

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]
MISC. APPLICATION NO. 0424 OF 2021
[ARISING FROM CIVIL SUIT NO. 0268 OF 2019]

NTINDA INDUSTRIAL ESTATE
DEVELOPMENT ASSOCIATION LTD

APPLICANT / DEFENDANT

V

KAMPALA GENERAL FURNISHING LTD

RESPONDENT / PLAINTIFF

BEFORE: HON. LADY JUSTICE P. BASAZA - WASSWA

R U L I N G

Representation:

Mr. Kyazze Joseph and Ms. Natukunda Antonia for the Applicant / Defendant

Mr. Kirumira Adam for the Respondent / Plaintiff

Introduction:

[1] This is a Ruling arising out of an application brought by Notice of Motion under **Section 33 of the Judicature Act¹, Section 98 of The Civil Procedure Act² and Order 6 Rule 28, Order 17 Rule 5 and Order 52 Rule 1 of The Civil Procedure Rules³.**

By the application, the Applicant / Defendant seeks:

- a) That **the Head suit no. 268 of 2019** be dismissed on the following grounds;

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¹ Cap 13

² Cap 71

³ S.I 71-1

- [4] The Head suit was originally filed by Kampala General against Ntinda Industrial on March 27, 2019. In its original plaint, Kampala General named Ntinda Industrial as **'Ntinda Industrial Estates Association'** and subsequently amended its plaint on April 24, 2019 and therein named Ntinda Industrial as **'Ntinda Industrial Estates Development Ltd'**. To wit; by the amendment, the word **'LTD'** was added.
- [5] In its suit, Kampala General raises allegations of fraud against Ntinda Industrial in respect of the suit land comprised in **LRV KCCA 144 Folio 21 Plot 17 at Nakawa measuring approximately 0. 8930 Hectares (2. 20 acres)**. It alleges *inter alia*; that in total breach of a goodwill agreement made in June 2016, Ntinda Industrial and its agents have stealthily processed and obtained architectural building plans, and have trespassed upon the suit land without its knowledge, and are commencing excavation / construction thereon of an industrial Park, to defeat its interests. That the actions of Ntinda Industrial are unlawful and illegal.
- [6] It (Kampala General) seeks *inter alia*; for a permanent injunction to restrain Ntinda Industrial from evicting it from the suit land and from constructing any structures thereon, or in any way developing the suit land without its consent or authorization. It also seeks for special, exemplary and general damages.
- [7] In answer, Ntinda Industrial contends in its written statement of defence, that the Head suit was instituted against a non-existent entity: **'Ntinda Industrial Estates Association'** which ceased to exist when **'Ntinda Industrial Estates Development Ltd'** was incorporated.
- [8] It (Ntinda Industrial) denies all the allegations in the plaint, and contends further, that Kampala General is a shareholder in Ntinda Industrial and cannot therefore

maintain an action against it, save by way of a derivative suit, rendering the suit a nullity. It also contends that its actions are lawful, and that Kampala General is not entitled to the remedies it claims in the suit.

The Applicant's case:

[9] The gist of Ntinda Industrial's application and supporting affidavit that is sworn by its Director: a one **Mr. Kizito Robert**, is;

- i) That Kampala General instituted the Head suit against 'Ntinda Industrial Estates Development Association' which is a non-existent entity and could not be sued.
- ii) That Kampala General being a member and shareholder in Ntinda Industrial, is precluded from instituting a suit against the latter, save by way of a derivative suit.
- iii) That together with other members of Ntinda Industrial, Kampala General granted a Powers of Attorney to Ntinda Industrial in respect of the suit land, which precludes Kampala General from instituting the Head suit against it.
- iv) That Kampala General has not set the Head suit down for hearing in almost two years since the defence was filed.

The Respondent's answer:

[10] In its affidavit in reply sworn by its Director; a one **Mr. Ssubi Magala**, Kampala General opposed the application, contending:

- i) That in the heading of its plaint in the Head suit, it inadvertently referred to 'Ntinda Industrial Estates Development Association' as opposed to 'Ntinda Industrial Estates Development Association Ltd'

[13] To determine that question, I will address each one of the three (3) grounds raised, separately.

Ground 1:

That the Head suit was instituted against a non-existent party, and in the alternative, that the Head suit was instituted without compliance with the mandatory conditions precedent for a representative suit.

[14] Under this ground, learned Counsel Mr. Kyazze and Ms. Natukunda argued that **Ntinda Industrial Estate Development** ceased to exist when it was incorporated into **Ntinda Industrial Estate Development Ltd.** That the former cannot therefore sue or be sued. That a suit by a non-existent entity is a nullity.

