

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT MPIGI  
CIVIL SUIT NO. 26 OF 2017

KASALIKO HERMAN.....PLAINTIFF

VERSUS

ENERGO PROJEKT LTD.....DEFENDANT

UGANDA NATIONAL ROADS AUTHORITY.....THRID PARTY

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE

Ruling

The Plaintiff brought a suit against the defendant seeking for a declaration that the defendant acted negligently and for that he seeks an order for compensation both in special and general damages, interest and costs of the suit.

The plaintiff alleges that due to the acts of the defendant his ponds were swept away leading to heavy loss of a variety of fish that existed in the plaintiff's ponds. That the ponds that were washed away had over 20,000 fish. All this happened on the 8<sup>th</sup> day of November, 2015, when the defendant's employees cleared the earth forming the border between the road and the plaintiff's land which acted as a barrier protecting the plaintiff's ponds from heavy water runoff from Mpigi Kanoni Ssembabule Road.

The defendant on the other had averred that it was not aware of the identity of the defendant named in the plaint.

In the alternative, that the earth that was cleared was earth from a gazetted road inclusive of a road reserve on which account the defendant served with process and denied any acts of negligence, and removal of protective barriers. Therefore, the works on the road were done in accordance with the law hence the particulars of special damages are false and the suit should be dismissed.

**Representation:**

Mr. Andrew Wetaka appeared for the defendant while Mr. Timothy Arinaitwe represented the defendant and Ms. Katami Lydia appeared for the 3<sup>rd</sup> party. Oral submissions were made in open court.

### **Preliminary objection:**

At the hearing of the suit a preliminary objection was raised by counsel for the defendant to the effect that the plaint is bad in law, that the plaintiff sued a non-existent entity as a defendant. That the defendant has never been served with the reply to the Written Statement of Defence.

Counsel submitted that the plaintiff has not discharged the burden of proof under **Section 102** of the Evidence Act. That the High Court has held in various cases that a suit brought against a non-existent entity is a nullity, non-starter, incompetent, bad in law and ought to be dismissed. And an amendment cannot cure this suit. Counsel relied on the case of **The Trustees of Rubaga Miracle Centre v. Mulangira Ssimbwa and Mulangira Ssimbwa a.k.a Afidra Milton v. The Board of Trustees, Miracle Centre and another, Miscellaneous Applications No. 576 of 2006 and 655 of 2005**, where court stated that;

*“With such averments as part of the Written Statement of Defence, the burden of proof shifted to the plaintiff to establish the proper capacity of the defendant to sue and to be sued. Section 101(2) of the Evidence Act also puts the burden of proof of a fact on the one, who asserts that fact. Thus, the plaintiff has to establish the fact of the correct identity of the plaintiff. This burden has not been discharged by the plaintiff in the suit.”*

Counsel concluded that the suit and the plaint are therefore, a nullity and court should proceed to dismiss the same. (See: **Bagamuhunda Vincent v. Uganda Electricity Board, HCT – 00 – CV – 0400 of 2007**).

In reply counsel for the plaintiff submitted that this anomaly is curable under **Order 30 Rule 10 and Order 1 Rule 10** of the Civil Procedure Rules as a misnomer and relied in the case of **Kyaninga Royal Cottages Limited v. Kyaninga Lodge Limited, Miscellaneous Application No. 551 of 2018** which relied on the case of **Attorney General v. Sanyu Television (1998)** where it was held that;

*“A misnomer would be curable under the provisions of Order 30 Rule 10 and Order 1 Rule 10(2) (ii) of the Civil Procedure Rules.”*

Court in that case further stated 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. In this case the applicant company as plaintiff filed a suit against the respondent describing herself as an incorporated company.*

*It is now well established that a misnomer can under certain circumstances be rectified by amendment replacing the name appearing on the plaint or*

*written statement of defence with what the parties believe to be the right litigant. The correction of the name is however, only possible where the plaint or written statement of defence speaks the truth and the misnomer was done out of good faith.”*

In rejoinder, counsel for the defendant submitted that **Order 30 Rule 10** of the Civil Procedure Rules is in regard to business names and those names you register under the law. That in the instant case there is no proof that the business name exists. Therefore, it cannot be amended under **Order 1 Rule 10** of the Civil Procedure Act and the same does not apply.

**Analysis of court:**

I have carefully considered the submissions of both parties in regard to the preliminary objection and hereby resolve the same as here under.

It was submitted for the defendant that the defendant as per the plaint is a non-existent entity and therefore, the suit should be dismissed as it is a non-starter and bad in law.

The plaintiff on the other hand argued that the anomaly can be cured as a misnomer and amended under **Order 30 Rule 10** and **Order 1 Rule 10** of the Civil Procedure Act and relied on the case of **Kyaninga Royal Cottages Limited v. Kyaninga Lodge Limited, Miscellaneous Application No. 551 of 2018.**

**Order 30 Rule 10** of the civil Procedure Rules provides as follows;

*“Any person carrying on business in a name or style other than his or her own name may be sued in that name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules under this Order shall apply.”*

The above order as cited by counsel for the plaintiff applies to persons carrying out businesses in names other than their own being able to be sued in that business name as if it were the firm name which is not the case in the instant matter therefore the Order is inapplicable and is accordingly disregarded.

Counsel for the plaintiff also cited **Order 1 rule 10 (1)** of the Civil Procedure Rules which provides that;

*“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 bona fide 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.”*

The above order only applies to instances where a plaintiff who has instated the suit is the wrong party, and such a substitution will be allowed by the court, which is not the case in the instant case.

I therefore, find the two orders as cited by counsel of the plaintiff are misplaced and not applicable to the case at hand. The authority also relied upon is also not applicable to the present case.

Secondly, the plaintiff in this case before instituting its case against the defendant should have done his due diligence and conducted a search in the company registry to confirm the proper details of the defendant. According to the defendant’s trial bundle, attached is a certificate of registration indicating that the company changed its name from Energoprojekt Engineering and Contracting Company to Energoprojekt Niskogradnja joint stock company W.E.F. 20<sup>th</sup> March, 2007. If the plaintiff had carried out due diligence he would have known that the defendant is a non-existent entity. As such a non-existent Defendant could not be substituted because as in reality there is no valid plaint. Since in this case there was no company called Energo Projekt Ltd the plaintiff cannot talk of substitution.

It is my considered view that this court is not faced with a mere misnomer and I agree with the authority as cited by counsel for the defendant. The plaintiff has to establish the fact of the correct identity of the plaintiff. In this case this burden has not been discharged by the plaintiff in the suit. (See: **Kyanninga Royal Cottages Limited v. Kyanninga Lodge Limited, Miscellaneous Application No. 551 of 2018**).

The preliminary objection is accordingly sustained. The plaint is hereby struck out as there is not defendant to the suit. I make no orders as to costs as a non-existing party cannot be paid costs. (See: **The Fort Hall Bakery Supply Co. v. Fredrick Muigai Wangoe [1959] E.A 474 and Benjamin and the Benjamin Ssajjabi T/A Namataba v. Timber Manufacturers Limited [1978] H.C.B 202**). I so order.

Right of appeal explained.

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OYUKO ANTHONY OJOK

JUDGE

14/11/2022