**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL DIVISION)**

**MISCELLANEOUS APPLICATION N0. 04 0F 2020**

**(ARISING FROM CIVIL SUIT NO.1009 OF 2009)**

**MUTEBI SULA :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPLICANT**

**VERSUS**

**NAM CHAU TRADING CO. LTD :::::::::::::::::::::::::::::::::::::: RESPONDENT**

**BEFORE HON. MR. JUSTICE BONIFACE WAMALA**

**RULING**

**Introduction**

This application was brought by Chamber Summons under *Order 6 Rule 28, 29 & 30; Order 7 Rule 11(a) & (e) and Rule 19 of the Civil Procedure Rules (CPR) and Section 98 of the Civil Procedure Act (CPA), Cap 71*, for orders that:

1. Civil Suit No. 1009/2019 **(NAM CHAU TRADING CO. TD VS. MUTEBI SULA T/A GOLD WORLDWIDE LTD)** discloses no cause of action against the Applicant/Defendant.
2. The plaint in the above said suit is frivolous and vexatious.
3. The plaint in the said suit be rejected and or struck off with costs.
4. The suit be dismissed with costs to the Defendant/Applicant.
5. Costs of the application be awarded to the Applicant.

The application was supported by the affidavit of **Mutebi Sula**, the Applicant, which sets out the grounds of the application. A supplementary affidavit was also filed, sworn by **Aisu Isaac Nicholas**, an advocate in one of the law firms representing the Applicant. Briefly, the grounds of the application are that:

a) The Respondent/Plaintiff entered into a clearing and forwarding contract between Gold Worldwide Ltd and itself.

b) The Respondent/Plaintiff believing to be aggrieved filed a suit against the Applicant/Defendant who is a director of the said Gold Worldwide Co. Ltd vide Civil Suit No. 1009/2019.
c) There is no privity of contract between the Plaintiff and the Defendant.
d) The said Gold Worldwide Ltd is a corporate entity with capacity to sue or be sued in its own corporate names.
e) The suit No. 1009/2019 discloses no cause of action against the Applicant/Defendant.
f) The suit is thus frivolous, vexatious and should be rejected or the suit ought to be dismissed with costs to the Applicant.

The Respondent opposed the application through an affidavit sworn by **Nguyen Thien Quang**, a Director of the Respondent, who averred that he had been informed by their lawyers that the Applicant was seeking to hide behind the doctrine of corporate personality to avoid paying the Respondent through use of a Company that was unknown to the Respondent at the time of the transaction. The deponent stated that the Respondent entered into an oral contract with the Applicant personally to deliver clean bills of lading and/or consignment of 104 containers and merchandise from Uganda to Vietnam. He stated that at all material times, the Respondent dealt with Mutebi Sula T/A Gold Worldwide Co. Ltd. The deponent further stated that in a written commitment signed by the Applicant on the 19th September 2019, the Applicant committed himself to deliver the outstanding part of the consignment within a given time frame. The said undelivered consignment is the basis of the Respondent's cause of action.

The deponent further stated that the Respondent was only advised by the Applicant to deposit the payments on the account which was in the names of Gold Worldwide Co. Ltd where the Applicant is the Managing Director and Company Secretary. The deponent stated that the present application by the Applicant was brought in bad faith and should be dismissed with costs.

The Applicant filed an affidavit in rejoinder deponed to by the himself and a supplementary affidavit in rejoinder sworn by advocate Aisu Isaac Nicholas.

**Background**

Briefly, according to the pleadings that were filed in the main suit, it was alleged that around July 2017, the Respondent/Plaintiff entered into an oral contract with the Applicant/Defendant for delivery of clean bills of lading and /or consignment of 104 containers and merchandise from Uganda to Vietnam at a consideration of USD 2,800 (UGX 10,315,200) per container. The Respondent duly paid USD 291,200 (UGX 1,072,780,800) to the Applicant upon which the latter made deliveries of only 96 containers and totally failed to clear the 8 containers from Mombasa to Vietnam.

On 19th September 2019, the Defendant made a written commitment to deliver the 8 containers within 3 weeks but he did not honor his obligation. The Respondent then engaged the services of Clint Wood General Traders to make the clearance, which they did. The Respondent brought this suit for recovery of damages and costs. The Applicant then brought the present application challenging the competence of the suit.

**Hearing and Submissions**

At the hearing, the Applicant was represented by Mr. Lutaaya Ramadhan while the Respondent was represented by Mr. Ddamulira Pius. It was agreed that the matter proceeds by way of written submissions, which were filed by both Counsel. I have considered the submissions in the course of resolution of the issues.

