

Habomugisha v Sewankambo
(MISCELLANEOUS APPLICATION NO. 1116 of
2024) [2024] UGCommC 373 (20 November 2024)
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This application was brought by way of Chamber Summons under **Section 33 of the Judicature Act (now Section 37, Cap. 16), Section 98 Civil Procedure Act, Cap. 282, Order 1 rules 10(2) and 13 and Order 6 rules 15 19 and 31 of the Civil Procedure Rules SI 71-1**, seeking orders that:

- 1. Kangaroo Brands Limited Kenya be added to *Civil Suit No. 454 of 2019* and the pleadings be amended accordingly.
- 2. Costs of this application be provided for.

Background

20 The background of this application is contained in the affidavit in support deponed by the Applicant, and is summarised below:

- 1. That on 5th June, 2019, the Respondent instituted *Civil Suit No. 454 of 2019* against the Applicant and other Defendants, where the Applicant appears as the 2nd Defendant for infringing on the Respondent's trademark.
- 2. That when the Respondent instituted *Civil Suit No. 454 of 2019* against the Applicant, the Applicant informed the principal of Kangaroo Brands Ltd Kenya, the owners of the Kangaroo trademark, which they registered in Kenya in 2001 in their country of origin.
- 3. That the Applicant acts on behalf of Kangaroo Brands Ltd Kenya in 10 Uganda as an importer and distributor of Kangaroo shoe polish.
- 4. That the Applicant was given Powers of Attorney to appoint legal representation on behalf of Kangaroo Brands Ltd Kenya.
- 5. That the Applicant's lawyers advised that for the suit and 15 counterclaim to be heard and determined on their merits, Kangaroo Brands Ltd Kenya must be added to the suit and the pleadings amended to defend its trade mark.
- 6. That the addition of Kangaroo Brands Ltd Kenya to the main suit will help avoid abuse of the Court process and multiplicity of suits over 20 the same subject matter.

In reply, Mr. Isima Sewankambo, the Managing Director of the Respondent, deponed an affidavit and opposed the application contending that:

1. The Applicant's affidavit in support of the application is incurably 25 defective for not conforming to the law governing affidavit evidence

thus untenable and violates the law because it is deponed by a muslim and should have been affirmed instead.

- 2. The Respondent has no slight or single complaint/claim against Kangaroo Brands Ltd Kenya as the Respondent's claim is against the 5 Applicant who hides under Kangaroo Brands Ltd Kenya to infringe the Respondent's registered trademark, Kangaroo.
- 3. The orders in this suit will not affect Kangaroo Brands Ltd Kenya in any way as a trademark is territorial and protected in a country of registration and in Uganda, the Respondent is the registered owner 10 of a trademark Kangaroo, which ought to be protected.

- 4. Kangaroo Brands Ltd Kenya's presence is not necessary for the Court to adjudicate on all questions in the suit.
- 5. The Applicant's goods and trademark do not originate from Kenya as they are manufactured, sold and registered in Uganda, and so there is no single connection between Kangaroo Brands Ltd Kenya and the Applicant.
- 6. Even if Kangaroo Brands Ltd Kenya was to sue the Respondent, its claims and cause of action would be completely different from the issues and claims against the Applicant in the matter at hand.
- 20 7. The introduction or addition of Kangaroo Brands Ltd Kenya as a party is going to introduce new causes of action and more parties like Uganda Registration Services Bureau thereby changing and altering the whole nature of the suit.
- 25 9. This Court should take into consideration the fact that this is a 2019 case and so litigation must come to an end.

In his affidavit in rejoinder, the Applicant reiterated his averments and further contended that:

- 1. The application is brought in good faith so the main suit can be heard and determined on its merits and the preliminary objection raised is a mere technicality that is curable under the Constitution.
- 2. The Applicant is obliged to bring Kangaroo Brands Ltd Kenya to join the suit to defend their trademark since he is just an agent.
- 3. The Applicant's actions and wrongs are not independent because he is an agent of Kangaroo Brands Ltd Kenya; therefore, it is unjust to find him personally liable for selling goods of his principal – Kangaroo Brands Ltd Kenya.
- 4. The orders made in the suit shall affect Kangaroo Brands Ltd Kenya because the trademark in contention belongs to Kangaroo Brands
- 15 Ltd Kenya, which was registered in their country of origin in 2001.

