

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
HCMA NO 15 OF 2015
(ARISING FROM HCCS NO 5 OF 2015)**

AYA INVESTMENTS (U) LTD}.....APPLICANT

VS

MAERSK (U) LTD}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

This ruling arises from a preliminary objection by the Respondents Counsel to the application on the ground that the Applicant had sued and non-entity and the Respondent was the wrong party. In the application itself, the Applicant seeks a mandatory injunction to issue against the Respondent, ordering them to release the Applicants goods held in their custody and for costs of the application to be provided for.

Briefly the grounds of the application as contained in the notice of motion are that the Applicant bought goods in China, obtained the pre-export verification of conformity, CE certificate of conformity and certification of conformity. The Respondent was contracted to ship the goods to the Applicant. The Respondent shipped the goods to Uganda and the same are detained in the Respondent's premises on 5th Street, Industrial Area, Kampala. The Respondent has refused to deliver the goods and is threatening to ship the goods back to China on a purported Chinese court order. The Respondent has no claim whatsoever to the goods, because its entitlement is payment of its shipping charges order Norwich charges which the Applicant is ready to pay immediately upon presentation of invoice to the Applicant. The Applicant filed a main suit against the Respondent

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+:*

for release of the cables and general damages which is yet to be determined. The Applicant further avers that it is a simple and summary act which can be remedied and decided at once and merits a grant of a mandatory injunction. Finally that it is in the interests of justice and equity that the application is granted and that if the application is not granted the Applicant shall suffer irreparable damage which is far greater than the value of its goods which arrived in the country and are being illegally held by the Respondent.

The application is supported by the affidavit of Mawlana Hamid.

In reply to the application Daniel Mwangi described as the Country Manager of Maersk Shipping Line, Uganda deposed an affidavit in reply. In paragraph 3 of the affidavit he avers that Maersk (U) Ltd the alleged Defendant in civil suit number five of 2015 does not exist and as such the present suit and application there under a bad in law because the suit was filed against a non-existent legal entity. Because the suit was filed against a non-existent legal entity the application ought to fail for that reason alone. Furthermore he deposes that the carrier that was responsible for shipping the Applicant's goods from China to Uganda is not the Defendant to the suit.

Upon hearing the Respondent's objection and a brief reply to the Applicants reply to the objection, the court decided that the question of whether the Defendant is a non-existent entity is a fundamental question which had to be tried first before hearing any other matter in the suit under Order 15 rule 2 of the Civil Procedure Rules. Consequently the matter was stood over for a few hours to enable the parties obtain the requisite information from the Uganda Registration Services Bureau.

Counsel Frederick Sentomero assisted by Counsel Godfrey Himbaza appeared as Counsel for the Applicant. Counsel Mathias Ssekatawa assisted by Counsel Stephen Zimula appeared as Counsel for the Respondent.

Counsel Mathias Ssekatawa argued that the Respondent was a nonentity and this point goes to the root of that suit and had to be raised at the earliest opportunity. He submitted that the objection is founded on paragraph 2 of the plaint which

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+:*

reads that the Defendant is a duly registered limited liability company operating business in Uganda. In paragraph 4 the Defendant averred in the WSD that Maersk Uganda Ltd the Defendant to this suit is a nonexistent entity and therefore the suit was filed or brought against a nonentity and is void ab initio. Maersk Shipping Line filed a defence because it is in custody of the suit property. If they took no action there was a likelihood of the matter proceeding ex parte with orders issued by this court against a nonentity being sought to be enforced against them. This is pursuant to the defence and affidavit in reply particularly paragraph 3 of Daniel Mwagi's affidavit which reiterates this position. Those two averments shift the burden to the Plaintiff to prove that the entity exists. Counsel referred to the affidavit of Diana Angeret who in an attempt to respond to the objection alluded to internet search in paragraph 4 of the affidavit in rejoinder suggesting that the Defendant exists. He contended that the legal status of an entity is not proved by internet search. It is not for Maersk Shipping Line to volunteer the information the Applicant seeks to sustain their claim. For those reasons both the application and the underlying suit are in essence a still born baby. No life can be breathed into them by way of amendment or substitution of parties. It is our submission that the plaint and consequently the ill fated application contravene Order 7 rules 11 (d) and (e) of the Civil Procedure rules and he prayed that the plaint is rejected. A suit cannot be instituted against a nonexistent party and secondly the suit as a consequence is frivolous and vexatious.

