

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

CIVIL SUIT NO. 248 OF 2008

REAL GABA MARKET PROPERTY OWNER ::::::::::::::: PLAINTIFF

VERSUS

KAMPALA CAPITAL CITY AUTHORITY ::::::::::::::: DEFENDANT

BEFORE HON. MR. JUSTICE BASHAIJA K. ANDREW

R U L I N G:

This ruling is pursuant to a preliminary objection raised by Counsel for the defendant Authority in the *Directorate of Legal Affairs* of the said Authority. The objection is premised on the reason that the suit was filed by *Real Ggaba Market Property Owners Ltd*; a legally nonexistent entity, and that the suit is therefore a nullity, and that it should be struck of and dismissed with costs.

Background:

Real Ggaba Market Property owners Ltd initially brought the suit against Kampala City Council, Makindye Division. The plaintiff then filed **HCMA No. 0285 0 2014** to amend the plaint. The purpose of the amendment was to substitute Kampala City Council, Makindye Division, with Kampala Capital City Authority (KCCA) and to substitute *Real Ggaba Market Property Owners Ltd* with *Real Gaba Market Property Owners Ltd*. Counsel for the Respondent conceded to the application and an order for amendment made and extracted dated 10/04/2014 in the following terms;

- 1. This application for amendment of the plaint in HTC-CS-248-2008 is hereby allowed.**

2. ***The application is allowed to substitute Kampala City Council Makindye Division with Kampala Capital City Authority.***

3. ***Costs shall be in the cause.***”

In the amended plaint, however, the plaintiff also amended the name *Real Ggaba Market Property Owners Ltd* to read *Real Gaba Market Property Owners Ltd*, with letter single “G”. It is the latter amendment that is a point of objection mainly because *Real Gaba Market Property Owners Ltd* is an incorporated company whereas *Real Ggaba Market Property Owners Ltd.* is not. Counsel for the defendants argued that *Real Ggaba Market Property Owners Ltd* is a nonexistent entity and that as such cannot institute a suit. For this proposition Counsel cited the case of ***V.G. Keshwala vs. M.M. Sheik Dawood HCMA No. 543 of 2011*** where it was held that an unincorporated company does not legally exist. Counsel also relied on the case of ***Ssimbwa & Afidra Milton vs. Trustees of Rubaga Miracle Centre & A’nor, HCMA No. 576 of 2006***, to the effect that a suit filed by a nonexistent person is illegal and a nullity.

Counsel for the defendants also attacked the Company Resolution (marked as *Annexure “F”* to the affidavit of Kyagaba Charles) which was provided by the plaintiff as authorizing it to institute the instant suit, which Counsel argued was also in respect of *Real Ggaba Market Property Owners Ltd* a nonexistent entity. Counsel pointed out that even the particulars of change of Directors and Secretary wherein Kyagaba Charles was appointed Secretary; and the Annual Returns - are all in respect of the nonexistent company in the name of *Real Ggaba Market Property Owners Ltd.* Counsel cited the case of ***Bugerere Coffee Growers vs. Sebadduka & Anor [1970] EA 147*** which was quoted with approval in ***Nsimbe Holdings Ltd vs. Attorney General & A’nor, Constitutional Petition No. 2 of 2006***, that a suit instituted by a company without authority of the company members is a nullity.

Counsel for the defendants also submitted based on strength of the authority *Makula International Ltd vs. His Eminence Cardinal Nsubuga & A'nor [1982] HCB 11 at page 16* that an illegality once brought to the attention of the court overrides all issues in the pleadings and cannot be sanctioned. Counsel also cited the *Advocates (Professional Conduct) Regulations S.1 267-2*, and in particular *Reg. 2* thereof which enjoins and/or directs all Advocates having conduct of matters whereof they have to have proper instructions from a person of his or her duly authorized agent. That in the instant case *Real Ggaba Market Property Owners Ltd* that issued instructions is nonexistent, and that therefore the Advocates in this case have no instructions whatsoever.

