THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL, DIVISION

 MISC .APPL. NO. 299 OF 2012

 (ARISING OUT OF HIGH COURT CIVIL SUIT NO.173 OF 2010)

ATTORNEY GENERAL :::::::::::::::::::::::::::::::::::::::::: APPLICANT/DEFENDANT

VERSUS

SABRIC BUILDING AND DECORATING

CONTRACTORS LIMITED :::::::::::::::::::::::::::::::::::::::: RESPONDENT/PLAINTIFF BEFORE: HON. MR. JUSTICE WILSON MASALU MUSENE

RULING

This is an application brought under section 98 of the civil procedure act cap 71, order 7 rule 11(a), (d), (e) anil Order 7 Rule 19 of Civil Procedure Rules. It seeks Orders that;

1. This Honourable court strikes out the plaint in High court civil suit no. 173 of 2010 for being bad in law and not disclosing a cause of action.
2. This Honourable court grants any other relief as it may deem just and appropriate.

The grounds of this application are set out in the affidavit of Mr. Ngabirano Kahiriita Secretary Ministry of Defence. These are generally two and first, that the respondent is not an incorporated limited liability company and is therefore incapable of suing and being sued. Secondly, that the instant suit is bad in law, a nullity, does not disclose cause of action and is frivolous and vexatious.

Mr. Ellison Karuhanga, appeared for the Applicant/Attorney General while Mr. Peter YValubiri appeared for the respondent.

Counsel for the Applicant submitted that the respondent who is the plaintiff in HCCS NO.173 OF 2010 is not registered /incorporated in Uganda. He further stated that an inquiry from the Uganda Registration Services Bureau (URSB), the Secretary Logistics Ministry of Defence was informed by letter dated 29 day of February 2012,that after making a search in the company register, it was established that Respondent M/S Sabric building and decorating contractors was not registered with them. That being the case counsel for the Applicant submitted that the respondent was not incorporated or a body corporate which can sue or be sued within the meaning of Section 15 of the Companies Act cap 110.

Counsel for the applicant cited the case of Nsimbe Holdings Ltd VS Attorney General, Constitutional Petition 2 of 2006 in support.

Counsel for the Applicant further submitted that where a suit was filed by a none existent party, such an error could not be cured by an amendment under Order 1 Rule

1. of the Civil Procedure Rules. For this proposition, he referred to the High Court case of The trustees of Rubaga Miracle Centre VS Mulangira Ssimbwa Misc .Appl .NO. 576 OF 2006 where Justice Kasule as he then was, held that a suit in the names of a wrong plaintiff or defendant cannot be cured by amendment.

Counsel for the Applicant added that, the plaintiff’s submission that the error is minor should not be accepted. Paragraph 11 of affidavit in reply in rejoinder by Col. Kagoro Asingura stated that, at no time during his evidence, scheduling or mediation did the Respondent ever try to correct this error purportedly “occasioned by addition of the description of work done by the company on its letterheads.” Counsel further submitted that since March, 2012, the plaintiff has not attempted to amend the pleadings.

, For the Respondent , it was submitted that the proper plaintiff is Sabric International Ltd and was incorporated on the 4,h day of April ,2005 as company No. 70943 and copies of Memorandum and Articles of Association and Certificate of incorporation are attached hereto as annexure “A” and “B” respectively.

Counsel for the respondent further submitted that in 2007, Sabric International Ltd entered into a contract with the Government of Uganda to rehabilitate a tank shade at

Masaka UPDF barracks and completed the work in 2008 and was partially paid for the contractual works but Government of Uganda defaulted on some payments.

Counsel for the respondent submitted that in 2009, Sabric International Limited signed another contract with Government of Uganda to rehabilitate the UPDF Barracks at Masalca and started on the work before its employers were ordered off the construction site by Brigadier Sabiti.

Counsel for the respondent submitted that owing to the Government’s breach of contract, Sabric International Limited filed HCCS NO.173 of 2010 against the Attorney General but by error occasioned by addition of the description of the work done by the company on its letter heads, the name of the plaintiff was recorded as Sabric building and Decorating Contractors Ltd instead of Sabric International Ltd.

