

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT NAKAWA
MISCELLANEOUS APPLICATION NO. 249 OF 2012

**(Arising from Miscellaneous Cause No. 007/2012 & Miscellaneous
Application No. 39/2012)**

NTARE NATHAN APPLICANT

VERSUS

1. KIBOGA WEST LIVESTOCK COOPERATIVE SOCIETY

**2. PADDY KABEJJA.....
RESPONDENTS**

BEFORE HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA

RULING

Nathan Ntare herein referred to as the 'Applicant' brought this Application by Notice of motion under order Section 14 (1) & (2) (c); Section 17 Judicature Act; Section 98 Civil Procedure Act and Order 52 Civil Procedure Rules. The Application is for orders that;

1. The Rulings and orders to pay costs in Miscellaneous Cause No. 007/2012 and Miscellaneous application No. 039/2012 be set aside;
2. That costs of this application be borne by the Respondent. .

The Application is supported by the affidavit of Nathan Ntare (applicant) and Salim Waiswa.

The Applicant was represented by M/s Kibeedi & co. Advocates whilst the 1st Respondent was represented by M/s Ochieng, Harimwomugasho & co Advocates and the 2nd Respondent by M/s Ruhinda Advocates and Solicitors.

Briefly, the facts that are subject of the Application are that Kiboga West Livestock Cooperative Society was a tenant of the 2nd Respondent. The Respondent filed Miscellaneous Cause No.59 of 2011 which was entered for

the 2nd Respondent and the 1st Respondent's tenancy was terminated on the 31st December 2011. It was the 1st Respondent's contention that the 2nd Respondent denied Kiboga West Livestock Cooperative Society access to its property. Nathan Ntare filed an ex parte application in Miscellaneous Cause No. 07 of 2012 on behalf of Kiboga West Livestock Cooperative Society, but he was not a party to the Application. In his ruling, His Worship Jesse Byaruhanga granted leave to the 1st Respondent (Applicant) to withdraw the application and awarded costs to the 2nd Respondent payable personally by Mr. Ntare Nathan. Being dissatisfied with the orders, the 1st Respondent then filed a Misc Application No. 39/12 through the Affidavit of Mr. Joseph Rwigyemeko, the Secretary of the 1st Respondent filed a Notice of Motion under Section. 98 of the CPA and O.46 rr 1 & 6 of the CPR for Orders that Court reviews the dismissal in the Miscellaneous Cause No. 07 of 2012 with costs to Mr. Nathan Ntare.

In the Misc Application No. 39, Counsel Harimwomugasho, Counsel for the Applicant raised two preliminary objections to wit that Mr. Ntare Nathan and Mr. Joseph Rwigyemeko had no *locus standi* to institute legal proceedings on behalf of Kiboga West Livestock Cooperative Society (the Applicant in *Misc Application No. 39*) as there was no general Assembly that had elected them to act on behalf of the Society. Secondly, Counsel Harimwomugasho also pointed out that the application in *Misc Application No. 39* seemed to require a review of a dismissal order yet the Court Order that had been obtained got was for leave to withdraw. He supported his argument by making his reference to O.25 of the CPR, which is to the effect that the remedy, after a withdrawal, is to file a fresh suit or to apply to Court for a reinstatement. Counsel Harimwomugisha's submission was that the *Misc Application No. 39* brought under O.46 of the CPR seeking for a review was misconceived. Hence, the need for dismissal for having wasted the Applicant's time. He relied on the case of ***East Mengo Growers versus Francis Nalweyiso H.CC.S 892/99***

In his ruling of 5th June 2012, His worship the Chief Magistrate Byaruhanga Jesse ruled that Mr. Ntare Nathan and Mr. Joseph Rwigyemeko as members of the Society have locus by the virtue of the resolutions made on 9th/1/2012 to bring an action for derivative action in High Court in its interest and for its benefit against persons who have wronged the Society. He advised the Applicant, Kiboga West Livestock Co-operative Society in Miscellaneous Application No. 39 of 2012 (now the Respondent) that in order for Applications for contentious matters such as the *locus standi*, to serve a purpose, the aggrieved party should file derivative actions in the High Court in order to protect the property of the Society if they feel that the property is going to waste. (See ***Christopher Kayoboke versus Amos Agaba & 2 Others KALR (1992) 2 at page 96***)

His Worship Byaruhanga upheld the preliminary objections and dismissed the application with no costs to any party but upheld the payment of costs in Misc Application No.059 personally upon Mr. Ntare Nathan.

