THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

MISCELLANEOUS APPLICATION NO. 831 OF 2023

[ARISING FROM CIVIL SUIT NO. 236 OF 2022]

STEPHEN MBUSA KASAKO] APPLICANT

VERUS

CHRIST'S HEART CHURCH LIMITED] RESPONDENT

Before: Hon. Justice Ocaya Thomas O.R

RULING

Introduction

This application is premised on Section 98 of the Civil Procedure Act, Section 33 of the Judicature Act, Section 39 of the Companies Act and Order 52 Rules 1, 2 and 3 of the Civil Procedure Rules.

The Application seeks the following reliefs:

(a) The Plaint in Civil Suit No. 236/2022 ["The Main Suit"] be struck out for having been filed by a non-existing party and being bad in law.

(b) Costs of this application be provided for.

The Applicant contends that;

1. On 13 April 2022, the Respondent erroneously filed the main suit against, among others, the applicant for recovery of UGX 183,000,000 arising from breach of contract.
2. According to company records from Uganda Registration Services Bureau ["URSB"], there is no company registered as Christ Heart Church Limited.

3. The plaint in the main suit was filed by a non-existent entity and is therefore incompetent and incurably defective.
4. Having been filed by a non-existent party, the main suit is a nullity and not maintainable in law.

The Respondent opposed this application. The Respondent contends that the use of "Christ Heart Church Limited" instead of "Christ's Heart Church Limited" on the plaint was a typographical error which was corrected in both the Written Statement of Defence and Reply to The Written Statement of Defence. The Applicant contends that the sale agreement and other documents on which the Applicant's claim in the main suit is premised on all reflect the name "Christ's Heart Church Limited" and accordingly, the applicant's application is misconceived, frivolous and an abuse of court process.

Representation

The Applicant was represented by M/s GEM Advocates while the Respondent was represented by M/s JOSKA Advocates.

Evidence and Submissions

The Applicant led evidence by way of an affidavit in support of this application deponed by himself. The Respondent led evidence by way of an affidavit in reply deponed by John B. Kabandize, an advocate working with the Respondent's retained advocates in this matter.

Both sides with leave of court filed written submissions in support of their respective cases for which I am grateful. I have however felt no need to reiterate the same here, save that I have read the same and I thankful to both counsel.

Decision

In the Applicant's submissions, the applicant advanced the following arguments supporting the prayers for the reliefs sought:

(a) The suit was filed by a non-entity and non-existing party.

(b) The suit by a non-entity constitutes an illegality.

(c) The defect in the suit is so grave that it can't be cured by amendment to substitute the non-existing party or even to be withdrawn, it's inevitable and natural fate is that it be struck out.

(d) Even if it was possible to amend or substitute the parties in HCCS 236/2023, the hands of court are tied because the Respondent in its pleadings doesn't pray for an order of amendment.

It is not a contested fact that no company called Christ Heart Church Limited exists. What exists is Christ's Heart Church Limited. The Respondent contends that the use of "Christ Heart Church Limited" was a mistake which was subsequently corrected. This application therefore rests on the impact of the use of "Christ Heart Church Limited" on the main suit.

The starting point, in my view, is the capacity of a non-existent entity to commence court proceedings. It is settled law that a non-existent entity cannot commence or continue proceedings before court. In such a suit, even amendment is not available as the absence of capacity is a fatal flaw See **Fort Hall Bakery Supply v Fredrick Muigai Wagoe [1959] EA 474, The Trustees of Rubaga Cathedral v Mulangira Ssimbwa HCMA 576/2006, V.G Keshwala T/a V.G Keshwala & Sons vs M.M Sheik Dawood, HCMA No. 543 of 2011**

It is also settled law that a misnomer in pleadings can be cured by amendment and is not fatal. See **J.B Kohi v Buchalal Popatal [1964] EA 219.**

In **AC Yafeng Construction Limited v Registered Trustees of Living Word Assembly Church and Anor HCMA 1/2021** this court expounded on the doctrine of misnomer, finding that where there is an error in the name of an existent party, inspite of which a reasonable person would attribute the naming used to the correct party, the same is not fatal and is curable by amendment. In that decision, the court went to great detail to distinguish the impact a suit filed by or against an entity that doesn't exist and a suit commenced or against an entity that exists but is misnamed. See Also **Attorney General vs Sanyu Television (1998) CS No. 614 of 1998, Kyaninga Royal Cottages Limited vs Kyaninga Lodge Limited HCMA 551 OF 2018**

I note that the Applicant made reference to Christ's Heart Church Limited in its written statement of defence. In **Trust Ventures Limited v Powerfoam (U) Ltd HCCS 669/2017** court held thus:

"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 of 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 23rd 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."