Counsel for the respondent further submitted that, at all material times before filing the suit and after filing the suit, the officials of the Ministry of Defence who dealt with the plaintiff company and Counsel who handled the defence suit were aware of the true name and identity of the plaintiff company and were not misled as to the true facts of this suit and that indeed the correct name of Sabric International Ltd appears on the documents that are part of the court record and namely, exhibits "p.3", “p.4", "p.5”, “p.6”,”p.7”,”p8,”p.9”,”p.l4”,”p.l5”.”p.21”,and “p.22” contained in the plaintiffs trial bundle filed in court on 10lh day of November ,2011 and copies of the exhibits are attached and marked annexure “C” “D” “E” “F” "G” “H” “I” “J” “K” “L” and “M” respectively.

Lastly, counsel for the respondent submitted that, in the circumstances of the case, the error or misnomer in the plaintiffs name on the plaint and other pleadings can be corrected by an a amendment which will not prejudice the defendant and that such amendment will enable court to inquire into and settle all the real issues in the suit. See the case of Mombasa Salt Works Ltd and Anor VS A1 Madhi Osman T/A Camel Trade Promoters Civil Appeal No. 30 of 2002.

I have addressed my mind to chamber summons, the affidavits for and in reply and the submissions of both counsel for which J am grateful. The question for determination is whether the suit was properly before court and an issue has been raised as to the identity of one of the parties to the suit namely, the plaintiff. The most basic and first step in founding a suit is the identification of who are the parties to the suit. A suit brought by or against a wrong party may embarrass or cause delay in trial. In the case of embarrassment the suit may well be a non starter altogether. Delay on the other hand may arise out of the need to amend which general power is provided for under Section 100 of the Civil Procedure Act for the purpose of determining the real question or issue raised by or depending on such proceedings. Indeed some genuine errors may arise in identifying the correct parties to the suit.

In the past mis joinder of Defendant was a ground for a “non suit” while mis joinder of a Plaintiff was the subject of plea in abatement (see Odger’s Principles of Pleadings and Practice in Civil Actions in the High Court of Justice. Casson & Dennis 22 edition Stevens P. 20). Today that position lias been relaxed and order 1 rule 9 of the CPR provides that no suit shall be defeated by reason of mis joinder or nonjoinder of parties.

That of course does not mean that the party to a suit should not be identifiable. Serious consequences flow from litigation and care should be taken to identify the correct parties so that the consequences of litigation do not fall on the wrong party. Conversely the benefits of litigation should accrue to the correct party as well. Order 7 rule 1(b) provides that the plaint shall contain

“(b)” the name, description and place of residence of the Plaintiff and an address for service...”

In this matter the plaint in the head suit states that the Plaintiff is SABRIC BUILDING AND DECORATING CONTRACTORS LIMITED and describes the Plaintiff

“... The Plaintiff is a limited liability company incorporated in Uganda"

On the evidence before court there is no company known as SABRIC BUILDING AND DECORATING CONTRACTORS LIMITE that is incorporated in Uganda as submitted by Counsel for the Respondent. For the Respondent this is said to be a mere misnomer.

To my mind if a company is not incorporated in Uganda as it is alleged to be, then, that means that it does not exist in Uganda as a body corporate. The leading case as to effect of non-registration or incorporation in the region appears to the decision of the Supreme Court of Kenya in The Fort Hall Bakery Supply Co. vs Fredrick Muigai Wangoe (1959) EA 474. In that case the Plaintiffs brought an action for the recovery of a certain sum of money from the Defendant. During the hearing, evidence disclosed that the Plaintiffs were not registered under the Registration of Business Names Ordinance and it was submitted by the Defendant that the action was therefore not properly before the court. Justice Templeton in that case held that the Plaintiffs could not be recognized as having any legal existence, were incapable of maintaining an 1 action and therefore court could not allow the action to proceed thus striking it out with no order to costs as the Plaintiff did not exist in law.

The case was followed in Uganda by the High Court in the Trustees of Rubaqa Miracle Centre case (2006 supra). In that case Ag. Justice Remmy Kasule (as he then was) went further to hold

The law is settled. A suit in the names of a wrong Plaintiff or Defendant cannot be cured by amendment ... the Defendant described as The Boa**r**d of Trustees **Miracle Centre Cathedral** does not exist in law. The attempt to add Pastor Robert Kayanja, is really an attempt to substitute a

1. non existing Defendant. The law does not allow that as in reality there is no valid plaint in the suit...”