**Issues for Determination**

In the submissions, both Counsel agreed on four issues for determination by the Court, namely:

1. Whether the deponent of the affidavit in reply had/has locus standi to make the same on behalf of the Respondent.

2. Whether Civil Suit No. 1009 of 2019 discloses a cause of action against the Applicant/Defendant.
3. Whether the suit is frivolous and/or vexatious.
4. What remedies are available to the parties?

**Resolution by the Court**

**Issue 1: Whether the deponent of the affidavit in reply had/has locus standi to make the same on behalf of the Respondent.**

It was submitted by Counsel for the Applicant that while the deponent of the affidavit in reply stated that he was a director of the Respondent, he did not attach proof of his position as director which would automatically have given him locus to make the said affidavit in reply. Counsel argued that by law, the deponent ought to have attached Company Form 20 to prove such a position in the Company.

Counsel for the Applicant further relied on the provisions of Order 7 Rule 14 (1) of the CPR which provides that where a plaintiff sues upon a document in his or her possession or power, he or she shall produce it in court when the plaint is presented. Under sub-section (2) thereof, where the plaintiff relies on a document as evidence in support of his/her claim, he/she shall enter the document in a list to be added or annexed to the plaint.

Counsel relied on the case of ***Ugafin Ltd Vs Beatrice Kiwanuka HC M.A No. 682 of 2014*** where it was held that failure to attach a fundamental document in possession of the plaintiff which gives him locus to bring an action would leave the plaintiff with no locus standi to bring the action. Counsel therefore concluded that short of the above mandatory requirement, the deponent of the affidavit in reply had no locus and was thus a third party and a stranger to the suit.

In reply, Counsel for the Respondent relied on Order 29 Rule 1 CPR to submit that in a suit by or against a corporation, a pleading may be signed on behalf of the corporation by the secretary or by any director or any other principal officer of the corporation who is able to depose to the facts of the case. Counsel submitted that the above provision was in line with the provision under Order 19 Rule 3 of the CPR which also provides that affidavits shall be confined to such facts as the deponent is able of his or her knowledge to prove, except in interlocutory applications in which statements of his or her own belief may be admitted, provided that the grounds thereof are stated. Counsel submitted that the deponent of the affidavit in reply fitted the above criteria and was under no strict legal requirement to attach proof of his position as a director. Counsel submitted that the deponent was conversant with the facts since he had been involved in the transaction.

Counsel for the Respondent further submitted that the provision under Order 7 Rule 14 and the authority in ***Ugafin Ltd Vs Beatrice Kiwanuka (supra)*** had been cited by the Applicant's Counsel out of context.

Let me begin by pointing out that the reason the Applicant challenges the affidavit in reply is not that, as director of the Respondent, the deponent had no capacity to depone to an affidavit on behalf of the Respondent Company. The challenge is based on the claim that the deponent had not shown or proved that he was actually a director in the Respondent Company.

To my understanding, where there is no dispute as to the directorship of a particular person in a particular company, it is not a mandatory requirement that for such a director to have capacity to depone to an affidavit or sign any pleading, he/she must attach evidence of his position in the Company. In other words, unless contested, an averment in an affidavit or a pleading would suffice as evidence of such a person's position in the Company. It follows therefore that where a person's position in the Company is challenged, such a person has to prove that he/she holds such a position.

On the case before me, the Applicant did not specifically lay out this challenge or contestation to the Respondent, in time enough for the Respondent to adduce evidence over the same. What appears in the affidavit in rejoinder and the supplementary affidavit in rejoinder is the averment that the affidavit in reply was incurably defective as the deponent had no locus standi to make the affidavit. The affidavits in rejoinder do not, therefore, communicate to the Respondent the particulars of lack of locus standi. As such, the Respondent could not be expected to adduce evidence over a matter that was not clearly demanded against them. It was only in their submissions that the Applicant clearly laid out the particulars of the lack of locus standi. The Respondent therefore had no option but to attach the available evidence on their submissions which, under the law, is not acceptable. But neither is trial by ambush acceptable to the court. I am of the view that the withholding of the particulars of the Applicant's challenge against the affidavit in reply until the time of submissions amounted to trial by ambush.

That being the case, I find that the Respondent's case cannot be defeated by the technical absence of evidence that they would have adduced if they were aware in time that it was required. I am convinced that this is a fit and proper circumstance to invoke the provisions of Article 126 (2) (e) of the Constitution to look at substantive justice in the matter and to avoid undue regard to technicalities.

