THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO.143 OF 1993

BONUS KAZOOBA.: : : : : : : : : : : : : : : : : :: : : : : : : : : : :PLAINTIFF

—versus—

LEVI TUGUME : ; : : : : : DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE I. MUKANZA

RULING

Both the plaintiff and the defendant in this case are co-directors and hold equal shares in a limited liability company known as Lebonnex (U) Ltd which was incorporated on 13th April 1989.

The plaintiffs claim against the defendant was for an order that the defendant do account to the plaintiff for the business of the company with effect from 1st September 1991 to date, in order that the defendant refunds shillings 1,650,000/= he embezzled from the company, an order that the defendant desists from excluding the plaintiff from the managing and running of the company and an order for the award of general and special damages.

When the matter came for hearing Mr, Mwesigwa Rukutana the learned counsel appearing for the plaintiff raised a preliminary objection. He submitted that the plaintiff brought this suit against the wrong done to him by the defendant in the course of operating a company known as Lebbonex Uganda Limited. His learned friend was at the material time the company secretary of that company. He was appointed so by a resolution of the company made on 24th April 1992 and registered with the company register on the same day. Article 3 of the resolution reads that M/S. Muhwezi and Co. Advocates becomes the company advocates. He had a copy of the resolution existed Mr. Muhwezi the counsel appearing for the defendant replied affirmatively. Mr.

Mwesigwa continued that his instructions were that in the course of his duties as a company secretary his colleague had opportunity on several occasions to meet both the plaintiff and the defendant in a bid to bring an amicable settlement of the matter. He discussed with the parties the matters in controversy in the suit. He finds that at any stage his colleague might be called upon to testify in this case. Being a possible witness Mr. Muhwezi is not capable to handle the instant case on behalf of the defendant. He referred me to the provision of Regulation 8 of the Advocates (professional conduct) Regulations 1977 r8 which provides "No Advocate may appear before any court or tribunal in any matter in which he has reason to believe that he will be required as a witness to give evidence extra….' The regulation is mandatory and there is a cardinal principle of justice that justice must not only be done but must be seen to be done, And it was more practicable in this situation where his colleague having had cons and pros from both sides as a mediator he then supposes to represent one of the parties. It is the practice of the court where an advocate has personal interest in the matter he disqualifies himself. He referred me to HCCS No. 650/91 Christopher Kayoboke Vs. Dol Mugasha and others where Dr, Byamugisha was disqualified from appearing for the defendant because as an advocate was likely to be called as a witness in the same case. Mr. Mwesigwa urged this court to disqualify Mr. Muhwezi from handling the case for the defendant and prayed for costs of that day.

Mr. Muhwezi the learned counsel representing the defendant submitted that first of all the preliminary objection both on point of law and fact need to have been pleaded specifically by the plaintiff and defendant in the counter claim that Muhwezi was appearing for the defendant in the instant suit and was likely to be called as a witness to avoid embarrassment and being taken by surprise but no such facts were pleaded. Order 6 rules 5 and 6 of the CPR would now bar the plaintiff from bringing the matter at this late hour of the hearing. And as an employee of the company and the company secretary he is authorised and qualified to appear for the company. The defendant is the managing director of the company. As indicated in the memorandum of association (which he headed in) it was pleaded by the defendant that his acts as managing director are deemed to be the acts of the company and therefore he was not being sued in his individual capacity but as managing director of the company. As such he appeared as counsel for the company to protect the acts made by the Managing Director of company. In addition the company is a party to this suit in the counterclaim where he also appeared for the same. He

denied having known the two parties personally but rather as directors of the company. Thirdly he did not participate in the arbitration his role was that of a company secretary. He was rather an administrator of the company.

Fourthly he had not received any notice from any body to appear a witness in this case and that day was a hearing date. His learned friend filled a form consenting to the hearing of the case on that date on behalf of their respective parties and both of them agreed that they would not be calling any witness. So it was not true that he would be called as a witness. He tendered in court the consent form signed by both counsels. He continued that the authority cited by his 1earned friend was not applicable to the present situation because Dr. Byamugisha who was a party to the suit cited appeared as counsel for himself and for other parties and it was held that he was likely to appear as one of the witnesses to the suit and therefore was disqualified. He argued that he was not a party to the suit and the authorities cited do not apply to him. He finally submitted that the prayer for costs for that day was misplaced since costs should have been in the cause since both parties were in attendance. He prayed that the preliminary objection of his learned brother be overruled.

In reply Mr. Mwesigwa Rukutano submitted that there was no merit whatsoever in his colleagues reply. Summing up what he had said culminated in three proposition. First his colleague conceded that he is a company secretary, secondly that the company is actually a party to the suit and finally conceded he had dealt with the parties not as individuals but as member's of the company. Looking at those three propositions it was clear his colleague had personal interest in this case. I was yet referred to another case in the name of Babumba and 2 others VS. Guaba Sanyu Rep 1988 at Page 119 that an advocate should not conduct a case where he was likely to be called as a witness. He continued that there was no need for him to plead that the counsel would be called as a witness in this case. The elements of that fact bad been admitted by his colleague. The contention that he has not been called as a witness is immaterial. He had instruction to call him a witness what the court should look at is whether he was likely to be called as a witness. That was a rational justice principle. He argued that his learned friend having failed to resolve the dispute he should not be allowed to take sides. Because of the nature of the reply by Mr. Mwesigwa where he raised some new matters Mr. Muhwezi was a1lowed to reply. He submitted that he did not have any interest in this case. Earlier on in the main objection the

learned counsel informed the court that he was likely to be called as a witness but then contradicted himself when he submitted that he had instructions to call him as a witness. He did not show such instructions to the court. He was alleging that fact for his own malicious notions known to himself and he was disassociating himself from the consent form that no witness was to be called by the defendant. There was no proof that he had instructions to call him as a witness

It is a rule of practice and reinforced by rules of professional conduct that an advocate should not act both as counsel and as a witness in the same case except in formal or non contentious matters see the Advocate (professional Conduct) Regulation 1977 R 8 Supra also **Francis Babumba an 2 others Vs. Erusa Bunja HCB 1988 - 1990 p. 119** and in another case of Jafferi and another 1971 EA p. 1165. It was held in that case that the rule of practice that an advocate should not act as counsel and witness in the same case is not violated until the advocate is called as a witness and it was further held that the court cannot make an order to prevent an anticipated violation See: also R Vs. Secretary of Stale for India Exp Ezekiel 1941 AE R p 46 which was quoted with approval in Jafferis case supra.