Representation

The Applicant was represented by **M/s Bamugemereire & Co. Advocates**, while **M/s DAB Advocates** represented the Respondent.

The parties were directed to file their written submissions, which they did, and the same have been considered by the Court.

Issues for Determination

In accordance with **Order 15 rule 5(1) of the Civil Procedure Rules** and the case of **Oriental Insurance Brokers Ltd Vs Transocean (U) Limited**

SCCA No.55 of 1995, this Court has rephrased the issues to read as follows:

- 1. Whether it is necessary and proper to add Kangaroo Brands Ltd Kenya as a Defendant in *Civil Suit No. 454 of 2019?*
- 5 2. What remedies are available to the parties?

Whether it is necessary and proper to add Kangaroo Brands Ltd Kenya as a Defendant in *Civil Suit No. 454 of 2019?*

Applicant's submissions

In his submissions, Counsel for the Applicant referred to **Order 1 rule 10 10(2) of the Civil Procedure Rules** and asserted that it gives the parties rights to apply to the Court to include a party whose presence before the Court may be necessary to enable it adjudicate upon and settle all questions involved in the suit effectually and completely.

To that end, Counsel submitted that the Applicant has demonstrated in 15 paragraph 3 of his affidavit in support and annexures "KBI", "KB2" and "KB3" that the trademark in contention belongs to Kangaroo Brands Ltd Kenya, which they registered in their Country of origin, Kenya in 2001 and thus it is necessary for them to be brought on board so that the Court can adjudicate upon and settle all questions involved in the main suit.

20 Counsel relied on the case of *Mulowooza & Brothers Ltd Vs N. Shah & Co. Ltd SCCA No. 26 of 2010* and *Gas Transport Services (Bus) Ltd Vs Martin Adala Obene SCCA No. 4 of 1994*, upon which he submitted on the principles that guide Court in the grant of leave to amend pleadings.

Respondent's submissions

Counsel for the Respondent submitted that the application is not arguable and has no merit as the grounds are far-fetched, based on a fishing expedition and intended to divert the Court from the real issues. That as 5 a general rule, the Respondent as the Plaintiff in the head suit is not obliged to sue a person against whom he does not have relief, and so he cannot be forced to sue someone because when he sues a wrong party, he will have to shoulder the blame.

Counsel asserted that in the instant case and as averred by the 10 Respondent in his affidavit in reply under paragraphs 10(p), (q), (r), (s) and (t), the Applicant has not shown the Court why it is necessary to add Kangaroo Brands Ltd Kenya other than throwing to Court sentences mentioning Kangaroo Brands Ltd Kenya. Further, that the Applicant has also not showed Court how Kangaroo Brands Ltd Kenya will be affected by 15 the orders to be made by Court in the main suit. That the Applicant's defence has effectually been set up, which clearly showed that Kangaroo Brands Ltd Kenya is not in any way connected to the individual/personal acts and omissions of the Applicant and thus the suit and issues can effectively be adjudicated upon even without the addition of Kangaroo

- 20 Brands Ltd Kenya Ltd as a party. Regarding whether Kangaroo Brands Ltd Kenya is necessary in the suit, Counsel submitted that as contended by the Respondent in his affidavit in reply, specifically paragraphs 10 (b-1), the Respondent has no slight or single complaint/claim against Kangaroo Brands Ltd Kenya and vice versa as its claim is against the Applicant who
- 25 hides under Kangaroo Brands Ltd Kenya to infringe on the Respondent's registered trademark Kangaroo.

That similarly, Kangaroo Brands Ltd Kenya is also protected in Kenya, and there is no doubt about it and that's why annexure "KB1" attached to the Applicant's affidavit has the following words, *"This certificate is not for use in legal proceedings or for obtaining registration abroad"* which means that 5 the trademark only applies and is valid only in Kenya and therefore, Kangaroo Brands Ltd Kenya cannot sue in Ugandan Courts using the said trademark. That as a result, the distribution agreement or even

assignment of the trademark to the Applicant as an importer or distributor

- did not extend protection to Uganda.
- 10 In conclusion, Counsel for the Respondent submitted that the application was brought in bad faith, to waste Court's time, defeat the interests of justice and prejudice the Respondent and therefore should be dismissed with costs to the Respondent.