They referred court to the certificate of incorporation and to the Memarts marked B1 and B2 to the affidavit in support of their application.

For their proposition, learned Counsel relied on; **Fort Hall Bakery Supply Co. v Frederick Muigai Wangoe**⁴ and **Uganda Freight Forwarders Association and Anor v The Attorney General**⁵.

[15] In rebuttal, Mr. Kirumira argued for Kampala General that perusal of the plaint as a whole, shows that Kampala General sued the corporate entity and not the association. That in paragraph 2 of the plaint it pleads that; **'the defendant is a limited liability company which can sue and be sued...'**. That under paragraph 4 (b) of the plaint, Kampala General pleads that it played a key role in creation

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⁴ [1959] EA 474

⁵ Constitutional Petition No. 22 of 2009

of Ntinda Industrial. That these are clear that it was simply an omission not to write the word 'limited' in the heading. That from the entire body of the plaint it is clear that Ntinda Industrial is a corporate entity and not an association as claimed by learned Counsel. That it was a mere misnomer that can be corrected by amendment.

[16] For his proposition, learned Counsel relied on the decision in **Ac Yaffeng Construction Limited V The Registered Trustees of Living Word Assembly Church & Anor**⁶ and argued that the omission of the word "limited" is a mere misnomer that ought to be corrected by amendment. That a misnomer arises when the author merely misnames the correct person as opposed to being unable to identify the correct person.

[17] In rejoinder, learned Counsel Mr. Kyazze and Ms. Natukunda argued that the omission of the word "**Ltd**" is a fatal error because it has the effect of altering the identity of the party and refers to a non-existent entity.

[18] **I have looked at the Plaint as a whole, and I agree with the argument of Mr. Kirumira that the omission of the word 'Ltd' in the plaint was simply a misnomer, an inadvertent mistake. A reading of the plaint indeed shows that Ntinda Industrial was properly identified in paragraphs 2 and 4 (b) as a limited liability company, and its Memorandum and Articles of Association were thereto annexed. A sheer error like that one, is not fatal. It can be corrected by**

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⁶ HCMA No. 0001 of 2021 (Comm. Crt.)

[21] In reply, learned Counsel Mr. Kirumira argued for Kampala General that his client has *locus standi* to maintain the head suit in its own right. That the Head suit was not filed on behalf of Ntinda Industrial, nor does Kampala General seek to enforce its rights as a member of Ntinda Industrial. That rather, Kampala General seeks to enforce its individual / personal rights against Ntinda Industrial to possess portions of the suit land that it had possession of, and its right to recover expenses incurred on behalf of Ntinda Industrial, pursuant to a power of attorney issued to it by Ntinda Industrial.

[22] Citing the text: **Company Law a Guide to the Companies Act of Uganda**⁹, Mr. Kirumira further argued that under corporate personality, a company is a separate legal entity from its shareholders and directors, and as such, it can enter into contractual obligations with its shareholders and directors from which the said shareholders and directors can derive a cause of action against the company.

[23] I have very carefully considered the arguments for and against this ground, and the authorities relied on by each party, and the law. Before I delve into the merits of this ground, it is pertinent that I first lay down the definition of '**a Derivative action**'.

[24] I found two definitions: The first is in **Black's Law Dictionary**¹⁰ that defines '**a Derivative action**' as:

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⁹ A book by Winifred Tarinyeba Kiryabwire at page 69

¹⁰ 9th ed. at page 509

' A suit asserted by a shareholder on the corporation's behalf against a third party (usu. a corporate officer) because of the corporation's failure to take some action against a third party' (Underlining added)

[25] The second definition, which is more elaborate, is in the text: Company Law a Guide to the Companies Act of Uganda (supra), that was cited by both Counsel.

The author defines that action as; I quote:

'a derivative action is a petition by a shareholder, usually a minority shareholder seeking a remedy for the company for a wrong that has been done to it. Not every wrong to the company will justify a derivative action to remedy it. It must be a wrong that cannot be adequately remedied by the company either in a general meeting or through the Board of Directors...In circumstances where a wrong has been done to the company by the majority who are in control, then it is unlikely that they will sanction any intended action against themselves. It may also be futile to call a general meeting to address the issues and take action because of the influence exercised by the wrong doers over the board and directly or indirectly over the votes capable of being cast in a general meeting. In those circumstances, courts have recognised that a minority shareholder may petition on behalf of the company¹¹. The relief sought must be for the benefit of the company'.