In the circumstances therefore, my finding is that there was no contestation regarding the directorship of the deponent of the affidavit in reply that the Respondent was aware of in time. As such, he was not expected to know that his directorship would be in issue. It is not the position of the law that every time an authorized officer of a Company depones to an affidavit or signs a pleading, he/she has to attach evidence of such authority. Such officers are deemed to hold ostensible authority to act for and on behalf of

the Company. Therefore, the question or challenge against the locus standi of the deponent of the affidavit in support (Mr. Nguyen Thien Quang) has not been made out. This point of objection therefore fails and the first issue is answered in the affirmative; that is, that the deponent had locus standi to make the affidavit in reply.

**Issue 2: Whether Civil Suit No. 1009 OF 2019 discloses a cause of action against the Applicant/Defendant.**

It was submitted by Counsel for the Applicant that under Order 7 Rule 11(a) of the CPR, a plaint shall be rejected where it discloses no cause of action. Counsel submitted that what amounts to a cause of action has been settled in the case of ***Auto Garage Vs Motokov (No.3) 1971 EA at page 51,*** cited in the case of ***Ainomigisho Winfred & 8 Ors Vs Fatuma Dusto Nalumansi & 3 Ors H.C (Kampala-Land Division) M.A No. 2084 of 2016***; wherein it was held that for a suit to disclose a cause of action, it must show that the plaintiff enjoyed a right; the right was violated and it is the defendant who violated the right. Counsel for the Applicant submitted that while the plaint in the main suit, on the face of it, contained facts that disclosed that the Plaintiff enjoyed a right and that the right was violated, the facts were not capable of disclosing who violated the said right; that is, was it the Defendant/Applicant or Gold Worldwide Ltd (who was a third party to the suit)?

Counsel for the Applicant submitted that according to the receipts for payment, the payments were paid directly to the Company's account in which the Applicant was simply a director. Counsel submitted that the plaint does not show anywhere that the contract was between the Applicant and the Respondent or that any payment was made to the Applicant.

Counsel further submitted that it is a fundamental principle of law that a company is a legal person with its own corporate entity, separate and

distinct from its directors or shareholders. Counsel relied on the case of ***Salim Jamal Vs. Uganda Oxygen Ltd SCCA No. 64 of 1995***. Counsel submitted that the Respondent had no contractual obligation with the Applicant and the latter acted in his capacity as director of the Company.

In reply, the Respondent's Counsel submitted that the facts in the plaint, the averments in the affidavit in reply and the admission of the Applicant's Counsel in their submissions were sufficient to establish that the suit by the Respondent disclosed a cause of action. Counsel submitted that it was shown in the affidavit in reply that the oral contract was entered into with the Applicant; that at all times, the Respondent was dealing with the Applicant trading as Gold Worldwide Co. Ltd; and that the Applicant made a personal commitment to deliver the outstanding consignment within three weeks. Counsel submitted that the above facts were sufficient to disclose a cause of action on the plaint.

The law as to when a suit discloses a cause of action has been well put by both Counsel. For a suit to disclose a cause of action, it must show that the plaintiff enjoyed a right; the right was violated and it is the defendant who violated the right. **See:** ***Auto Garage Vs Motokov (No.3) 1971 EA at page 51*** and ***Ainomigisho Winfred & 8 Ors Vs Fatuma Dusto Nalumansi & 3 Ors, H.C (Kampala-Land Division) M. A No. 2084 of 2016***.

It is also the established position of the law that in order to determine whether a plaint or any pleading discloses a cause of action, court has to look at the plaint or the particular pleading only and nowhere else. **See:** ***Kapeeka Coffee Works Ltd Vs. NPART, Civil Appeal No. 03 of 2000 (unreported); Ainomugisho Winfred & Others Vs. Fatuma Nalumansi & Others (supra).***

On the case before me, the Applicant concedes that the plaint disclosed that the Plaintiff enjoyed a right and that its right was violated. The Applicant

only contests the claim that it was the Applicant in person who violated the said right.

According to the evidence before the Court, the contract between the parties was orally made. But both parties agree as to the existence of the contract and its performance to a greater part. Because of the oral nature of the contract however, one cannot tell who the actual parties to it were. According to the Applicant, the parties were the Respondent on the one hand and Gold Worldwide Co. Ltd, on the other. Yet according to the Respondent, the contract was between the Respondent and the Applicant in person. On the face of the pleadings, this issue cannot be resolved without further evidence. It therefore calls for trial and is incapable of being disposed of by way of a preliminary point of law.