Applicant's submissions in rejoinder

15 Counsel for the Applicant reiterated his submissions that since the Applicant was appointed by Kangaroo Brands Ltd Kenya to distribute its goods in Uganda, it is therefore necessary to add Kangaroo Brands Ltd Kenya, the supplier of the goods sold by the Applicant, so as enable the Court determine the lawful owner of the trademark and if at all the 20 Applicant is infringing on the trademark.

In Conclusion, Counsel for the Applicant submitted that it is necessary to add Kangaroo Brands Ltd Kenya as a party from whom the Applicant derives rights to use the trademark and as someone who has been affected directly by the fraudulent registration of its trademark in Uganda by the 25 Respondent, so that the suit can be determined on its merits.

Analysis and Determination

I find it imperative to determine the preliminary point of law raised by the Respondent in his affidavit in reply though both parties did not submit on the preliminary objection. In his affidavit in reply, the Respondent averred 5 that the Applicant's affidavit in support is incurably defective because it does not conform to the law governing affidavit evidence. That it is untenable and violates the law because it is deponed by a muslim Applicant instead of being affirmed. That as a result, the same should be expunged from the record.

- 10 **Section 5 of the Oaths Act, Cap. 21** is instructive on the form and manner in which an oath may be taken, it stipulates that:
- *(1) Whenever any oath is required to be taken under the provisions of this or any other Act, or in order to comply with the requirements of any law in force for the time being in Uganda or any other country, the* 15 *following provisions shall apply, that is to say, the person taking the oath may do so in the following form and manner—*
- *(a) he or she shall hold, if a Christian, a copy of the gospels of the four evangelists or of the New Testament, or if a Jew, a copy of the Old Testament, or if a Moslem, a copy of the Koran, in his or her uplifted* 20 *hand, and shall say or repeat after the person administering the oath the words prescribed by law or by the practice of the Court, as the case may be;*
- *(b) in any other manner which is lawful according to any law, customary or otherwise, in force in Uganda.*
- 25 *(2) For the purposes of this section, where a person taking the oath is physically incapable of holding the required copy in his or her uplifted hand, he or she may hold the copy otherwise, or, if necessary, the*

copy may be held before him or her by the person administering the oath."

Section 8 of the Oaths Act which provides for affirmation, provides that:

- *"Any person who objects to the taking of an oath and desires to make* 5 *an affirmation in lieu of the oath may do so without being questioned as to the grounds of that objection or desire, or otherwise; and in any such case the form of the required oath shall be varied by the substitution for the words of swearing, the words, "I solemnly, sincerely and truthfully affirm that", and such other consequential* 10 *variations of form as may be necessary shall thereupon be made; except that in any case where the Oath of Allegiance is taken, for the words "truthfully affirm" in this section there shall be substituted the words "truly declare and affirm", and the words "So help me God" shall be omitted.*"
- 15 In the instant application, the Respondent contended that the Applicant is a muslim but no evidence was adduced to prove the same. I have also perused the Applicant's affidavit in support and it is not indicated anywhere that the deponent is a muslim which would require him to affirm his averments. No facts or evidence was adduced to prove non-compliance 20 with the above provisions. In the premises, the preliminary objection is hereby overruled.

I will now proceed with the resolution of this application on its merits.

Order 1 rule 10(2) of the Civil Procedure Rules provides that:

"The Court may at any stage of the proceedings either upon or without 25 *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 5 *necessary in order to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit, be added."*

Accordingly, the Court has discretionary powers to remove or add a party to a suit either on its motion or on the application of either party. The same 10 has been stated in several decisions including *Kololo Curing Co. Ltd Vs West Mengo Co-op Union Ltd [1981] HCB 60*. However, such discretion is to be exercised judiciously. As shown in the case of *Yahaya Kariisa Vs Attorney General & Another SCCA No.7 of 1994*, the addition of the parties is aimed at enabling the Court to deal with matters to their finality 15 so as to curb multiplicity of suits. In the case of *Departed Asians Property Custodian Board Vs Jaffer Brothers Ltd SCCA No. 9 of 1998*, the Supreme Court considered **rule 10(2) of Order 1 of the Civil Procedure Rules** and held that:

"*This rule is similar to the English R. S. C Order 16 r11, under which* 20 *the case of Amon Vs Raphael Tuck & Sons Ltd (1956)1 All ER considered and decided that a party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the Court effectually and completely adjudicate upon and settle all the questions involved in the* 25 *cause or matter*."