I have read the decision in **Real Gaba Market Property Owner v Kampala Capital City Authority HCMA 248/2008** where this court held that, in a case where there was a misnomer by spelling "Ggaba" in the name of the company as "Gaba", the consequent suit was commenced by a non-existent entity and therefore fatally defective.

With the greatest respect to the learned judge who decided that matter, and to counsel for the applicant who cited the same, I find that the same matter is wrongly decided on the point above. I will explain why.

A company is an abstraction. It is a legal fiction in which a thing is conferred on legal personality akin to that which a natural person typically possesses. See **Halsbury's Laws of England, 5th Edition, Vol 14 P 137, Para 115 and P 342-343, Para 268, Lennard's Carrying Co. Ltd v Asiatic Petroleum Co. Ltd (1915) AC 705**

The characteristics of corporate personality are fairly similar to those of natural capacity which is possessed by humans. For instance, as a general rule, a company does not need to be registered in another country to enforce rights much like a human. This is because, as a general rule, incorporation, much like birth in context of a human, confers on a company corporate status all around the world, and not only in the jurisdiction such a company is incorporated. See **Krone Uganda Limited v Kerilee Investments Limited HCMA 306/2019**

It is incorporation that confers existence and corporate capacity on a company, not the naming of the same in pleadings. Similarly, in the context of a human, their name may be misspelt on an identity card or document but the same does not mean that the person intended to be referred to does not exist. In my view, it is not the position of the law to say that a company does not exist merely because its name is misspelt.

The Respondent has led evidence to the effect that the use of "Christ Heart" instead of "Christ's Heart" in the plaint was a typographical error which was corrected subsequently. This evidence was not disputed by the Applicant. In my view, the evidence on record points to an error in the preparation of the plaint by using "Christ Heart" instead of "Christ's Heart". That error did not affect who the Applicant knew to be the entity commencing the cause, as the Respondent did not repeat the error and instead used the correct name. The evidence on record also shows that the entity Christ's Heart Church Limited exists in law and was what was sought to be named as the plaintiff in the main suit. I take the view that the use of "Christ Heart" instead of "Christ's Heart" in the plaint is a misnomer.

I have also read the decision in **Wasswa Primo v Moulders (U) Ltd HCMA 685/2017** wherein the court held that where there was a misnomer, the remedy of amendment to rectify the same was only available if the entity on the pleadings existed. This decision needs to be considered together with the later decision of the same judge in **Trust Ventures Limited v Powerfoam (U) Ltd HCCS 669/2017** which was decided later in which his Lordship took a different view, as already stated above.

With the greatest respect to his Lordship, I think Wasswa Primo (above) is not correctly decided. In my humble view, on top of the reasons already provided above, the law does not impose the requirement relied on by his lordship in determining that matter. Moreover, his Lordship based his decision on Order 1 Rule 10 whose application we shall shortly consider below. I believe his Lordship later revisited his decision in Trust Ventures Limited (supra) which contains, in my humble view, the correct position of the law.

In any case, I take the view that the misnomer above, from the evidence, is a mistake of Counsel for the Respondent, who admitted to it, and the same should not be visited on the respondent. It is trite law that mistake, error, negligence or error on the part of the counsel should not imputed on their client. See **Banco Arabe Espanol v Bank of Uganda SSCA No. 8 Of 1998, Akuwati Kalyesubula v Bank of Africa HCMA 944/2022**

Is The Misnomer Curable?

Counsel for the Applicant contended that, the Respondent having not prayed for the remedy of amendment, the court's "hands were tied" and the court was confined to dismiss this suit.

For the Respondent, it was contended that Order 1 Rule 10 of the CPR empowers this court to make an order substituting a party wrongly named with the correct party. In AC Yafeng (above) the court made a distinction between classic misnomers and other misnomers. A classic misnomer is one that involves an inconsequential error in the naming of a party or entity such as where a party is named as "ABC (T) Ltd" instead of "ABC (U) Ltd" or where "XYZ Limited" is named as "XYZ Ltd".

Other misnomers include where a correct party is given the wrong name or where a person sues A thinking it is the principal of an agent against whom the actions of an agent are imputed when it is B.