According to the records Mr. Muhwezi is the company secretary of Lebbonex (U) Ltd as per the resolution of the company dated 24th June 1992 of which he admitted was correct. The written statement of defence and counterclaim showed that he was appearing for the defendant as a managing director of the company and the company itself. The plaintiff and the defendant are Co-directors and as already indicated above hold equal shares in the said company. However a company registered under the company's Act as a corporation is a legal person distinct from the individuals who are its members See: Companies Act Cap 85. The consequence of this is that the company's debts are those of the company and could not be enforced against the members Solomon vs. Solomon r co, Ltd. The emphasis here is on the fact that the company is a separate person from its members.

From what has transpired above Mr. Muhwezi is not likely to be called as a witness by either the plaintiff or defendant. And even if I might be wrong in so finding the rule that the Advocate must not act both as counsel and witness in to same case is not violated until the Advocate is called as a witness**.** And there is also further authority to the effect that the court cannot make an order to prevent an anticipated violation. In the premises the learned counsel for the plaintiff as merely

speculating that Mr. Muhwezi was likely to be called as a witness See: Jafferis case above. I do not therefore subscribe to the submissions he made over that matter. Mr, Rukutano referred me to the case of Christopher Kayobaka .Vs. Dr. Mugisha and 2 others unreported where Dr. Mugisha was disqualified from appearing for himself and two others. That case is distinguishable from the instant case in that… this case and he was acting for the defendant as a managing director of the company as opposed to an individual and in that case he was not likely to be called as a witness. Besides that, Mr. Rukutano in his first address to this court submitted that his learned brother was likely to be called as a witness and at the same time while replying to the submissions of Mr. Muhwezi stated that he had by then received instructions to call Mr. Muhuezi as a Witness. However in the consent form signed y both counsels in which the matter was fixed for hearing the counsels agreed that they would be calling no witnesses. It is inconceivable that counsel of that standing could turn around and make such glaring contradictions that he intend to call any witness at the trial. I am of the view that was embarrassing to Mr. Muhwezi and he was taken by surprise. The learned counsel should have stuck to his word. I seem to be agreeable with the submissions of Mr. Muhwezi that may be there were some malicious notions on the part of the counsel for the opposite party.

This now brings me to consider the other aspects of this application. Mr Muhwezi submitted that the preliminary objection should have been specifically pleaded both in the plaint and in the counterclaim that the counsel was likely to be called as a witness. I was referred to Order 6 Rule 5 of the Civil Procedure Rules. Rule 5 provides that;

'The defendant or the plaintiff as the case may be shall raise by pleading all matters which shows that the action or counterclaim not to be maintainable or that the transaction is either void or voidable in point of law and all such grounds of defence or reply as the case may be or as if not raised would be likely to take the opposite party by surprise or would raise issues of fact not a rising out of the proceedings pleadings, a for instance fraud, limitation act, release, payment, performance or facts showing illegality either by statute or common law".

In the instant case the plaintiff did not raise in his pleading that the counterclaim was not maintainable because the counsel appearing for the defendant was likely to be called as witness. The submission therefore that the counsel for the defendant was likely to be called as witness or

that Mr. Rakutano had instructions to summon him as such took the learned counsel appearing for the defendant by surprise because that was not pleaded in the plaint that Mr. Muhwezi had admitted to the fact that he was likely to be called as a witness. There were no pleadings to that effect. That disposes the first aspect of this matter.

The second aspect of this case concerned costs. Mr. Rukutano prayed for costs for that day where as Mr. Muhwezi opposed the application. He was of the view that costs for that day should have been costs in the cause.

The general rule is that costs shall follow the, event unless the court for good reason otherwise orders. This means the successful party is entitled to costs unless he is guilty of misconduct or there is some other good cause for not awarding costs to him. The court may not only consider the conduct of the party in the actual litigation but matter which led up to the litigation See: **Mulla on Code of Civil Procedure 12th Edition Page 150 See also Francis Butagira Vs. Deborah Namukasa Supreme Court Uganda CAP NO.6 of 1989 unreported. In Kiska Ltd Vs. Angelis 1969 EA 6 Sir Clement Lestang Ag. P.** reiterated the same principles upon which an appellate court should interfere with an award for costs made by the trial. See also **Odgers on pleading and practice 9th Edition chapter 26 P.393.**

I am of the opinion that the successful party in this preliminary objection was the party entitled to the costs of that day. The defendant was not guilty of misconduct and there was no other good reason for not awarding him costs of that day.

It would however make a difference if the case had taken off and there was an application for adjournment, the court might have then used its discretion for sound good reason put forward for the adjournment and award costs in the cause. In the end having heard, the submissions of the learned counsels and the law applicable, the preliminary objection by Mr. Mwesigwia Rukutano the learned counsel appearing, for the plaintiff that Mr. Muhwezi counsel for the defendant was likely to be called as a witness and therefore should not appear for the defendant must fail. The same is overruled with costs to the defendant.

I MUKANZA

JUDGE

15.7.1999