

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL APPEAL NO 39 OF 2014
ARISING FROM HCCS NO 43 OF 2010
MM SHEIK DAWOOD VS VG KESHWALA AND SONS 11 FEB 2015
CIVIL APPEAL NO 39 OF 2014
(ARISING FROM HCCS NO 43 OF 2010)**

MM SHEIK DAWOOD}.....APPELLANT

VS

VG KESHWALA AND SONS}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

This Ruling arises from a preliminary objection on the competence of the Appellant’s appeal on the ground that it was filed against the V.G. Keshwala and Sons which had been declared a nullity by the court. The Appellant had appealed the taxation decision of the learned Assistant Registrar delivered on 30 October 2014.

At the hearing of the appeal Counsel Rebecca Nakiranda of Messieurs Shonubi Musoke and company advocates appeared for the Appellant while Counsel Kasisa Ronald of Kasisa and Co Advocates appeared for the Respondent

The Respondent’s Counsel objected to the framing of the appeal as presented in the court ruling of 23rd of May 2014 which has never been appealed. He submitted that in that ruling the court declared V.G. Keshwala and Sons to be a non registered entity. It can neither sue nor be sued. Secondly the court ordered

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costs against Keshwala Ranmal personally. The suit was held to be a nullity on the same grounds. Subsequently he received instructions from Keshwala Ranmal to represent him in the taxation. After the order of the court it would be futile for the Appellant to present to court a nonexistent entity causing costs to the individual. They should have brought the appeal against the individual. He prayed that the appeal as it is should be dismissed for being brought against a nonexistent entity.

In reply Counsel Rebecca submitted that the order of the court is clear about who is to pay costs irrespective of the names of the parties presented in the suit. Following the ruling of court a bill of costs was prepared in the same names as the ruling had been made and the Respondent's Counsel proceeded with taxation without objection as to whether bill was presented against a non entity. Secondly there was evidence from the reply in the appeal that there was an attempt to clear the awarded amount though a cheque drawn on VG Keshwala and Sons Ltd. This appeal is not a new suit or new proceeding but a continuation and an attempt to conclude a matter on which the court decreed. Any outcome of the appeal would still be affected and bound by the order of the court as to who pays the costs. She prayed that the objection is overruled with costs.

In rejoinder Counsel Ronald Kasisa disagreed. He submitted that after the order of the court that the suit is a nullity, nothing could proceed in the same names. It is the names that were in contention. The parties have to be brought to court under proper names. As to the issue of names, V.G. Keshwala and Company Ltd is what the Respondent uses to run business. He reiterated prayers for the appeal to be dismissed or struck out with costs.

I have carefully considered the matter. The ruling of the court giving rise to the taxation matter was delivered on the 23rd of May 2014. The ruling came as a result of the withdrawal of the Plaintiff's Counsel upon discovery that the VG Keshwala and Sons (the supposed Plaintiffs) were not registered and was a nonentity. There was consensus that the action could not be maintained in the circumstances and only controversy that was decided was whether costs could be awarded against the Plaintiff because a nonexistent party cannot withdraw from

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the suit or pay costs. The court held that because a nonexistent party cannot sue, it follows that it cannot apply for withdrawal of the action. Following various matters in which the client of Counsel Ronald Kasisa swore an affidavit and was the person behind the Plaintiffs actions, costs were awarded against Ranmal Keshwala.

It was clearly the ruling of the court that the VG Keshwala and Sons could not maintain the action. There are various authorities to the effect that an action by a non-entity cannot be maintained.

In the same suit from which this appeal emanates, I had reviewed the authorities below and would repeat them here. In the case of **The Trustees of Rubaga Miracle Centre vs. Mulangira Ssimbwa HCMA No. 576 of 2006 and Mulangira Ssimbwa A.K.A Afidra Milton vs. the Board of Trustees, Miracle Centre and Pastor Robert Kayanja HCMA No. 655 of 2005**) (both Applications arising from HCCS No. 768 of 2004), Hon Justice Remmy Kasule, Judge of the High Court as he then was held that where the amendment by way of substitution of a party purports to replace a party that has no legal existence, the plaint must be rejected as it is no plaint at all. He accordingly allowed the application to reject the plaint and dismissed the application for amendment. There are other authorities for the proposition that a suit filed by a nonentity cannot be cured by substitution of the nonentity neither can the plaint filed by a nonentity or a suit against a nonentity be sustained or amended for want of a cause of action. In the Tanzanian case of **Babubhai Dhanji Pathak V. Zainab Mrekwe [1964] EA 24**, a suit was filed in the lower court in the name of a dead Plaintiff 45 days after her death and an application to substitute the deceased Plaintiff under order 1 rule 10 was allowed in ignorance of the fact by the Magistrate. On appeal to the High Court Law J held at page 26:

“A suit instituted by a dead person is a nullity. The power to substitute a Plaintiff where a suit has been filed in the name of a wrong person, conferred by Order 10, r. 1(1) in the First Schedule to the Indian Civil Procedure Code, can only be exercised where the “wrong person” was

living at the date of instituting the suit, and has no application where the “wrong person” was dead at such date.

Finally in the case of **Fort Hall Bakery Supply Co. Ltd V. Fredrick Muigai Wangoe [1959] EA 474**, the Plaintiff’s were an association consisting of 45 persons trading in partnership for gain but their firm was not registered under the Business Name Registration Ordinance. It was submitted by the Defendants that the Companies Ordinance prohibited an association or partnership of more than twenty persons. The Plaintiffs were a group of persons not having legal existence under the Companies Ordinance. The Plaintiffs filed the suit in the name of “Fort Hall Bakery Supply Company”. Templeton J agreed with the words of Bankes L.J in **Banque Internationale De Commerce De Pertograd v Goukassaow (3), [1923] 2 K.B. 682** at p 688 that:

“The party seeking to maintain the action is in the eyes of our law not party at all but a mere name only, with no legal existence.”

He concluded by saying at page 475:

"A nonexistent person cannot sue and once the court is made aware that the Plaintiff is nonexistent, and therefore incapable of maintaining the action, it cannot allow the action to proceed. 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 can pay nor receive costs there can be no order as to costs."

I agree with the Respondent’s Counsel that the court cannot revisit the decision made on the 23rd of May 2014 where the suit by the nonentity V.G. Keshwala and Sons was declared a nullity as a matter of law. The nonentity could not give instructions to withdraw since it is nonexistent. Court ordered costs of the proceedings to be borne by the individual Ranmal Keshwala. In other words there is no V.G. Keshwala and Sons before the court. As far as the cheque issued by V.G. Keshwala and Sons Ltd is concerned, the cheque was issued by a limited liability company and it is not material to the finding as to the nullity of V.G. Keshwala and

Sons who purported to file a suit before that company was incorporated according to the evidence on court record.

The Appellant's Counsel was privy to the proceedings giving rise to the taxation matter and hence the appeal and cannot bring an action by way of appeal against a party declared not to exist. In those circumstances I reaffirm my earlier ruling that there is no Respondent by the names V.G. Keshwala and Sons before the High Court and the appeal is hereby struck out with not order as to costs.

Ruling delivered in open court the 13th day of February 2015

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Rebecca Nakiranda for the Appellant

Counsel Kasisa Ronald for the Respondent

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

13/02/2015