

**ABEX TOUR & SAFARIS COMPANY LIMITED** ..... **APPLICANT**

1. SABIITI ROBERT  
2. MWEBESA JOHNSON..... RESPONDENTS

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4. The Applicant does not own the alleged motor vehicle UAH 022X and cannot therefore be held liable.
5. The Plaintiffs' claim is frivolous and the Applicant's application be allowed and the Respondents' Civil Suit No. 0014 of 2020 be dismissed with costs to the Applicant.
6. That it is just and equitable and in the interest of justice that this application be granted.

The application is supported by the affidavit of Luutu Kiiza C/O M/s Balikuddembe & Co. Advocates. The gist of his affidavit is that;

1. The Respondents' Advocate on 17/3/2020 effected service of summons to file a written statement of defence on him on the false premise that he was the Managing Director of Abex Tour & Safaris Co. Limited.
2. That he instructed M/S Balikuddembe & Co. Advocates to file a WSD.
3. That Abex Tour & Safaris Co. Limited is not a registered Company and is therefore a non-existent company.
4. That his advocate advised him that since Abex Tours & Safaris Company Limited does not exist, he needed to appear in court to avoid any result and effect of non-appearance.
5. That since the company does not exist, they cannot be the owners of motor vehicle UAH 022X, which is alleged to have caused the accident.
6. That Civil Suit No. 0014 of 2020 is barred in law since it was instituted against a non-existent entity.
7. That the Respondent's suit, Civil Suit No. 0014 of 2020 should be rejected and be dismissed with costs.

The Respondents in an affidavit sworn by Mwebesa Johnson opposed the application.

Mwebesa deponed that:-

1. The application lacks a proper affidavit in reply and ought to be struck out.
2. That the Applicant was sued because the accident report disclosed the Applicant as the owner of Motor vehicle UAH 022X which caused the accident.
3. That it was a bonafide mistake for M/S Rwakafuuzi & Co. Advocates to reply on the Police Traffic Report which misnamed the owner of the vehicle as ABEX TOURS & SAFARIS COMPANY LIMITED instead of ABEX SAFARI & TOURS (U) LIMITED.



4. That Miscellaneous Application No. 0028 of 2020 having been brought by a non-existence Company, is unsustainable and should be struck out with costs.
5. That the summons to file a defence were served upon Abex Safaris and Tour (U) Limited and not on Luutu Kiiza.
6. That the Applicant being a non-existent company cannot be granted costs.

**Background to the application:-**

It is alleged that on 16/1/2020 at about 8:35am at Kaigo Trading Centre along Kagadi Hoima, Motor Vehicle Reg. No. UAH 022X belonging to Abex Tour and Safari Company Limited, that was being recklessly driven by Issa Kabugo at a terrific speed, zigzagged in the road, moved out of its lane and knocked Motor Vehicle Reg. No. UBF 854Z, a Toyota Wish. That as a result of the accident, Tinkibyenda who was a passenger in Motor Vehicle No. UBF 854Z, sustained injuries that led to his death. Kibirige Peter, the transporter of the defendant Company confirmed that Motor Vehicle UAH 022X Toyota Land Cruiser belonged to their Company and wanted to settle the matter with Tinkibyenda's family but negotiations broke down – hence the suit.

The defendant company, on its part denied liability for causing the accident. In its Written Statement of Defence the defendant company, in paragraph 4, stated that the suit against the defendant company was brought against a non-existing party neither at law nor in fact and that the suit was vexatious and frivolous, and should therefore be dismissed. In paragraph 5, the defendant denied that the motor vehicle which is alleged to have caused the accident and was allegedly driven by Kabugo, was its property. The defendant also denied that Issa Kabugo was its employee. However, in paragraph 6 of the Written Statement of Defence, the defendant turned round and claimed that it would lead evidence to show that Motor Vehicle Reg. No. UAH 022X was not recklessly driven and that the accident was caused by the negligence and over loading of the driver of motor vehicle UBF 854Z.

