to file a reply to the counterclaim. Subsequently the applicant VG Keshwala or somebody describing himself as VG Keshwala who deposed to the affidavits in support of the two applications cited above filed an application for the Defendant's lawyers to be barred from representing the Defendant on the ground that they had ever acted for VG Keshwala and Sons. It is material that in that application the issue of the identity of the applicant was submitted on. The ground for the application for withdrawal on the basis that VG Keshwala and sons is not a registered entity does not absolve the party who gave instructions for the filing of the plaint and the various applications. I must emphasise that unlike the case of **Fort Hall Bakery and Company** (supra) there is no statutory provision barring a person from registering a business name. The business name can be used in a suit. In a previous application between the same parties where VG Keshwala and sons applied for amendment of the plaint, the same question about the status or identity of the Plaintiff was touched on by the court and the court observed that the amendments sought was not a mere case of misnomer but affected the legal status of the party. It cannot be said in the Plaintiff's case that there was no person behind the name. It is not a Corporation which can be separated from its members. At best it could have been a business name for a sole proprietor or a partnership. In either case the members are liable for the actions of the partnership or a sole proprietorship. The party involved swore affidavits and gave instructions to the Plaintiff's lawyers. The nullity of the action cannot absolve the parties and particularly the Plaintiff from meeting its obligations. Too many representations have been made on behalf of the sole proprietor or partnership to the prejudice in terms of incurring costs of the Defendant.

Had it been a Corporation in whose name the action is commenced without undue authority, the Plaintiff's Counsel would be held personally liable for the costs according to the case of **Bugerere Coffee Growers Ltd versus Sebaduka and another [1970] 1 EA 147** where Counsels for the Plaintiff were condemned in costs for filing an action without authority of the purported Plaintiff. In this case the Plaintiff used a name which is not a registered in circumstance where if it was the business name the person who is the partner or sole proprietor thereof would be personally liable. Failure to register the name does not absolve the deponent of the various affidavits from being the person who instructed the lawyers who filed the action against the Defendant, who represented himself as being the Defendant to the counterclaim and filed various other interlocutory applications. He cannot suddenly discover that the entity he has represented in court is an unregistered entity and claim that on account of non-registration he is not liable to pay costs. The cost of the withdrawn the suit shall be borne by the person who gave instructions to Messieurs Muwema and Mugerwa Advocates and was able presumably to meet their fees for filing the action on his behalf albeit in the names of VG Keshwala and Sons. Costs accordingly are awarded against the deponent in Miscellaneous Application No. 501 of 2012, Miscellaneous Application No 543 of 2011 being an application for amendment of the plaint and Miscellaneous Application No 538 of 2011 being an application for extension of time to file a reply to the Defendant's counterclaim.

Finally on the prayer of the Defendant's Counsel for the court to rule that there cannot exist a trademark in the names of a non-entity, the response of the Plaintiff's Counsel primarily is that the registrar of trademarks who is a party ought to be given a hearing before an order is made. I have carefully perused the counterclaim. The primary question is whether the admission of the Plaintiff's Counsel that the Plaintiff is not a registered entity and therefore this suit is a nullity requires hearing the registrar who registered a trade name using the names of the Plaintiff.

I have carefully considered the counterclaim and paragraph 1 thereof shows that it is for the registration of the first Defendant's trademark "TOTO" Wax Safety Matches and for the subsequent registration of the trademark "Baby" Wax Safety Matches and to restrain the first Defendant VG Keshwala and Sons from seizing matches with the trademark "Baby" (supra). In the prayers the second Defendant who is the Registrar of Trademarks is mentioned. The only prayer sought against the registrar of trademarks is that the second Defendant be ordered to deregister the Mark "TOTO" Wax Safety Matches and subsequently register the Mark of "BABY" Wax Safety Matches. The counterclaimant sought punitive damages against the first Defendant and the second Defendant for the irregularity that has caused disruption of the counterclaimant's business interests, general damages costs of the suit and interest.

The prayer sought by the counterclaimant's Counsel arises from the submission that the Plaintiff is not a registered entity. It does not require the presence of the registrar for a declaration to be made that nothing can be registered in the names of a nonentity. However the other prayers require the presence of the registrar of trademarks.

It is a principle of law that an illegality once brought to the attention of court overrides all questions of pleadings including admissions made therein. Is it an illegality to register property in the names of a non-existent person? The procedure for bringing an illegality to the attention of court is not important. An illegality once brought to the attention of court overrides all questions of pleadings including any admissions made therein. This proposition of law was approved by the Court of Appeal in the case of **Makula International vs. His Eminence Cardinal Nsubuga and another reported in [1982] HCB 11**. The court held that it could interfere with a taxing officer's order even where the appeal from the order was incompetent. They held that "a court of law cannot sanction what is illegal and an illegality once brought to the attention of court overrides all questions of pleadings, including any admissions made thereon." The court cited with approval the case of **Belvoir Finance Co. Ltd vs. Harold and G Cole & Co. Ltd [1969] 2 ALL ER 904** and the judgment of Donaldson J at page 908. In the case the Defendant asserted that the hire purchase agreements in question were illegal but that one Belgravia was in possession of the vehicles in question with the consent of the Plaintiff and the consent was admitted in the pleadings. Donaldson J held: "I think illegality, once brought to the attention of court, overrides all questions of pleadings, and therefore this is, and remains a real and indeed insuperable difficulty in the way of the Defendant so far as the Mercantile agency defence is concerned." In the case of **Mercantile Credit Co. Ltd v Hamblin [1964] 1 ALL ER 680** the illegality was not pleaded, though the Defendant sought to rely on it as a defence. The Plaintiff asserted that for illegality to be relied on, it had to be pleaded. The Defendant sought leave to amend the defence. John Stephenson J held that Counsel was not acting improperly to draw courts attention to an illegality of the transaction. On the contrary it was Counsel's duty, however embarrassing to prevent the court from enforcing an illegal contract. Finally the court cited with approval the case of **Phillips versus Copping [1935] 1 KB 15** per Scrutton LJ at page 21 when he said:

> *"But it is the duty of the Court when asked to give a judgment which is contrary to a statute to take the point although the litigants may not take it."*

In other words the court can on its own motion determine the point even though the litigants have not requested the court to determine it. The fact that VG Keshwala and sons is a non-registered entity is fatal to any action taken by the Registrar of Trademarks in registering trademarks in its names. The Registrar shall be summoned to appear in court on the issue before a final judgement on the registration of the trademark is made. In the premises the Registrar of Trademarks shall be summoned by the Registrar of this court to appear in court and be heard on the question of the effect of non-registration of VG Keshwala and Sons on any registered trademark.

Ruling delivered on the 23rd of May 2014 in open court.

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Brian Kabayiza for the Plaintiff

Rebecca Nakiranda for the Defendant.

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

23/05/2014