Resolution of the Matter

The parties filed written submissions before this Honorable Court and now I have the duty to determine the issues before me. As I have already pointed out, this Application was filed by Mr. Nathan Ntare seeking that orders made against him by His. Worship Byaruhanga Jesse for paying costs personally in Misc Cause No. 007 of 2012 be set aside. The costs arose when His Worship Byaruhanga granted Kanyana Norah leave to withdraw the Application without giving him (Applicant) a chance to reply to it. (See *the order dated 3rd April 2012 and annexure "E" on the Affidavit sworn by Nathan Ntare in support of his Application.*) The Applicant also claims that the 1st Respondent filed Misc Application No. 039 of 2012 seeking the review of the Honorable Chief Magistrates Orders in Misc Cause No. 007 of 2012. However Misc. 039 of 2012 was dismissed and he was ordered to pay the costs personally. (See

Order dated 5th June 2012 and Applicant's Affidavit in support of the Application marked as Annexure "F".)

The Applicant submitted that he was not a party to the Misc Cause No. 007 of 2012 where he was condemned to pay costs to both Respondents. It is his submission that he was therefore not entitled to prefer an Appeal under Section 220 of the Magistrates' Courts Act Cap 16 neither could he apply for Review or Revision under Sections 82 and 83 of the Civil Procedure Act Cap 71. Due to the foregoing said reasons, the Applicant chose to bring this Application by Notice of Motion under Sections 14 (1) & (2) (c) and 17 of the Judicature Act, Section 98 of the CPA and Order 52 rr 1 & 3 of the CPR.

The Applicant cited **Section 14 (1) and (2) of the Judicature Act**, which confers upon the High Court unlimited original jurisdiction in all matters. He further cited Section 17 of the Judicature Act, which gives the High Court the general powers of supervision over the Magistrates' Courts by exercising its inherent powers to prevent abuse of the process of the Court by curtailing delays, including the power to limit and stay delayed prosecutions necessary for achieving the ends of justice.

The Applicant relied on the case of **Ladak Abdulla MuhammedH. versus Griffiths Isingoma Kakiiza and 2 others S.C.C.A No. 8/1995** where Court held that Section 98 of the CPA saves the inherent powers 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 and is only called or utilised where there are no specific provisions governing or applying to the matter. In that judgment, Court stated that;

'It may be that in a suitable case a third party can apply for review under the inherent powers of the Court but he can bring objection proceedings against execution or bring a fresh suit or file an application to set aside the decree or order.....this was not a suitable case for granting the order for review, the learned Judge

should have considered the application to set aside the consent judgment'

In ***Benoist Plantations Ltd versus Jean Emile Adrien Felix (1954) 2 EACA 105***, Court stated that where the law provides for a right to bring an application but does not specify the procedure, an application may be brought by the notice of motion. The Applicant's motion was based upon the above cited authorities. Hence, Court should exercise its powers in accordance with the law, principles of justice, equity and good conscience and should not turn the Applicant away from the fountain of justice on mere procedural technicalities.

Counsel for the 1st Respondent submitted that the meaning of *locus standi* as defined in the **Black's Law Dictionary, 8th Edition by Bryan A. Garner at page 960** is the right to bring an action or to be heard in a given forum. He submitted that since the Applicant was not a party to Misc Cause No. 007 of 2012, he has no locus to bring this application to High Court. He further submitted that the application should have first been made in the Magistrates Court of Kiboga and not High Court. Therefore, the Applicant has no locus.

Counsel further pointed out that the case of ***Ahmed Hassan Mulji versus Shirinbai Jadavji [1963] EA 217***, and stated that it is trite law that a party to a dispute cannot ordinarily invoke the inherent jurisdiction of the Court if there are other express remedies available. See also ***Ladak Abdulla Muhammed H. versus Griffiths Isingoma Kakiiza and 2 others, ibid.***

Counsel for the 1st Respondent continued to submit that the procedure for invoking the supervisory powers of Court is well set out. Therefore, the Applicant should have proceeded by way of an application for review to the High Court, if he intended to invoke the inherent powers of Court. He was of the view that the Applicant should have filed an Appeal as opposed to attempting to set aside orders in applications which he was not a party to.

Therefore, Counsel for the first respondent prayed to Court to dismiss this Application with costs to the Applicant. He also contended that instead of the Applicant appealing, he opted to apply for setting aside the decisions. In order to challenge the said decision, Counsel contends that this is an improper procedure and prayed that the same application be dismissed with costs.