Counsel relied on the ruling of Hon Justice Remy Kasule judge of the High Court as he then was in **HCMA 576 of 2006, The Trustees of Rubaga Miracle Centre vs. Mulangira Simbwa**. He held that the plaint had to be rejected under order 7 rule 11 and 19 of the CPR as the Defendant does not exist as a real or legal person capable of suing or being sued. The plaint was a nullity and could not be cured by amendment or substitution of parties. The plaint must be rejected. Counsel referred to other authorities mentioned in that ruling for the same proposition of law. He submitted that a nonexistent party is not entitled to costs and prayed that the suit is rejected under Order 7 rule 11 of the Civil Procedure Rules. The Plaintiff can with due diligence ascertain who the proper Defendant is.

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+:*

In reply Counsel Frederick Sentomero submitted that the application was served on the Respondents more than a week earlier and they acknowledged service and came to court whereupon they sought an adjournment. They only served the Applicants Counsel with their affidavit in reply yesterday at 5.30 pm and a rejoinder was filed that morning. With reference to paragraph 3 of the affidavit of Daniel Mwangi that the suit was filed against a nonexistent party, the preliminary objection is meant to defeat the ends of justice by being served late and to defeat the application. The burden is on the Respondent who asserts the fact to prove their allegation that there is a nonexistent party. They ought to have attached a copy of their search in the company registry. It was a disservice to court to decide a fact which is not evidence. Furthermore Counsel contended that with reference to paragraph 1 of the affidavit of Daniel Mwangi who deposed the affidavit in reply, he is the Country Manager of Maersk Shipping Line Uganda. He gives no address and does not indicate whether it is a limited company. The deponent deliberately avoids information that helps the court. Secondly the internet is a publication and the affidavit of Diana Angeret deposes in paragraph 3 that there was nothing in the affidavit of Daniel Mwangi to suggest that Maersk Uganda Ltd is nonexistent. A Google search shows that Maersk Uganda Ltd is located on 5th street Kampala P.O. Box 28687 Kampala. Business week also gives the same address. The deponent of the affidavit in reply ought to have stated that there is Maersk Uganda Ltd passing off. It cannot be a coincidence to be located at the same address/premises. He has not explained whether it is a past name and finally the burden is on the Respondent to prove it is nonexistent.

The court directed that the issue of whether the Defendant/Respondent exists as a legal entity is a fundamental issue which would be tried first under Order 15 rule 2 of the Civil Procedure Rules. The matter was stood over to the afternoon to enable the parties obtain the requisite information from the Uganda Registration Services Bureau. In the afternoon the Respondent had not obtained any further information but the Applicant deposed a further affidavit in rejoinder through Ms Diana Angeret, the Company Secretary of the Applicant.

In further reply after conducting a search with the Uganda Registration Services Bureau Counsel Frederick Sentomero submitted that the Applicant filed an additional of Diana Angeret based on the said search. She attached several documents from the Uganda Registration Services Bureau which documents prove that the Respondent/Defendant exists. The documents are the certificate of incorporation dated 28th July 1997 in the names of the Respondent/Defendant. Subsequently two further certificates of change of name were also issued. On the 26th of Nov 2008 the certificate proves that the name was changed from **Maersk Uganda Ltd** to **APN Global Logistics Uganda Ltd**. A year later on the 27th of August 2009, there is a change of name from **APN Uganda Ltd** to **DAMCO Logistics Uganda Ltd**. There is also annexed a letter from Uganda Registration Services Bureau dated 20th January 2015 confirming the changes. The letter annexure “CC” is to the effect that that registered address is Plot 78/80 at 5th Street Industrial Area P.O. Box 2867 Kampala. In another letter annexure “DD”, the Registrar of Uganda Registration Services Bureau writes that Maersk Shipping Line Uganda Ltd where Mr. Daniel Mwangi deposes that he comes from not appear in the system as a company.