(Underlining added)

[26] I find the above excerpt very useful and agree entirely with it. Similarly, to the same effect is the decision of Musota, J., (as he then was) in Ssenteza and Anor v Donnie Company Ltd and Anor¹², to which I also subscribe.

[27] It is settled that where a wrong is alleged to have been done to a company or a duty is owed to it, to remedy that wrong, or to enforce that duty, the company is the proper Plaintiff. See Kabale Housing Estate Tenants Association Ltd v Kabale Municipal Local Government Council (supra) and also see the text: Company Law in Uganda by D.J Bakibinga¹³.

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¹¹ Reference to Allied Bank International Ltd v Sadru Kara and Anor CS No. 191 of 2002

¹² Company Cause No. 005 of 2016.

¹³ 2001 (reprinted in 2012) at page 201

- [28] Guided by the principles that are re-stated in the texts and authorities above, I find that, the argument by Mr. Kyazze and Ms. Natukunda; '*that the Head suit should have been by way of a derivative action,*' is misplaced. It is apparent to me, from the pleadings in the Head suit, that the Head suit is not brought to remedy alleged wrongs to Ntinda Industrial, but is brought by Kampala General seeking to remedy alleged wrongs that it claims were done to it.
- [29] Although it is indeed an age - long fundamental Principle as enunciated in Foss v Harbottle¹⁴, **that a company is a legal person with its own corporate identity, and is separate and distinct from its directors or shareholders, with its own property rights and interests**, clearly, with due Respect to learned Counsel, they failed to distinguish between alleged wrongs to a member of the company, (in this case Kampala General), *viz a vis* alleged wrongs to the company itself (in this case Ntinda Industrial).
- [30] In the Foss v Harbottle case (supra), the minority shareholders sued the Company for misapplying Company property. In contrast, in the present case, in the Head suit, Kampala General sued Ntinda Industrial for alleged acts of fraud. It complains that the latter and her agents have stealthily processed, and obtained architectural building plans without its knowledge, and have trespassed upon the suit land, and are commencing excavation / construction thereon, of an industrial Park, to defeat its interests.

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¹⁴ [1843] 67 ER 189

alleged acts or alleged proposed acts of Ntinda Industrial, which Kampala General as a member of Ntinda Industrial, describes as acts that are '*prejudicial*' to its interests. On this point, refer to a detailed examination of the principle of '*unfair prejudice*' to members of a company, by Musota, J., (as he then was) in his decision in **Kigongo v Mosa Courts Apartment Ltd**¹⁶.

[36] I opine accordingly, that there is no justification for this suit to proceed otherwise than as provided for by the law. Proceeding by petition under **section 248 of the Act** is a specialised quick procedure designed to avoid the winding procedural steps under the Civil Procedure Rules. In that part of the Companies Act, special provision has been made for remedies (**see section 250 of the Act**), which include the principal remedy sought for by Kampala General in the Head suit¹⁷.

[37] **The Companies Act being a Principal legislation, failure to adhere to it, would be to contravene the law. In these circumstances, the Head suit brought by ordinary plaintiff, is improper and cannot be sustained.**

Ground 3:

That the Head suit should be dismissed for want of prosecution.

[38] In view of my conclusion on ground 2, the determination of ground 3 is rendered unnecessary and superfluous. I will not address ground 3.

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¹⁶ Company Cause No. 01 of 2015.

¹⁷ In the Head suit, the principal remedy sought for by the Plaintiff is a permanent injunction against Ntinda Industrial, to refrain it from the alleged acts. (See sec. 250 (2) (b) of the Act).

Decision of Court:

[39] In the final result, this application succeeds, albeit for a different reason than that which was pleaded, and argued. It is trite that a court of law will not sanction any contravention of the law, once drawn to its attention. That position transcends the pleadings of the parties. See the decision in **Makula International v His Eminence Cardinal Nsubuga**¹⁸.

[40] I accordingly Order as follows:

1. The plaint in the Head suit is struck out with costs for being procedurally wrong and in contravention of the Companies Act, 2012.
2. The prayer for a consequential order is rejected. Such an order can only be made upon hearing and determining the matters in controversy between the parties. That has not been done.
3. Each party shall bear its own costs for this application.

I so order,



P. BASAZA - WASSWA

JUDGE

May 31, 2023

Ruling delivered via email to the parties and uploaded on the Judiciary ECCMIS Portal.

¹⁸ [1982] HCB at page 24