Counsel for the 2nd Respondent agreed with the submissions of the Applicant in the case of ***Ladak Abdulla Muhammed H. versus Griffiths Isingoma Kakiiza and 2 others, supra*** but stated that the Applicant wrongly applied it as there is a specific provision of the law that guides members of the society in case of a dispute. He further submitted that the above procedure was not a mere technicality because given the fact that the Applicant dragged the Cooperative to Court, it is a procedural irregularity which cannot be overlooked by this Honorable Court and prayed for the dismissal of this Application on this ground.

On grounds 1 and 2, the Applicant submitted that he was ordered to pay costs in Misc Cause No. 007 of 2012 without giving him a chance to hear him yet he was not a party to the suit. This, according to him, breached the principles of natural justice. He further submitted that the principle of *audi alteram partem* (no one can be condemned unheard) requires one to be given a chance to present his/her side of the story before a decision is reached against him/her. The Applicant relied on the case of ***Kamurasi Charles versus Accord Properties and Anor S.C.C.A NO. 3 of 1996***. In that case, Court stated that this rule embraces the whole notion of fair procedure and due process, which is embedded under **Article 28 of the 1995 Constitution**. Similarly, in ***Matovu versus Sseviri & Anor [1979] HCB 174***, Court held that this principle must be observed by both judicial and administrative tribunals and that a decision taken in breach is a nullity.

The Applicant further contended that this ground is set out in paragraphs 2-13 of his Affidavit in support of the Application, Paragraph 6 of the additional Affidavit of Counsel Salim Waiswa in support of the Application and paragraphs 5 & 6 of the Applicant's Rejoinder to the Affidavit of the 2nd Respondent. In his submission on this ground, the Applicant stated that the trial Chief Magistrate dispensed with service in respect to the fresh hearing date. This is in addition to his failure to specifically summon the Applicant, a non-party to the said suit to show cause why he should not be ordered to pay costs. His prayer to Court was to set aside the order for payment of costs.

Counsel for the 2nd Respondent refuted the Applicant's submissions that he was not given a chance to defend himself. He submitted that the case was called on a date when it was supposed to be heard but the Applicant was not present at the time of the hearing. He implored Court to look at the record of proceedings.

It was also the Applicant's contention that the trial Magistrate made a withdrawal order in respect of Misc Cause No.007/12 and awarded costs against the Applicant in contravention of the principles governing costs in Order 25. R 1 of the CPR. The said order which requires that the costs occasioned by a withdrawn suit, if any, be borne by the Plaintiff and in this case, it should have been the 1st Respondent, which was the Applicant in *Misc Cause No.007/2012* to bear such costs and not the Applicant.

It was the Applicant's submission that considering his arguments above, this Honorable Court finds it to be a fit and proper ground for setting aside the order for costs against him.

Counsel for the 2nd Respondent submitted that it was not true that the chair person of the 1st Respondent asked Court to withdraw Misc Cause No. 007/2012 (*as per Annexure 'A' of the 2nd Respondents affidavit in reply specifically Para 3, 4, 5 and 8*). Therefore the provisions of the O.25 of the

CPR do not apply because the Chairperson of the 1st Respondent was not withdrawing the matter. Rather, the Chairperson requested Court to dismiss it. In addition, the said Order was extracted by the Applicant and phrased in such a way to appear as if the matter had been withdrawn. Hence in this regard, Counsel for the 2nd Respondent also invited Court to look at the record of proceedings.

It is the Applicant's contention that he was wrongly ordered to pay costs yet he acted as an Agent of a disclosed Principal, the 1st Respondent which breached the principles of corporate personality. The same are contained in paragraph 14 of the Applicant's own Affidavit in support of the Application and cemented by paragraphs 4 and 5 of the additional Affidavit of Counsel Salim Waiswa in support of the Application. The Applicant relied on **Section 28 of the Cooperatives Act Cap 112** which stipulates that a registered Cooperative Society becomes a body corporate with all the attendant attributes of a body corporate. **(See also Salomon versus Salomon & Co. (1897) AC 22)** It is the Applicant's prayer that the ruling and orders of the Trial Magistrate that the Applicant bears the costs in respect of a suit instituted and later withdrawn by a body corporate (1st Respondent) be set aside.

Counsel for the 1st Respondent submitted that the Applicant had no authority to act on behalf of the 1st Respondent because the purported election of himself as the treasurer of the 1st Respondent are mere allegations because the said minutes were never registered thus cannot form part of the evidence in Court. He moved Court to reject the said minutes of the meeting. Therefore, he submitted that since the Applicant acted without authority, he was rightly condemned to pay the costs. Counsel for the 1st Respondent requested Court to dismiss the application.