The Applicant’s Counsel further submitted that there is an affidavit of service of the Complaint and notice of motion on court record and it shows an acknowledgement by DAMCO Logistics. He submitted that the evidence is that Maersk Uganda Ltd exists and only changed its name to DAMCO Logistics Uganda Ltd. Secondly at any time during the hearing a party can amend pleadings to write its current name. Thirdly the authorities relied on by the Respondent’s Counsel deal with a situation where the Respondent is nonexistent or never born. In this case there is a certificate of incorporation and therefore the “baby” was born and only underwent a change of name. In the premises the authorities cited by the Respondent’s Counsel are inapplicable. The Plaintiff is not a nullity and an amendment can be made. Counsel submitted that where a party exists an amendment can be made because it is the same party. The amendment is to the name and a new party is not being brought into court.

Last but not least the court record has a return of service of one Sewanyana Steven which in paragraph 6 thereof deposes that plaint and notice of motion were served and received and he attached a copy of the acknowledgement. The recipient according to the acknowledgement is DAMCO Logistics Uganda Ltd. Consequently the Applicant's Counsel submitted that there is a stranger in court in the names of Maersk Shipping Line Uganda. That stranger had never been served and Counsel wondered why it was in court. In the premises he concluded that the said stranger has no locus standi to make any submission in this matter or to appear in this case. In other words the said stranger has not right to be heard by this court and ought not to be heard. Furthermore all along the said stranger has the information in their possession. He submitted that DAMCO logistics is formerly Maersk (U) Ltd. In the circumstances the application for all intents and purposes is unopposed and the preliminary point should be overruled.

In rejoinder to the Applicants reply Counsel Mathias Ssekatawa submitted that he had been served with a further affidavit in rejoinder having the annexure referred to by the Applicant's Counsel. Furthermore reference was made to an affidavit of service which throws a spanner in the works. The entitlement shows it is Maersk which was served. Seeing that the party served was technically the wrong one, the proceedings are tainted with irregularity. Aware that courts do not grant costs to a nonexistent entity. The service was on a party which is not a party. For purposes of consistency, the Applicant having filed a further affidavit, he now knows the proper Defendant and Respondent. He submitted that that the plaint should be rejected and no prejudice would be occasioned to the Plaintiff as there are no costs which can be awarded. Fresh pleading being filed would be the right course of action for the Plaintiff/Applicant to take. The proper party would be at liberty to instruct Counsel and the merits of the application and suit can be considered.

Counsel submitted that equity aides the vigilant and it would not have been prudent for Maersk Shipping Line to do nothing. This gave Maersk Shipping Line the locus standi to be heard. He reiterated submissions that if an order is issued

against Maersk (U) Ltd, it would create mayhem. This is because of Maersk Shipping Line is in possession of the goods and this is a problem of the Plaintiff. Counsel maintained the prayer for the plaint to be rejected and for the Plaintiff to put its house in order in light of its new findings.

In rejoinder on the issue of Locus Standi with leave of court Counsel Frederick Sentomero, for the Respondent submitted that Maersk Shipping Line Uganda is nonexistent and Counsel Mathias Ssekatawa did not address court on that. It is on court record that Maersk Shipping Line was never served. In those circumstances its Counsels do not have locus standi as they do not represent DAMCO logistics. Secondly the affidavit in reply does not state their address. Preliminary objection is based on the pleadings and it means they do not have the goods. He prayed that the preliminary objection is overruled.

Ruling

I have carefully considered the submissions of Counsel as well as the pleadings in HCMA No 15 of 2015 as well as HCCS No 5 of 2015.

The main controversy is whether the Defendant/Respondent to this application exists or is a nonentity. The question of whether it exists was considered by the court to be of fundamental importance in the proceedings and therefore a matter to be tried under Order 15 rule 2 of the Civil Procedure Rules which provides as follows:

"Where issues both of law and fact arise in the same suit, and the court is of the opinion that the case or any part of it may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined."