The Plaintiffs in their reply to the Written Statement of Defence stated that the suit is rightly brought against the defendant and has merit. In paragraph 5, of the reply to the Written Statement of Defence, the Plaintiff stated that without prejudice, should the defendants show that the name of the Company is different in style and presentation, then the plaintiff would move court to amend



the plaint and correct the name. Lastly the Plaintiffs denied that the driver of Motor Vehicle UBF 854Z was negligent.

**Arguments of parties:**

The Applicant submitted that there is no company in Uganda known as Abex Tour & Safaris Company Limited and that as such the Respondent had brought a suit against a non-existent party. He submitted that Justice Remy Kasule, as he then was in the **Trustees of Rubaga Miracle Centre versus Mulangira Ssimbwa, High Court Miscellaneous Application No. 576 of 2006**, held that;

**“The law is settled. A suit in the names of the wrong plaintiff or defendant cannot be cured by amendment. The defendant described as the board of Trustees of Rubaga Miracle Centre Cathedral does not exist in law.”**

Counsel submitted that the Respondents’ suit should therefore be dismissed with costs.

Furthermore, counsel submitted that the Respondents’ suit which is based on the negligence of the driver of Motor Vehicle UAH 022X does not disclose a cause of action against the Applicant as the Applicant does not own the vehicle in question. He also submitted that Issa Kabugo, who is alleged to be the driver of the said vehicle, is not an employee of the Applicant Company. Relatedly Counsel submitted that the Respondents failed to join Issa Kabugo, as a party to the action. He asked the Court to dismiss the Respondent’s suit.

The Respondents opposed the application. Counsel for the Respondents submitted that the application before the Court was a nullity because it was brought by a non-existent party. He submitted that whereas in paragraph I of the Applicant’s supporting affidavit, Mr. Luutu Kiiza states that he deponed the affidavit as the Managing Director of the Applicant Company, yet in paragraph 5 and 7 of the same affidavit, Luutu says that Abex Tours and Safaris Company Ltd is non-existent.

Counsel submitted that on the basis of **Attorney General versus Sabric Building & Decorating Contractors Ltd (Supra), Miscellaneous Application No. 299 of 2012** a non-existent entity cannot sue and that therefore the Applicant’s application was moot. He also submitted that since



the Applicant Company is non-existent, it cannot be awarded costs. In conclusion, Counsel invited the court to strike out the application with costs.

In rejoinder, Counsel for the Applicant submitted that Miscellaneous Application No. 0028 of 2020 is not an independent suit of its own as it originates from Civil Suit No. 28 of 2020. He submitted that the only nullity is Civil Suit No. 14 of 2020 which forms the basis of the instant application and that the only way the Applicant would have come to Court was through this Application and not the introduction of new parties.

On the issue of costs, Counsel submitted that a successful party under S. 27 (2) of the Civil Procedure Act, should not be denied costs except for good cause. The principle was laid out in **Professor Ephraim Kwabu Kamuntu versus Attorney General, High Court Land Civil Suit No. 38 of 2016.**

Counsel submitted that Luutu deponed that he manages a Company known as Abex Safaris and Tours (U) Ltd, which the Respondents served believing it to be Abex Tours and Safaris Company Ltd and that as a result, they caused Luutu to address the court through pleadings which attracted costs that the Respondents should pay. In the circumstances of the case, Counsel for the Applicant therefore, invited the Court to use its discretion and award the Applicant costs for this application and the main suit.

#### **Consideration of the Application:**

There is no doubt in this matter that Motor Vehicle Reg. No. UAH 022X, a Toyota Land Cruiser was involved in an accident with Motor Vehicle Reg. No. UBF 854Z a Toyota, Wish on 16/01/2020. This accident resulted into the death of Tinkibyenda on whose behalf the Defendants are bringing this suit.

