

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

**CIVIL SUIT NO. 669 OF 2017**

**TRUST VENTURES LTD:.....PLAINTIFF**

**VERSUS**

**POWERFOAM (U) LTD:.....DEFENDANT**

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

**R U L I N G:**

Trust Ventures Limited the Plaintiff herein sued PowerFoam (U) Ltd herein after referred to as the Defendant for a declaration that the Defendant breached the supply agreement between the parties when she failed to pay USD 20,075 to the Plaintiff, an order of Court directing the Defendant to pay USD 20,075 to the Plaintiff being the outstanding amount on the supply agreement, general damages, interest and costs of the suit.

The Plaintiff a limited liability company incorporated in Uganda carries on business of supply of chemicals used to make mattresses. The parties executed a contract where they agreed that the Plaintiff would supply chemicals used in the manufacture of mattresses to the Defendant. According to the supply agreement the initial payment plan between the parties was that the Plaintiff would supply to the Defendant and present an invoice. The Defendant would then make payment within one week upon receipt of the invoice.

The parties later modified the payment arrangement such that the Defendant was given lee-way to make payment within one month after date of receipt of invoice.

The Plaintiff alleges that the Defendant failed to comply with the new payment plan and therefore breached the understanding between the parties. Because the Defendant has an outstanding balance of USD 20,075 she filed this suit seeking a declaration that the Defendant breached the supply agreement between the parties, an order of Court directing the Defendant to pay USD 20,075 to the Plaintiff being outstanding amount, general damages, interest and costs of the suit.

In response, the Defendant denied liability. The Defendant alleges that the delivery and payment was upon invoice as a business custom and no formal contract was executed between the parties. That they dealt with the Plaintiff on the basis of cash on delivery until the entire factory caught fire and all stock was destroyed.

When the matter came up for hearing on the 27<sup>th</sup> of August 2018 the Defendant raised a preliminary objection on the ground that the Plaintiff was a nonexistent entity incapable of entering into a contract, suing or being sued.

Counsel for the Defendant submitted that the Defendant carried out a search at the Company Registry which established that the Trust Ventures is not reflected in the Company Registry of the Republic of Uganda. On 2<sup>nd</sup> May 2018 the Registrar General Uganda Registration Services Bureau wrote to the Defendant regarding the search conducted on Trust Ventures (U) Ltd. She wrote;

*“Reference is made to yours dated 18<sup>th</sup> April 2018 in respect to the above subject matter to which we respond as hereunder;*

*A search conducted on our records revealed that the name Trust Ventures (U) Ltd is not reflected in our database.*

*We therefore request for any documentation in your possession pertaining to the said name that can aid a further search.”*

He further submitted that all invoices attached in the names of Trust Ventures Inc. had been done by a non-existent company who had purported to invoice the Defendant yet she is a nonexistent entity incapable of contracting or invoicing.

It is trite that a nonexistent person cannot sue and that once Court is made aware that the Plaintiff is nonexistent, and therefore incapable of maintaining the action, it cannot allow the action to proceed but to strike out the suit as the alleged Plaintiff has no existence; ***V.G Keshwala T/a V.G Keshwala & Sons vs M.M Sheik Dawood, HCMA No. 543 of 2011, Fort Hall Bakery Supply Co. Ltd vs Fredrick Muigai Wangoe [1959] EA 474.***

In response to the objection raised, Counsel for the Plaintiff submitted that at the time of incorporation the Company Registry carried out registration using both names. That the

correspondences between the Plaintiff's advocates and the Registrar of Companies indicate that documents belonging to Trust Ventures Limited have occasionally been filed under the company name of Trust Ventures Inc. Limited.

This can be seen from the Annexures to the Affidavit of Julius Ainomugisha the Managing Director of the Plaintiff Company filed on 11<sup>th</sup> Septemeber 2018. On 31<sup>st</sup> August 2018 **Annexure PE11**, the Plaintiff's Advocate wrote to the Registrar of Companies seeking advise on whether the Plaintiff's variation in name is merely a misnomer. She wrote;

*"We act on behalf of our Client whose name must either be Trust Ventures Ltd, Trust ventures (U) Ltd or Trust Ventures Inc.*

*To ease your reference, we have enclosed copies of the following documents previously issued or registered by your office in request to our Client;*

- 1. Memorandum & Articles of Association under the name Trust Ventures Ltd*
- 2. Certificate of Incorporation under the name of Trust Ventures Inc Ltd*
- 3. Form A.9 under the name Trust Ventures Inc Ltd*
- 4. Form 7 under the name Trust Ventures Inc Ltd*
- 5. Board Resolution nominating Standard Chartered Bank under the name Trust Ventures Inc Ltd.*

*Our Client had dealings with Powerfoam (U) Ltd that culminated in HCCS No. 669 /2017 Trust Ventures Ltd vs Powerfoam(U)Ltd. When the matter came up for hearing on 27<sup>th</sup> August 2018, Powerfoam (U) Ltd raised an objection relying on documents from your office and asserted that our Client is a fictitious entity. (Attached are copies of the documents relied on by Powerfoam (U) Ltd.*

*The purpose hereof is to request you to avail us with all the incorporation details of our Client in whichever name(s) **and***

