

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
MISCELLANEOUS CIVIL APPLICATION No. 0145 OF 2017
(Arising from Civil Suit No. 0028 of 2016)**

- 5 1. CPT. SANTO OKOT LAPOLO }
2. ENG. NOAH OPWONYA }
3. MAGENDO THOMAS }.....APPLICANTS
4. ENG. OKULLO ENYANSIO }
5. LABEJA GEORGE }

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VERSUS

1. OPIO GEORGE PIUS }
2. JUSTINE NYEKO }
3. NYERO DICK }
15 4. LATIGO JACKSON }
5. ONGOM PETER }
6. OPOBO ISAAC }
7. OKECH MARCELINO }RESPONDENTS
8. OPERA HUNNINGTON }
20 9. MRS. KEROBINO UMA }
10. ODONGO YAYERI }
11. ODONGO CELESTINO }
12. ODONGO MARTIN }
13. AKENA SIMON PETER }

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Before: Hon Justice Stephen Mubiru.

RULING

30 This is an application made under the provisions of sections 27 and 98 of *The Civil Procedure Act*, section 33 of *The Judicature Act* and Order 52 rules 1 and 2 of *The Civil Procedure Rules*. It

seeks consequential orders to be made directing the respondents to pay personally, costs awarded against the applicant. The applicants in effect seek a review, by way of variation, of the order made by the Assistant Registrar of this court on 17th November, 2016 when he allowed Acholi War Debts Claimant Association to withdraw Civil suit No. 28 of 2016 and two interlocutory applications that had been filed hereunder, with costs to the defendant / respondents therein.

The background to the application is that sometime in October, 2016 a suit was filed whereby the Acholi War Debts Claimant Association sought remedies against the Attorney General of Uganda and the five applicants herein, including;- nullification of an election of new office bearers of the Association, a permanent injunction restraining them from further interference with the internal management of the Association, general damages and costs. All the defendants filed their respective defences to the suit refuting the plaintiff's averments and contesting the plaintiff's capacity to sue, since the Association's Executive had not authorised litigation to commence in its name. The plaintiff filed two interlocutory applications seeking and interim and interlocutory injunction, respectively.

When the application for an interim injunction came for hearing before the Assistant Registrar of this court on 17th November, 2016 counsel for the defendants raised a preliminary objection contending that being an Association, the plaintiff did not have a legal personality and could not sue in its name, but in the name of its Executive members. In the alternative, that the Association had not passed a resolution authorising any of its members to sue in its name. Conceding to both objections, counsel for the plaintiff instead sought leave to withdraw the two interlocutory applications and the suit itself. The Assistant Registrar granted the application and awarded costs of the withdrawn proceedings to the defendants.

The defendants / applicants now seek a variation of that order. It was argued by counsel for the applicants, Mr. Crispus Ayena Odongo, that the respondents, being the individuals who took steps and filed the suit and applications on behalf of Acholi War Debts Claimants Association, while they were not seized with authority to do so, should be ordered to pay the costs personally. In response, counsel for the respondents, Mr. Godfrey Aballa, argued that the respondents should not pay the costs personally because they filed the suit upon authority of a representative

order. The respondents thus had the authority of court, although they did not have authorisation from the leadership of the Association.

Order 46 rules 1 of *The Civil Procedure Rules*, authorises empowers this court to review its own
5 decisions where error is apparent on the face of the record. The error or omission must be self-evident and should not require an elaborate argument to be established. According to the decision in *Attorney General and another v. James Mark Kamoga and another, S.C. Civil Appeal No. 8 of 2004* the power extends to Orders of the Registrar.

10 Under section 27 of *The Civil Procedure Act*, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid, but the discretion must be exercised judiciously and not capriciously. Being an exercise of discretion, it should be based on sound principles and the decision of the Assistant Registrar may be interfered with where it is demonstrated that he or she
15 erred in principle or where exceptional circumstances otherwise justify the court's intervention. As a general principle, a party who engages in conduct which tends to defeat justice in the very cause in which they are engaged must compensate the opposite party in the action for costs "thrown away." The general principle is that the person responsible for the loss or costs is the one to bear the burden of payment (see *Wilkinson v. Wilkinson [1958] 2 All E.R. 179, at 192*).

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However, in the instant case the respondents were not party to the terminated proceedings. Courts though have inherent jurisdiction to order non-party costs, on a discretionary basis, in situations where the non-party has initiated or conducted litigation in such a manner as to amount to an abuse of process. The Court should seek to prevent abuse of process or vexatious conduct
25 that undermines the fair administration of justice, by precluding non-parties who engage in improper conduct from insulating themselves from cost awards. For example in *Ontario Limited v. Laval Tool, 2017 ONCA 184* the Court went as far as piercing the corporate veil and disregarded the corporation's separate legal personality. The Court held that "costs against non-parties who are directors, shareholders or principals of corporations may be ordered in
30 exceptional circumstances if the non-party commits an abuse of process... such circumstances may include fraud or gross misconduct in the instigation or conduct of the litigation."