Counsel then attempted to address the issues raised in Mr. Kyagaba's affidavit that Kampala Capital City Authority(the defendant) has vested interest to take over the plaintiff's company's property and its operations. I did not find the submissions to be particularly relevant to the issues at hand raised by the preliminary objection, and hence I will therefore not address the same.

In reply Counsel for the plaintiff, *M/s Kabega, Bogezi & Bukenya Advocates*, submitted that the plaintiff company filed the case and that the defendant filed the defence and responded to all issues and facts set out in the plaint without raising any objection as to the descriptive phraseology of the plaintiff in being referred to as *Real Ggaba Market Property Owners Ltd* instead of *Real Gaba Market Property Owners Ltd*. That as such the defendant acquiesced in the use of the phraseology name/description *Real Ggaba* interchangeably with *Real Gaba*. That the case preceded under the use of *Ggaba* instead of *Gaba* both parties knowing and conversant with the fact as reflected and going by the pleadings.

Counsel for the plaintiff further submitted that *HCMA No. 285 of 2014* was filed to amend the plaint to correct the mix-up in the name of the plaintiff, and that the application was granted and that the plaint was amended by substituting the right

word “Gaba” in place of “Ggaba”. Counsel pointed out that without a formal application the defendant has now reintroduced the issue, which was resolved by the amendment, by way of a preliminary objection reasoning that the plaintiff is a nonexistent entity that it cannot sue, and has sought the court order that the amended plaint be struck out.

Counsel argued that the issues raised by the preliminary objection whether the plaintiff is a nonexistent entity or not is not purely a question of law, but one of mixed law and fact, and that it cannot be resolved at a preliminary stage without looking at the evidence from the plaintiff on its capacity to institute a suit. To back that argument Counsel relied on the case of ***Verjee Brothers (U) Ltd vs. Tatu Naiga & Co. HCCS No. 587 of 1993***. Counsel argued that court has to be satisfied that it was not a bona fide mistake in typing the plaintiff’s name with a double “GG” instead of a single “G” rather than a case of a nonexistent entity commencing a suit.

Counsel also submitted that ***HCMA No. 285 of 2014*** sought to amend the plaint by correcting the spelling of the plaintiff’s name to *Real Gaba Market Property Owners Ltd* and substituting the defendant with Kampala Capital City Authority. That the application was conceded to by the defendant’s Counsel, and that the plaint was accordingly amended. Counsel argued that the defendant was not prejudiced and knew who was suing it, and even answered all the allegations in the plaint. Counsel relied on the case of ***Herman P. Steyn vs. Charles Thys, KCA 1986 of 1996***, where it was held that having acquiesced in the departure and participated in it, parties cannot be allowed to complain to the contrary; and that acquiescence and participation amounted to estoppel within the meaning of ***Section 114 of the Evidence Act***.

At that stage Counsel's submissions delved into other matters not raised by; or related to preliminary objection. It does well not to reproduce them here in this ruling as they are not relevant to the fact in issue.

Issues:

1. ***Whether the plaintiff had the legal capacity to institute this suit.***
2. ***If the answer in (1) above is in the affirmative, whether the instant suit was filed pursuant to a Company Resolution.***
3. ***Whether the amended plaint is properly before court.***
4. ***What are the remedies available to the parties?***

Resolution:

Issue No. 1: Whether the plaintiff had the legal capacity to institute this suit.

I will start by observing that the question as to whether a company is a nonexistent entity or not is an issue of law. For a company to exist legally, it must conform, as of law, to the ***Companies Act, Act No 01 of 2012*** as regards its incorporation and mode of operation. Anything that purports to be a company outside the ambit and provisions of the said Act is not a company and is legally nonexistent as a company. The basic salient features of a company under the Act are, *inter alia*, Memorandum and Articles of Association pursuant to ***Section 21(supra)*** which bind all members of a company, and a Certificate of Incorporation issued pursuant to ***Section 22(supra)*** which is conclusive evidence that all requirements under the Act as to registration have been complied with.