I have noted the decision of my Learned Brother **Justice Oyuko Anthony Ojok in Francis Katabarwa & Ors v Yowasi Nsubuga & Anor HCMA 2/2022** wherein His Lordship held that a misnomer is curable under Order 1 Rule 10 of the CPR.

In my view, Order 1 Rule 10 refers to the addition or removal of a party other than the one on the pleadings, and therefore the same is inapplicable with the present circumstances where the correct party was named wrongly. There is no replacement or substitution per se as no party is replacing another. See **Ateria Gedion & Anor v Attorney General & Anor HCMA 111/2022**, **Vastina Kyalisima v Josephine Abaasa HCMA 500/2021, Sarah Nabukenya & Ors v Sulaiman Mukasa & Ors HCMA 193/231 of 2022**.

In my view, Order 1 Rule 10 applies to the other forms of misnomer other than classic misnomer which is being dealt with in the present circumstances.

Inherent Powers

Under **Section 98** of the Civil Procedure Act, the inherent power of court is saved in the following terms;

"Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

These provisions vest the High Court with wide discretionary and inherent powers respectively to grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it. See also **Kagumaho Musana v Rama and 3 Others HCMA 933 of 2019 and Tullow Uganda Limited & Anor v Jackson Wabyona & Ors HCMA 443/2017, Green Meadow Limited v Patrice Namisono HCMA 1368/2022**, **Akuwati Kalyesubula v Bank of Africa HCMA 944/2022.**

I am aware of the decision of the Supreme Court in **MS Fang Min v Belex Tours & Travel Ltd Civil Appeal No. 1 and 6 of 2013** in which their Lordships held that a party cannot be granted a relief which was not claimed.

In my view, the invocation of court's inherent powers and their subsequent utilization to make an order in the interests of justice do not require pleading. Once the court is satisfied that the circumstances exist for it to invoke its inherent powers in the interests of justice, it can go ahead and make the orders necessary in the interests of justice even if the pleadings did not plead the same and pray for the reliefs or orders that the court may grant/issue. I therefore cannot accept the submissions of Counsel for the Applicant that, the Respondent having not prayed for corrective orders in its affidavit in reply, court's hands were tied.

It is trite law that the interests of justice typically require full adjudication of all disputes on their merits in order to resolve, in finality, all issues between the parties. This is the reasoning behind Article 126(2)(e)'s command to courts to deliver substantive justice, on the real issues in dispute between the parties, rather than stifling the same on technical grounds.

In the case of **Independent Electoral & Boundaries Commission –v- Jane Cheperenger & 2 Others [2015] eKLR** the Kenyan Supreme Court citing provisions akin Article 126(2)(e) held thus;

"[21] The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits."

See also **Francis Kyengo Kaloki & 4 Others v Peter Makenzi Kaloki & Another [2012] eKLR.**

I must also note that **Order 6 Rule 17** of the CPR prohibits the making of technical objections against want of form of a pleading. The impact of that rule, in my view, is that a party may only object to a pleading where the circumstances are such that the objection warrants the pleading to be rejected, disregarded or struck out in whole or in part. Any other objection, unless otherwise provided by law, may only be raised for housekeeping purposes, and resolved with no impact on the pendency or competence of the suit, except that the court may order the other party to take certain corrective measures to address the procedural noncompliance. See **Patrick Baya Maitha v Cabinet Secretary Industry Trade and Enterprises Development & 2 others [2021] eKLR, Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A)**

The position of the law, therefore, is that no doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits. See **Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A), Marshall Albers & Ors v The Minister of Justice and Correctional Services [2022] ZASCA 25**

I have considered the pleadings of both parties and they reveal a dispute warranting adjudication and resolution. Accordingly, I find that this is a deserving case to invoke this court's inherent powers to cure the misnomer in the plaint.

Conclusion

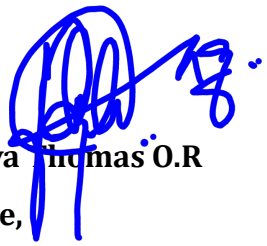
Owing to the reasons above, the applicant's application does not succeed. I make the following orders:

(a) This application is dismissed with costs to the Respondent.

(b) The Respondent shall, within ten (10) days from the date of this ruling amend its plaint to cure the typographical error in its name. No other amendment may be made arising from this ruling.

I so order.

Delivered electronically this 26th day of March 2024 and uploaded on ECCMIS.



Ocaya Thomas O.R

Judge,

26th March 2024