The court has, before, held that where the court has to go beyond the pleadings and seek to rely on evidence adduced, or where the preliminary objection seeks the exercise of judicial discretion, it would not be proper to dispose of such a matter by way of a preliminary objection. Such a matter should await trial. **See:** ***Yuda Lutta Musoke Vs. Greenland Bank (In Liquidation) HCCS No. 506 of 2001 [2202] KALR 533*** and ***Mukisa Bisquits Vs. Western Distributors [1969] E.A 696***.

Further available material is that pursuant to the oral contract, the Respondent/Plaintiff effected payment of the consideration through the bank account of the Company (Gold Worldwide Co. Ltd). According to the Applicant, this was evidence that the contract had been made with the Company. The explanation by the Respondent in the affidavit in reply was that the Respondent deposited the payments on the Company account because it is the account that was provided by the Applicant. It was argued by Counsel for the Respondent that it is a normal business practice for a party to a contract to provide an account in different names to be used in the course of performance of the contract.

In my view, and on the facts and circumstances before me, the mere deposit of the proceeds of the contract on the bank account of the Company does not, without more, make the transaction a contract between the Plaintiff and the Company. There would have to be other evidence to establish the nexus between the said payments and the contract herein in issue. Such evidence is likely to be adduced at the trial which, as well, puts this matter beyond disposal by way of a preliminary objection.

The Respondent on the other hand disclosed positive facts that corroborate the claim that the contract was between themselves and the Applicant in person. It was shown by the Respondent that on 19th September 2019, the Applicant executed a written commitment to ensure that the outstanding consignment is cleared within three weeks. A copy of that commitment is Annexture "A" to the affidavit in reply. The same was annexed to the plaint as Annexture "B". It is a commitment in respect of 8 containers that were pending clearance. It lists the containers by numbers and reads, at the bottom:
*"I commit that I am responsible for the bills and will get them done as soon as possible in the next three weeks. (signature and phone number").*

The Applicant does not deny making the said written commitment. He only says he executed it on behalf of the Company. There is however nothing on the face it to show that the maker of the document was doing it on behalf of anyone else. It was a personal commitment. There is no mention of the Company in that document. This, in my view, renders credence to the Respondent's claim that the contract and all transactions were done between themselves and the Applicant in person.

The Applicant has therefore failed to establish that the Respondent/Plaintiff's suit against him is without a cause of action. To the contrary, the Respondent has established that they have a cause of action

against the Applicant in person. The second issue is answered in the affirmative; that is, that the suit discloses a cause of action against the Applicant/Defendant.

**Issue 3: Whether the suit is frivolous and/or vexatious.**

Counsel for the Applicant submitted that under Order 7 Rule 11 (e) of the CPR, a plaint shall be rejected where the suit is shown by the plaint to be frivolous or vexatious. Counsel submitted that the suit herein in issue was frivolous and vexatious on two grounds; one being the lack of locus standi by the Plaintiff to bring the action in its corporate names; and two, bringing the suit against the Applicant trading as Gold Worldwide Ltd, which is a different legal entity.

On the first ground, it was argued by the Applicant that much as the Respondent claimed in the plaint that it was a corporate entity, it did not attach proof of its corporate status by way of attaching a certificate of incorporation. Counsel argued that the plaintiff was a non-existent entity and was thus incapable of instituting the suit.

On the second ground, it was argued by the Applicant's Counsel that Gold Worldwide Co. Ltd being a corporate legal entity, there was no way the Respondent could bring a suit against a natural person mixed with the artificial person as one party. Counsel submitted that for this reason, the suit was frivolous and vexatious and ought to be struck out.

For the Respondent, it was submitted that the Respondent had shown in the affidavit in reply that there was a contract which was violated; which facts the Applicant does not deny. The Respondent had also shown that at all material times, the Respondent had dealt with the Applicant. Counsel submitted that it was therefore mala fide for the Applicant to insist that the

Plaintiff's suit was frivolous and vexatious. Counsel for the Respondent relied on the case of ***Ssekuma & Others Vs. Ssempiija, HCMA No. 140 of 2018*** where it was held that a suit cannot be rendered frivolous and or vexatious where a litigant shows a prima facie case or substantial claim.

**Court's finding**

According to the **Black's Law Dictionary, 5th Ed., P. 601**, "frivolous" is defined as "of little weight or importance". A pleading is said to be "frivolous" when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the opponent. Frivolous pleadings may be amended to proper form, or ordered stricken off the record.

On the other hand, "vexatious" is defined to mean "without reasonable or probable cause or excuse; harassing, annoying". **See: The Black's Law Dictionary, 7th Ed., P. 1235**. The text further defines a vexatious suit as a "lawsuit instituted maliciously and without good cause".