**advise us as to whether the name variation is merely a misnomer....**

On 4<sup>th</sup> September, **Annexure PE12** the Registrar General Uganda Registration Services Bureau replied in these words;

*“Reference is made to yours of reference no. CNP/CV/17/23 dated 31<sup>st</sup> August, 2018 in respect to the above subject matter;*

*A search conducted on our records revealed that the name Trust Ventures Inc and Trust Ventures (U) Limited are not reflected in our database.*

*This is to advise you that **Trust Ventures Limited** was incorporated on the 2<sup>nd</sup> day of October, 2012 under registration number 156385.*

*The Company’s share capital is Ushs. 5,000,000 divided into 100 ordinary shares of UShs. 50,000 each.*

*The Subscribers as per the last filed annual return of 2017 filed on 20<sup>th</sup> February, 2018 are;*

- |    |                           |                  |
|----|---------------------------|------------------|
| 1. | <i>Ainomugisha Julius</i> | <i>90 shares</i> |
| 2. | <i>Joan Nassuna</i>       | <i>10 shares</i> |

*The Directors of the Company as per the above mentioned return are Ainomugisha Julius and Nassuna Joan. The Company secretary is Agaba Justus.*

*The Company’s registered address is Plot 2, 2<sup>nd</sup> Street Industrial Area Kampala, P.O.Box 16666 Wandegeya.*

*We also note that documents belonging to Trust Ventures Limited have occasionally been filed under the company name Trust Ventured Inc Limited.”*

Counsel for the Plaintiff further submitted that from the time of registration when the Registrar issued the certificate in the name of Trust Ventures Ltd, the same Registrar also registered the Memorandum and Articles of Association and all the other accompanying forms, and resolutions under the name of Trust Ventures Inc. Ltd. Therefore there was a mistake from time of incorporation.

It is my view that a misnomer refers to a mistake in naming a person, place or thing in a legal instrument which can be corrected by an amendment to the pleadings. It is also a well established principle that a misnomer can under certain circumstances be rectified by amendment replacing the name appearing on the Complaint or Written Statement of Defence with what the parties believe to be the right litigant; ***Attorney General vs Sanyu Television (1998) CS No. 614 of 1998, Kyaninga Royal Cottages Limited vs Kyaninga Lodge Limited HCMA 551 OF 2018.***

Such correction of name however is only possible where the Complaint or Written Statement of Defence speaks the truth and the misnomer was done out of good faith. Order 1 Rule 10 of the Civil Procedure Rules provides for suits filed in the name of a wrong Plaintiff. It states as follows;

*“ (1) Where a suit has been instituted in the name of the wrong person as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bonafide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.”*

In the instant case paragraph 1 of the Complaint describes the Plaintiff as a limited liability Company incorporated in Uganda whose major business is the supply of chemicals used to make mattresses. The search conducted at the Company Registry shows that documents belonging to Trust Ventures Limited have occasionally been filed under the company name Trust Ventures Inc Limited.

What makes it more credible that the name Trust Ventures Inc Limited is a misnomer is the fact that the Defendant made payments to Trust Ventures Inc. Limited as clearly admitted by her in paragraph 9 of the Written Statement of Defence. In paragraph 9 of the Defendant's Written Statement of Defence the Defendant admits making payment to the Plaintiff in these words;

*“The Defendant partially admits the content of paragraph 4(i) to the extent of making a payment totaling to USD 3,187(three thousand one hundred and eighty seven dollars).*

Furthermore, in paragraph 5 of the Written Statement of Defence the Defendant does admit transacting with the Plaintiff Trust Ventures (U) Limited. In paragraph 4 of the Written Statement of Defence the Defendant wrote;

- (a) Early 2015, we dealt with the Plaintiffs on basis of Cash on delivery until the entire factory caught fire and all stock destroyed.*
- (b) Delivery and payment was upon an invoice and no formal contract thereto but as a business custom..”*

The Defendant's Counsel contended that the Defendant dealt with Trust Ventures Inc. and payments were made to her, was it to a nonexistent entity? Interestingly, in a reply to the Notice of intention to sue dated 23<sup>rd</sup> January 2017 the Defendant writes to the M/D Trust Ventures Limited acknowledging indebtedness and requesting for time within which to settle the debt.

In my view the anomaly in the Plaintiff's name is a bonafide mistake because the Defendant knew who she was dealing with from the onset of the agreement between the parties. Secondly, the mistake was not misleading such as to cause reasonable doubt as to the identity of the person suing the Defendant. In any case, the Plaintiff has proceeded to mitigate any damages that would have resulted from the mistake in its name by amending the name in her Memorandum and Articles of Association, Company Form 18 that provides for the registered office and postal address of a company, particulars of the Directors under Form 20 and Annual returns in the names of Trust Ventures Limited

In light of the above, I find that the name Trust Ventures (U) Ltd was a mere misnomer and is curable.

The sum total is that this preliminary objection is hereby dismissed. The Plaintiff is to be amended within 14 days by substituting the name of the Plaintiff to Trust ventures Limited. Each party shall bear its own costs.

**Dated at Kampala this 3<sup>rd</sup> day of September 2019**

**HON. JUSTICE DAVID WANGUTUSI**

**JUDGE**