According to the Police Accident Report, Motor Vehicle Reg. No. UAH 022X is owned by Abex Safaris and Tours Ltd, which is different from Abex Tour and Safaris Company Ltd. The former Company, does not legally exist as it is not an incorporated Company under the Companies Act of Uganda. This “Company” is for all intents and purposes a non-existent person in law. In The



**Trustee of Rubaga Miracle Centre versus Mulangira (Supra)**, it was held that a suit brought against a non-existent party is incompetent and cannot therefore create liability or obligations. Therefore, while I have great sympathies for the Respondents/Plaintiffs who lost their relative and bread winner in this accident, I cannot permit them to sue the Applicant, who is a non-existent party, for to do so, would be to defeat the very purpose for which they have come to court, for if they succeeded, they would not be able to enforce the decree against a non-existent entity.

In arriving at this decision, I am mindful that the Respondents said that in case the Applicant was misdescribed, they would ask the court for permission to amend the suit to reflect the right party. Amendments would have been possible if the error was minor such as a spelling error in the name. The error in this matter was grave in that the Advocates for the Respondents/Plaintiffs never bothered to check with the Companies Registry, whether the Company they were suing actually existed or not. The Advocates took a gamble for which they have to take full responsibility and no amount of amendment can save a suit which was a none starter from the very beginning. The Respondents/Plaintiffs' plaint as it stands is a nullity and is therefore struck out.

As I have struck out the plaint, it is not necessary to consider whether the Applicant's application is incompetent for having been filed by a non-existent company. Nonetheless, I will mention that the approach taken by the Applicant in moving the Court to consider the legality of the main suit was the right one, as it is the Respondents/Plaintiffs who served Mr. Luutu mistaking him to be the Managing Director of the Company they wished to sue. The Respondents/Plaintiffs having made an error cannot turn around and claim that the Applicant is improperly before the Court. The Applicant is properly before the Court as there was no other way the Court would have known that the Respondents/Plaintiffs had sued a non-existent Company.

#### **Are the Applicants entitled to costs?**

According to Section 27 of the Civil Procedure Act, a successful party can only be denied costs for a good reason. The position was re-echoed in **Prof. Ephraim Kamuntu's case (Supra)** where Justice Andrew Bashaijja expressed similar views. The Respondents in this matter submitted that the Applicant being a non-existent entity cannot be awarded costs, for the obvious reason that an entity which does not exist cannot own property or create obligations. In this case however, the

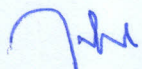


Respondents mistakenly served court process on Mr. Luutu, under the wrong impression that he was the Managing Director of the Company that had caused the accident. Being a responsible person, Mr. Luutu instructed counsel to file a Written Statement of Defence to the Respondents/Plaintiffs action. Prima facie, the Applicant should be entitled to costs under S.27 of the Civil Procedure Act, unless if there is good cause to deny them the costs.

There is good cause for the Court to deny the Applicants costs for the suit and the application in the matter. The only reason I have struck out this matter is that the Respondents brought the suit in the names of the wrong Company. Otherwise, the Respondents/Plaintiffs effected service of court process on Mr. Luutu who works with M/S Abex Safaris and Tours (U) Ltd, which should have been sued as the right defendant. My position is fortified by paragraph 6 of the WSD, where the Applicant/defendant in very unequivocal terms denied that the driver of Motor Vehicle Reg. No. 022X, was not the cause of the accident but the driver of Motor Vehicle Reg. No. UBF 854Z whom they claimed to have overloaded the vehicle, which was believed to have been the cause of the accident. As a responsible company, Abex Safaris and Tours (U) Ltd, through its Managing Director, Mr. Luutu should have in their Written Statement of Defence indicated that their company was misdescribed and provided the right Company name. The Applicant did not act responsibly and only waited to raise this point in a formal application to strike out the suit. I would have expected Abex Safaris and Tours (U) Ltd, where Luutu is Managing Director to say that the accident involved their car but their driver was not negligent. That would have been enough to correct the record instead of using the backdoor to deny liability for the suit. For this reason, I am unable to award costs of the suit and the application to the Applicant. Each party will therefore meet there own costs.

**Decision:**

In the result, I strike out Civil Suit No. 0014 of 2020 for being incompetent and allow the application. Each party will meet their own costs in the suit and application.



Gadenya Paul Wolimbwa

**JUDGE**

03/07/2020

Order only will be emailed to  
the parties on 3/7/2020  
3/2/2020