On the facts before me, the first ground upon which the Applicant claims that the main suit is frivolous and vexatious is on account of the Respondent's failure to attach proof of existence of the Plaintiff as a corporation. Counsel for the Applicant argued that the Plaintiff was a non-existent entity and was thus incapable of instituting the suit. As I indicated in issue 1 above, there was no dispute as to the existence of the Plaintiff/Respondent as an issue during the pleadings. Parties' pleadings are based upon issues in dispute. Where such an issue arises during submissions, a party cannot be expected to answer such an issue with evidence.

There is something more, however, on this particular matter. Counsel for the Applicant relied on the provisions of *Order 7 Rule 14 (1) & (2) of the CPR*

to the effect that where a plaintiff sues upon a document in his/her possession or power, or relies on any other documents as evidence in support of his claim, the plaintiff shall attach a copy of such a document or copies of such documents on the plaint.

A close look at the above provision discloses that for the provision to have mandatory effect on a plaintiff, he/she must be suing upon such a document or relying upon such a document for his/her claim. In the present case, it was argued for the Applicant that the Respondent ought to have attached evidence of their corporate status by way of a certificate of incorporation. The question is: Was the Plaintiff suing upon the certificate of incorporation? Or were they relying on the said document as the basis of their claim? On the facts before the Court, the answer to both questions is "no".

As I have already indicated, at the time the Plaintiff instituted the suit, there was no dispute as to its corporate status. As such, while the certificate of incorporation of the Plaintiff Company may be a relevant document in the matter, it definitely was not the basis of the Plaintiff's action for it to be required to have been attached to the plaint. When a dispute is raised as to the Plaintiff's legal existence, the Plaintiff will definitely have to adduce such evidence.

The argument by the Applicant on this ground therefore fails and I do not find anything that makes the Plaintiff's suit frivolous or vexatious on basis of such facts.

The second leg of this issue is a complaint against the way the Respondent brought the main suit. The Respondent titled the defendant as "Mutebi Sulaiman T/A Gold Worldwide Ltd". T/A, meaning "TRADING AS", is an expression used in reference to business names for entities that have no corporate legal status. As such, a duly incorporated company cannot, under

the law, be referred to as "trading as" for some other person. This argument has legal significance. The question, however, is whether such a misnomer makes the suit against the defendant fatally defective.

In my view, such a misnomer amounts, in law, to a misjoinder of parties. *Order 1 Rule 9 of the CPR* provides –

> *No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.*

*Order 1 Rule 10 (2) of the CPR* provides –

> *The court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.*

*Order 1 Rule 10 (4) of the CPR* provides –

> *Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant, and, if the court thinks fit, on the original defendants.*

From the foregoing provisions, it is clear that bringing a suit in the names of a wrong party or a misjoinder of parties does not make the suit defective. The wrong or irregularity can be corrected and the Court proceeds to deal with the suit as the justice of the matter demands.

On the facts before me, I find that the Plaintiff having intended to bring the suit in the name of "Mutebi Sulaiman" as the defendant, the addition of "T/A Gold Worldwide Ltd" was simply superfluous. It did not add anything to the description of the defendant under the law. Such a superfluous addition can be expunged without occasioning any legal effect.

On the other hand, if the Plaintiff intended to include the Company as a party to the suit, the Plaintiff can still obtain leave to add the Company as a second defendant.

In all therefore, my finding is that the misnomer or misjoinder of parties does not invalidate the suit. It definitely does not make the suit frivolous or vexatious. Such can be corrected without occasioning any miscarriage of justice. The third issue is therefore answered in the negative.

**Issue 4: What remedies are available to the parties?**

From the above findings, all the preliminary points of objection raised by the Applicant/Defendant have failed. The Applicant has not satisfied the Court that the suit discloses no cause of action against him or that the suit is frivolous and/or vexatious. It is the court's finding that the suit shall proceed for hearing on its merits. The Plaintiff is required to amend the plaint to either indicate the Applicant as the only defendant or to include the Company (Gold Worldwide Ltd) as a second defendant; whatever best serves the intention of the suit on the facts. The amended plaint shall be filed within 15 days from the date of this Ruling and be served onto the defendant(s) with fresh summons. Each party shall bear their own costs of this application.

In all therefore, this application fails and is dismissed with the following orders:

1. The preliminary points of objection raised by the Applicant have been overruled.
2. The Respondent/Plaintiff is allowed to amend the plaint to properly name the defendant(s).
3. The amended plaint shall be filed within 15 days from the date of this Ruling and served onto the defendant(s) with fresh summons.
4. Each party shall bear their own costs of this application.

It is so ordered.

***Signed, dated and delivered by email this 16th day of October, 2020***

**Boniface Wamala**
**JUDGE**