The question as framed in the objection by the Respondents Counsel was not strictly in the circumstances a question of law because there was controversy as to matters of fact. However the issue as to whether a party is a non-entity or not is a question of fact that affects a fundamental question as to the capacity of the

Plaintiff or the Defendant to appear in the proceedings. The question as to whether a non-entity can appear in the proceedings as a Defendant/Respondent is a question of law. From the submissions however a counter objection was made against the Respondent's Counsel on the ground that they had no locus standi to even make the objection. The question of whether they have locus standi can be considered from the pleadings and affidavit evidence. Finally even though the question of whether the Respondent is a nonentity or not is a question of fact, in this application facts were adduced by affidavit evidence and additional evidence was obtained from the Uganda Registration Services Bureau to establish the facts which are not controversial and therefore what is left for consideration is a matter of law as to whether the suit is a nullity in the circumstances having been brought against Maersk (U) Ltd.

As far as the question of law relating to the standing of the Respondent's Counsels is concerned, the Respondent entitled in this application is Maersk (Uganda) Ltd. The affidavit of service of Sewanyana Steven (hereinafter referred to as the affidavit of service of the summons and attached plaint as well as the notice of motion), has the person who acknowledged service of the summons to file a defence as well as a notice of motion in this application as DAMCO Logistics Uganda Limited. As a question of fact summons to file defence were served on the DAMCO Logistics Uganda Limited on 9 January 2015 according to the signature and stamp acknowledging service. Similarly the notice of motion in this application was served on DAMCO Logistics Uganda Limited.

The first time Miscellaneous Application Number 15 of 2015 arising from HCCS Number 005 of 2015 was mentioned was on 13 January 2015 which is the date fixed in the Notice of Motion. When it came up Counsel Stephen Zimula of Messieurs Masembe, Makubuya, Adriko Karugaba and Ssekatawa Advocates (MMAKS Advocates) informed court that he appeared for the Respondent. He informed the court that his client had been served on Friday, 9 January 2015 and passed on the application to them the previous day at 4:30 PM (that is 12th of January 2015) whereupon he sought a short adjournment to file an affidavit in reply. He undertook on behalf of his client that the goods would not be shipped

back to China in the interim. The Applicant had applied for a mandatory injunction for the release of the goods in the notice of motion. The application was consequently adjourned to 21st of January 2015 for hearing to enable the Respondent's Counsel file a reply of the Respondent and to give an opportunity for negotiations between the parties.

On 20 January 2015 the affidavit in reply filed by the said Respondent's advocates is deposed to by one Daniel Mwangi described in paragraph 1 of the affidavit as the Country Manager Maersk Shipping Line Uganda. In paragraph 3 he deposes that Maersk (U) Ltd, the alleged Defendant in HCCS Number 5 of 2015 does not exist and as such the present suit and the application there under is bad in law since the suit is filed against a nonentity. In paragraph 7 he avers that the Carrier that was responsible for shipping the Applicant's goods from China to Uganda is not the Defendant to the suit. The affidavit however does not attach any documents from the Uganda Registration Services Bureau certifying whether the Defendant/Respondent is a registered company as described in the plaint.

Last but not least on 21 January 2015 when the application came for hearing the Respondent's Counsels made a surprising revelation that they do not represent the Respondent but represent Maersk Shipping Line. The Respondent's Counsel further submitted that the Defendant is a non-existent 'entity'. The written statement of defence was filed on 20 January 2015 on behalf of the Carrier. It does not however reveal the name of the Carrier/Defendant. It also does not attach any documents about the name or status of the person who instructed the Defendant's Counsel. The Defendant is entitled as Maersk (U) Ltd. Similarly the affidavit of Daniel Mwangi has Maersk (U) Ltd as the person entitled as the Respondent.

The submission of the Respondent's Counsel that the Defendant does not exist and that they filed a defence on the behalf of Maersk Shipping Line Uganda is only supported by paragraph 1 of the affidavit in reply in which the Country Manager indicates the capacity in which he deposes to the affidavit. This situation is compounded by the affidavit in further rejoinder of Angeret Diana, the Applicant's Company Secretary filed on 21 January 2015 after both parties were

given a chance to obtain information from the Ugandan Registration Services Bureau. The letter of the Registrar General dated 20th of January 2015 addressed to the Applicant's lawyers on the subject matter of Maersk Shipping Line (U) Ltd provides that the name does not appear in the system as a company and they requested for more particulars to enable them conduct a further search. Secondly as far as the Defendant is concerned it shows that it was registered on 28 July 1997 and subsequently had its name changed to APM Global Logistics Uganda Ltd on 26 November 2008. Finally the company name was again changed to DAMCO Logistics Uganda Ltd on 27 August 2009. The certificates of change of name as well as the certificate of incorporation are attached to the affidavit of the Applicant's Company Secretary.