The Fort Hall Bakery case (supra) was also followed by the Court of Appeal sitting as the Constitutional Court in Uganda Freight Forwarders Association & Anor VS Attorney General & Anor Constitutional Petition 22 of 2009 where it was held

It is an elementary principle of law that an unincorporated association is not a legal entity capable of suing or being sued. A suit by an unincorporated body is a nullity...”

On the other hand, counsel for the Respondents states that this error in naming the Plaintiff in the head suit is a mere misnomer which the Applicant is aware of and can be corrected by amendment. A misnomer is defined in Black’s Law Dictionary 7th edition by Bryan A Garner at P. 1015 as follows:-

“... A mistake in naming a person, place or thing especially in a legal instrument. In federal pleading - as well as in most states - misnomer of the party can be corrected by an amendment, which will relate back to the date of the original pleading...”

The authors of “ODGERS ON PLEADINGSS AND PRACTICE” (supra) at pages 174 - 175 illustrate this as follows

"... If any party to the action is improperly or imperfectly named on the writ and no change of identity is involved, the misnomer may be corrected in the statement or claim by inserting the right name with a statement that the party misnamed had been sued by the name or the writ e.g. ‘John William Smythe’ suecl as ‘J.M. Smith’. The Defendant cannot take advantage of such alteration (pleas in abatement of misnomer were abolished as long as 1834); but difficulty may arise in executing a judgment unless the Plaintiff amends the writ. The author also notes that where a Defendant has executed a deed by a wrong name, it is right to sue him by the name in which he executed it...”

As to the tests to be applied there is a fairly detailed discussion in the case of Davies V Elsby Brothers Ltd [I960] 3 All ER 672 (CA).

In that case Devlin L.J. held

“... It is a general principle of English law, not merely applicable to cases of misnomer, that the intention which the framer of the document had in mind when he brings it into existence is not material. In that we differ from any continental systems. In English law as a general principle the question is not what the writer of the document intended or meant, but what a reasonable man reading the document would understand it to mean; and that is the test which ought to be applied as a general rule in case of misnomer...”

A review of the authorities show that most cases of misnomer involve misnaming the Defendant though there are also involving the Plaintiff making a mistake as to its own name and legal status. Amendment will ordinarily be made under Order 1 rule 10. In the case of

Reliable Afr**ican In**surance **Age**n**cies** V **Nati**onal In**surance** C**orpo**r**ation**

[1979LHCB 59

1. was held that amendments of a plaint under Order 1 rule 10 can be made if they are minor matters of form, not affecting the substance of the identities of the parties to the suit.

I must say it is not clear how' this mistake of naming the Plaintiff came about. Certainly it is not a name in common usage like that fast food outlet in Kampala called “Nandos” which legally could for example be “Nandos (U) Ltd”. Could it have in reality been mistake of counsel? That position was not canvassed by counsel for the Respondent.

A reasonable man would not in my view say that Sabric building and decorating contractors limited can be mistaken to be Sabric international limited.That even the Respondent in its pleadings denies. Actually the said Sabric building and decorating contractors limited does not even exist legally so really cannot be mistaken for any other company.

That to my mind is a matter of substance and not mere form. The Plaintiff in the head suit was not improperly or imperfectly named but it simply does not exist.

From a pleadings point of view, this is not a mere misnomer. It is an embarrassment.

In the words of Te**mpleton** I in the **Fort hall Bak**ery case (supra)

“... A non-existent person cannot sue and once the court is made aware that the, Plaintiff is no nonexistent, and therefore incapable of maintaining an action it cannot allow the action to proceed...”

I agree and this holding is applicable to this matter before me. In the premise I uphold the prayers in the summons and strike out the plaint in High Court Civil Suit 173 of 2010 as being bad in law and therefore disclosing no cause of action.

Since the Plaintiff is none existent no order as to costs is made.

Wilson masalu musene

1 JUDGE

 7th/02/2014