A cursory look at the Certificate of Incorporation in the instant case (attached as *Annexure "A"* to affidavit of Kyagaba Charles) shows that *Real Gaba Market Property Owners Ltd* is the name of the incorporated company. The Memorandum and Articles of Associate (*Annexure A2*) also show that the name of the company is *Real Gaba Market Property Owners Ltd*. The company has 50 names of persons attached to the Memorandum of Association as subscribers - all of P.O. Box 1873

Kampala. The certificate of title (*Annexure “C”*) which is the suit property is in the name of *Real Gaba Market Property Owners Ltd.* In my view, given these obvious and uncontroverted facts in the affidavit of Kyagaba Charles, *Real Ggaba* with letter double “G” is not an incorporated company as far as the instant suit is concerned. Since it does not have any certificate of incorporation in that name, or the Memorandum and Articles of Association reflecting that name, then *Real Ggaba* with letter double “G” is legally a nonexistent entity since it does not conform to the provisions of the ***Companies Act (supra)***.

The other observation is that the instant suit was filed on 23/06/2008 by *Real Ggaba Market Property Owners Ltd* which, as already found, is a legally nonexistent entity. It follows logically that ***HCCS No. 248 of 2008*** was filed by a nonexistent entity. There is a string of authorities on the effect of a nonentity instituting proceedings in court. In ***Banque Internationale De Commerce De Portorgrand vs. Gaukassaow (3) [1923]2 K.B 682***; which was quoted in ***V.G Keshwala T/a V.G Keshwala & Sons vs. MM Sheik Dawood, HCMA No. 543 of 2011 (Commercial Court)*** per Madrama J, it was held that a nonexistent person cannot sue and that once the court is made aware that the plaintiff is nonexistent, and therefore incapable of maintaining the action, it cannot allow the action to proceed, and that the order of the court is that the action must be struck out, as the alleged plaintiff has no existence.

Applying the same principle in the above holding to facts of the instant case, it would mean that *Real Ggaba Market Property Owners Ltd.*, a nonentity had no capacity to sue, and that the plaint which the purported company filed in ***HCCS No. 0248 of 2014*** is a nullity *abinitio*.

That brings me to the subsequent application for amendment of the plaint in ***HCCS No. 0248 of 2014*** by the plaintiff to substitute *Real Ggaba* with *Real Gaba*. Indeed ***HCMA No. 285 of 2014*** sought to amend the plaint in ***HCCS No. 248 of 2014*** by

substituting *Real Ggaba* with *Real Gaba*; and Kampala City Council, Makindye Division with Kampala Capital City Authority (KCCA). Counsel for the defendant conceded to the application; which was granted, and an order for the amendment extracted in the terms already cited above.

The reading of the order arising out of the application shows that it does not include an item on the terms substituting *Real Ggaba* with *Real Gaba* but only provides for substituting Kampala City Council, Makindye Division, with Kampala Capital City Authority. There was no subsequent application for the variation of the order for the amendment to include substituting *Real Ggaba* with *Real Gaba*. It means that the amendment of the plaint by the plaintiff contrary to the terms of the court order allowing the amendment was illegal to the extent of the variation and departure from the order.

Apart from the above finding, the purported substitution of *Real Ggaba* with *Real Gaba* is also a nullity. As was held in *Mulangira Ssimbwa, a.k.a Afidra Milton vs. Board of Trustees Miracle Centre & Pastor Robert Kayanja, HMCA No. 655 of 2005* per Kasule J. (as he then was) where an amendment by way of substitution of a party purports to replace a party that has no legal existence, the plaint must be rejected as it is no plaint at all. This holding is in line with the holding in the *locus classicus* case of *Auto Garage vs. Motokov [1971] EA 514* that a plaint which is a nullity discloses no cause of action and cannot be amended because in effect there is nothing to amend.

Going on strength of the above cited authorities, it would follow naturally that the plaint filed by *Real Ggaba* in *HCCS No. 248 of 2014* was filed by a nonentity and hence a nullity and could not even be corrected or cured by an amendment to substitute *Real Ggaba* - a nonentity, with *Real Gaba* - an incorporated company, because there was nothing to amend in the first place; nor could the plaint filed by a nonentity be sustained or amended because it disclosed no cause of action.