Whatever the case may be, Messieurs MMAKS Advocates have put themselves in the very difficult situation. The first time Counsel Stephen Zimula appeared, he represented to court that he represented the Defendant/Respondent. Secondly service of court process was received by DAMCO Logistics Uganda Limited. How did DAMCO Logistics (U) Ltd end up giving instructions or passing over summons and plaint as well as the notice of motion to another entity to give instructions? The Applicant's Counsel emphasised that the address for service had not changed.

Finally I have considered the submission of Counsel from MMAKS Advocates to the effect that their client put in a defence because they are in possession of the goods and that had the matter proceeded ex parte, any court order passed may complicate their client's situation during enforcement. I am not satisfied with these submissions because they do not cure the problem of their status in this application or proceedings. In any case it is the Plaintiff's problem. In other words they do not represent DAMCO Logistics (U) Ltd. They had no right to file any documents or pleadings on behalf of a Party who has not been sued by the Plaintiff and whose names are different.

To file pleadings on behalf of a party who has never been served or even sued without instructions of the party served amounts to an abuse of court process unless they have sought to be added on as parties. There is no attempt in the proceedings to add Maersk Shipping Line (whether it is a duly registered company

or a partnership or a business firm is not relevant and does not have to be considered in resolving the question of locus standi). The question of locus standi is not only a matter of whether a party has been sued but it is also a question of ethics. In the absence of any other evidence, the only party which can give instructions in this matter is DAMCO Logistics Uganda Limited, the party served with court process according to the return of acknowledgement attached to the affidavit of the process server. The question of ethics is raised in consideration of rule 2 (1) of the Advocates (Professional Conduct) Regulations Statutory Instrument 267 – 2 which 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.

There is no information from Counsel for Maersk Shipping Line as to whether a duly authorised agent of DAMCO Logistics Uganda Limited gave them instructions to file a defence to the plaint in the main suit and the affidavit in reply in this application. An advocate cannot act for any person unless he or she has received instructions from that person or his or her duly authorised agent. The Advocates have unequivocally submitted on who gave them instructions and there are no grounds to disbelieve them. In any case it was not DAMCO Logistics Uganda Limited which instructed them since they had a duty to court to disclose the party from whom they received instructions.

The issue of whether the current suit was duly filed against a nonentity cannot be considered on the basis of their submissions as court process was received by another company which is not their client. MMAKS advocates from representations of their own Advocate have no right of audience in these proceedings and for emphasises they did not appear as *amicus curiae*.

In the premises the pleadings of Maersk Shipping Line cannot stand. To compound the problem Counsel from MMAKS advocates submitted that the plaint should be struck out and the Plaintiff should file against the right party which the Plaintiff can ascertain. That should not be the concern of their client.

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+:*

The said advocates from their own representations cannot file pleadings on behalf of DAMCO logistics (U) Ltd, which is the party that had received summons and plaint as well as the notice of motion according to the returns of service (and a non entity cannot act so the person served is the one to act). In the premises it is the Defendant's pleadings as well as the reply to the notice of motion which I hereby strike out.

The question of whether the suit can be maintained as it is will be considered in the application itself as a point of law though the submission of MMAKS Advocates will be disregarded on a fundamental issue of being unethical to make submissions without instructions. As it stands now, there is an application by the Applicant's Counsel which has not been fully argued as to whether the name of the Defendant should be amended to read DAMCO Logistics (U) Ltd. That application is stayed and the Applicant's Counsel shall make further submissions in the application before a final ruling of the court which will consider the documents from the Uganda Registration Services Bureau finally.

Ruling delivered this 27th day of January 2015

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Frederick Sentomero assisted by Godfrey Himbaza for the Applicant

Mr. Mawlana Director and Diana Angeret Company Secretary of Applicant

Mathias Sekatawa and Stephen Zimula for the Respondent

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+:*

27/01/2015