Counsel for the 1st Respondent agreed with the Applicant on the principle of corporate personality as was set out in **Salomon versus Salomon, ibid.**

Although he shared the same thoughts about the corporate personality principle, as already pointed out, Counsel contended that the Applicant had no authority to institute any legal proceedings on behalf of the 1st Respondent and thus, he was not an authorized agent. Therefore, no protection could be accorded to him. Accordingly, the awarding of costs were justifiable in the circumstances. Counsel for the 1st Respondent prayed to Court to dismiss the Application for lack of merit.

Counsel for the 2nd Respondent agreed with the Applicant on the issue of the corporate personality as per **Section 28** and the case of ***Salomon verses Salomon***, supra as already cited. It was the argument of Counsel for the 2nd Respondent that the Applicant is trying to say that he was not a party to the suit but only acting as an Agent for the 1st Respondent. He relied on the case of ***Watteau versus Fenwick [1891] 4 ALLER***, where Court held that the Principal is liable for all the acts of the Agent which are within the authority usually confided to an Agent of that character, not withstanding limitations as between the Principal and his Agent but upon such authority. Counsel contended that the Applicant was not authorized to institute proceedings on behalf of the Society nor did he show any documentation allowing him to institute legal proceedings. (See ***also United Assurance Co. versus Attorney General S.C.C.A No.1 of 1998, Bugerere Coffee Growers Ltd versus Ssebaduka***). He contends that one way of proving a decision by the Board of Directors is by a Resolution to that effect. Counsel for the 2nd Respondent submitted that from the Affidavit of Kanyana Norah, a chairperson of the 1st Respondent (the Cooperative Society) marked as Annexure A, it is clear in paragraph 3 which states that the Applicant is not a competent person to depone an Affidavit on behalf of the Cooperative since there was no resolution to that effect. He contended that even if Annexure 'B' existed at the time of instituting Misc App No. 007 of 2012, which fact has been denied, the same was *void ab initio* because there was

no General Assembly entrusting the Applicant with the authority to file the suit.

Moreover, the Misc Cause No. 007/2012 was dismissed because the Applicant in his own capacity without the mandate of the Cooperative Society(emphasis added)instituted proceedings against the 2ndRespondent. Resultantly, other members of the Society headed by their chairperson objected to the competence of the Applicant to file a suit on behalf of the Cooperative, and this led to the same being dismissed with costs to the Applicant. (**See Annexure 'a' on the 2ndRespondent's Affidavit in reply and order**). He concluded that therefore the Trial Magistrate was justified to condemn the Applicant to pay the costs personally. The prayer made by Counsel for the 2ndRespondent was one of dismissal of the Application with costs since there was a breach of the principles of corporate personality thereby justifying the learned Chief Magistrate's ruling.

Further Resolution

I have carefully considered the contentious issues raised by both parties in this application and the Orders sought. The main issue is whether the costs awarded to the Applicant was done judicially. I have read through the submissions and the whole record of proceedings. I do agree with His Worship that the parties have internal conflicts as regards the running of the Cooperative and as such, it is not easy to tell whose meeting was valid. In this regard, I implore the Applicant and other members to sort out their internal grievances. To me, the Applicant is an aggrieved party as per the decision in **Re Nakivubo Chemists (U) Ltd, (1949) HCB 12**, which defines an 'aggrieved party' to mean a person who has suffered a legal grievance. (**See O.46 r. 1**). This is because the orders for costs were made against him personally. I reiterate His Worship Byaruhanga's analysis in **Foss versus Harbottle (1843) AC67 ER 189**. I make reference also to **Burland versus Earle (1902) AC 83 at 93**. It was held that where Courts have often

refused to interfere in the conduct of the corporate affairs by entertaining actions brought by individual members to remedy wrongs done to the corporate body. This is because the corporate body alone can sue to enforce rights of action vested in it, and only the directors or general meeting can decide whether an action shall be brought in the corporate body's name. The 1st Respondent should handle their wrangles internally.

According to the resolution of the Society and by virtue of the resolutions made on 9th/1/2012, the Applicant has locus to bring an action for derivative action in the High Court in its interest and for its benefit against persons who have wronged the Society. I also advise the Applicant as an aggrieved party to file derivative actions in the High Court for purposes of protecting the property of the society if he feels that the property is going to waste.

In my opinion, the Applicant had locus to institute legal proceedings and should have been heard by the Trial Magistrate. The costs should not have been made against him personally. He has proved his case on a balance of probabilities. They should have been made against the Cooperative Society. Therefore, the acts done by the Applicant were in line with the Resolution that was made and the Applicant had the mandate to do so. In this regard, I hereby order that the Trial Magistrate's orders for costs against the Applicant personally be set aside. Parties to bear their own costs.

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HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA
JUDGE
22/11/2013