Costs may be awarded against a non-party where a named party on record is merely a "man of straw," or the "formal" or "ostensible" litigant, while the non-party is the "real" or "substantial" litigant who "set in motion," "supported," "instigated" or "actively promoted" the litigation,
5 "putting forward" the named party in its own place "for the purpose of avoiding liability" (see *Re Sturmer and Town of Beaverton (1911)*, 25 OLR 190 (HC)). The court has authority, derived from its inherent jurisdiction to prevent an abuse of process, to award costs against a non-party who has proved to be the real person controlling the litigation but has put forward another to avoid liability for costs or other reasons.

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The test does not ask whether the non-party engaged in misconduct serious enough to amount to abuse of the court's processes. Rather, it is a factual inquiry that asks whether the party of record is only the "formal" or "ostensible" litigant and whether the non-party is the "real" or "substantial" litigant, controlling the proceedings and advancing the named party for the purpose
15 of deflecting liability for costs. The aim is to determine whether the non-party, as a matter of fact, functions as if it were a "party" in relation to which the court has statutory jurisdiction to order costs under section 27 of *The Civil Procedure Act*, but put someone else forward to avoid costs consequences.

20 In the proceedings before the Assistant Registrar, the respondents conceded that they filed the terminated proceedings without authorisation of the Association and by extension sought a representative order without such prior authorisation. At common law, a corporation sole, a corporation aggregate and an individual or individuals are the only entities with the capacity to sue or be sued, or those associations of individuals which are neither corporations nor
25 partnerships, upon whom the Legislature has conferred such a status (see the pronouncement of Farwell J. in *The Taff Vale Railway Company v. The Amalgamated Society of Railway Servants [1901] A.C. 426*, at p. 429). Groups of persons associated for the carrying out in common of any purpose or advantage of an industrial, commercial or professional nature; do not possess therein a collective civil personality recognised by law just by virtue of only the conduct of such
30 activities in common. It is the act of incorporation that creates entities which are by law be regarded as distinct from their individual members, and as having the right to ester en justice, as

a legal fiction (see *Salomon v. Salomon* [1897] A.C. 22 at p. 29). Henceforth, they may institute and actions may be instituted against them under the name by which they designate themselves.

Save for partnerships which are permitted by Order 30 of *The Civil Procedure Rules*,
5 unincorporated associations may not sue or be sued under the name by which they are commonly known and called, or under which they do business as if it were incorporated (see *A. M. Okwonga v. Ameda James Anywar and The Church of Uganda* [1984] HCB 45; *Campbell v. Thompson* [1953] ALL ER 831, and *Fort Hall Bakery Supply Co. Ltd v. Frederick Muigai Wangoe* [1959] E.A 474). Being an unincorporated Association with no legal capacity, Acholi
10 War Debts Claimant Association was incapable of maintaining the suit and interlocutory applications. A nonexistent party can neither pay nor receive costs. It is then an error on the face of the record for the Assistant Registrar to have awarded costs against a nonexistent party.

Filing a lawsuit without a genuine legal basis, such as in the name of a nonexistent party, is an
15 abuse of process. A suit instituted without authority is certainly not a suit properly instituted. Just as a suit instituted by a company without authority of the directors is not maintainable (*Bugerere Coffee Growers v. Sebaduka and another* [1970] E.A. 147 and *Makerere Properties v. M. R. Karia HCCS No.32 of 1994* [1995] 3 KLR 25), a suit, representative or otherwise, instituted in the name of an unincorporated association without the authorisation of the executive of the
20 unincorporated association is a nullity. It is one form of misuse of the tools the law affords litigants, regardless of whether there was probable cause to commence that suit or not. Misuse of the power of the court is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice. An advocate who institutes such a suit should ordinarily be condemned to pay costs personally, but only after being given opportunity to be heard (see
25 *Halsbury's Laws of England*, 3 Edition, Vol. 36 page 198; *Abraham v. Justin*, [1963] 2 ALL.E.R. 402; and *J.B. Kohli and others v. Bachulal Popallac* [1964] E.A 219).

Just as advocates who initiate suits without authorisation will be condemned to pay the costs of such proceedings personally, third parties who initiate such proceedings become the "real" or "substantial" litigants and the named party as a mere "formal" or "ostensible" litigant. Being the
30 substantial litigants, the respondents should bear the costs of the withdrawn proceedings, and not

the named Acholi War Debts Claimant Association. Accordingly the application is allowed with costs to the applicants.

Dated at Gulu this 25th day of October, 2018.

Stephen Mubiru

5 Judge