In that same regard, I am unable to agree with the submissions of Counsel for the plaintiff that the issue is one of “descriptive phraseology” of the plaintiff being referred to as *Real “Ggaba”* instead of *Real “Gaba”*, or that the amendment of the plaintiff only sought to correct a “typing error” in the name *Real “Ggaba”* to *Real “Gaba”*. The issue is so fundamental as it relates to whether *Real Ggaba* has any legal existence as opposed to *Real Gaba*. It is more poignant now that members claiming to be shareholders of *Real Gaba* disowned the suit filed in their name by Counsel for the plaintiff when he sought to amend the plaintiff to substitute the nonentity *Real Ggaba* with their company *Real Gaba* which is an incorporated entity. The net effect of *Real Gaba* members disowning the suit is that there is essentially no dispute over the suit property because *Real Gaba* the registered owners of the suit property have no claim in their name against the defendant; and as such there is no cause of action against the defendant.

Issue No. 2: If the answer in (1) above is in the affirmative, whether the instant suit was filed pursuant to a Company Resolution.

Having answered *Issue No. 1* above in the negative, it follows that there was no Company Resolution pursuant to which the plaintiff instituted the current suit against the defendant; and lack of the Company Resolution in instituting a suit is illegal in itself. *Annexure “F”* to the affidavit of Kyagaba Charles is a copy of a Special Resolution that shows that *M/s. Lukwago & Co. Advocates, M/s. Kabega, Bogezi, Bukenya & Co. Advocates, and M/s. Nyombi & Co. Advocates* have joint instructions to prosecute or defend any intended suits against *Real Ggaba Market property Owners Ltd* which, as a nonentity, had no capacity to pass such resolution in the first place and as such it lacked the capacity to institute a suit against anybody.

Indeed in a letter dated 3rd January, 2012 instructing *M/s. Kabega, Bogezi & Bukenya Advocates*, Kyagaba Charles, the purported Company Secretary, wrote on

a headed paper of *Real Ggaba Market Property Owners Ltd* instructing the said lawyers to defend the nonentity in ***Civil Suit No. 248 of 2008*** in the High Court. What this meant was that all along the said lawyers were acting under the illusion that they had instructions whereas not; because their purported client is legally a nonentity. It is settled law, as was held in the case of ***Bugerere Coffee Growers vs. Ssebadduka & A'nor [1970] EA 147***, which was quoted with approval by the ***Constitutional Court in Nsimbe Holdings Ltd. vs. Attorney General & A'nor, Constitutional Petition No. 002 of 2006***, that a suit instituted by a company without authority of its members is a nullity. This principle can be extended, in the context of the facts of the instant case, to include that where a nonentity purports to institute a suit, there is even no company resolution to talk of, and as such no dispute exists as between the parties to be resolved before court.

Counsel for the plaintiff argued that there was acquiescence on part of the defendant Authority of the suit instituted against it by *Real Ggaba*, and that the defendant is estopped complaining. With due respect to Counsel for the plaintiff, this is a misrepresentation and misapplication of the doctrine of estoppel in the context of facts of the instant case. The pleadings of the plaintiff are essentially a nullity, which means they are illegal and are regarded as of no effect right from inception. An illegality once brought to the attention of court cannot be condoned and it supersedes all issues including admissions and the pleadings. See: ***Makula International Ltd. vs. His Eminence Cardinal Nsubuga (supra)***. What this means, with respect to the pleadings of the plaintiff in the instant case, is that they cannot be sanctioned because they are a nullity. An illegality remains an illegality and a party cannot be allowed to acquiesce in the same. As such the doctrine of estoppel would not apply where a party commits an illegality; as the contrary would mean that a party is allowed to profit from the illegal actions it commits, which would create an absurdity in our jurisprudence.

Issue No. 3: Whether the amended plaint is properly before court.

Having found as above, it follows logically that there is legally no plaint in existence, and no pleadings by the plaintiff which properly lie before this court..

Issue No.4: What are the remedies available to the parties?

The plaint is accordingly struck off and dismissed with costs to the defendant.

**BASHAIJA K. ANDREW
JUDGE
26/11/ 2014**