Hon. Justice Mulenga, JSC (RIP), gave considerations for adding a party to a suit and stated that:

"*For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions involved in the suit one of two things has to be shown. Either it has to be shown that the orders, which the Plaintiff seeks in the suit would* 5 *legally affect the interests of that person, or that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit*."

In the instant case, the Applicant, one of the Defendants in *Civil Suit No. 454 of 2019* filed by the Respondent contending that the Applicant/2nd 10 Defendant and others infringed on its trademark; seeks to have Kangaroo Brands Ltd Kenya added as a party to the suit on grounds that he is an agent of Kangaroo Brands Ltd Kenya, the owners of the Kangaroo Brands Ltd Kenya trademark that they registered in 2001, whose products the Applicant imports and distributes in Uganda, the subject matter of *Civil*

15 *Suit No. 454 of 2019*. He asserted that for the suit and counterclaim to be heard and determined on their merit, Kangaroo Brands Ltd Kenya must be added to the suit and the pleadings amended so that it can defend its trade mark. He further stated that the orders of this Court in determination of the ownership of the Kangaroo trademark shall directly 20 affect Kangaroo Brands Ltd Kenya. He concluded that this instant application will not prejudice the Respondent in any way.

On the other hand, the Respondent contended that as a Plaintiff in the main suit, he is not obliged to sue a person against whom he does not have relief. Also, that the party being sought to be added will not be affected by

25 the order of this Court in *Civil Suit No. 454 of 2019* as a trademark is territorial and protected in a country of registration. Further that the Respondent's claim is against the Applicant who hides under Kangaroo

Brands Ltd Kenya to infringe the Respondent's registered trademark, Kangaroo. The Applicant has demonstrated through the annexures, such as his appointment as a Kangaroo Regional Distributor – Annexure KC1- 3 showing his distributorship of a range of shoe care products for 5 Kangaroo Brands Ltd Kenya, all demonstrate his connection to the Kangaroo Brands Ltd's trademark – "KB1-KB3". The Applicant has also demonstrated through the power of attorney – annexure "KD" of his relationship with Kangaroo Brands Ltd Kenya to the extent of legal representation on behalf of Kangaroo Brands and other related matters 10 therein.

As evidenced by the plaint annexed as "KA", the claim against the Defendants jointly and severally is for infringement and passing off the Respondent's trademark. The claim is also for orders for inspection of or restraining the Defendants from passing off their goods as goods of the 15 Plaintiff and for the removal and destruction of the Defendants' goods impounded. The Respondent in the plaint avers that he is the owner of the

- registered trademark of KANG SHOE CARE in class 3 under No. 54469 and that around December, 2018, he got information that the Defendants were counterfeiting his goods and passing them off as the Plaintiff's goods.
- He averred that the 2nd 20 , 3rd and 5th Defendants deal in products bearing the same or similar mark as the Plaintiff's trademark but packaged in boxes with indications that they are made in Kenya and that the 2nd Defendant (Applicant) imports the goods and passes them to the 5th Defendant.
- 25 In my view, and drawing from the Respondent's cause of action/claim above, the alleged wrongs, actions, and omissions of infringement and passing off the Respondent's registered trademark are specific to the

individual Defendants, and they constitute the questions for the Court to settle in this matter, and the Applicant/2nd Defendant has not demonstrated the relevance of joining Kangaroo Brands Ltd Kenya for the Court to settle such a claim. Further, the Applicant has not imputed such 5 questions that require the involvement of Kangaroo Brands Ltd Kenya as a Defendant, for without the addition, such questions will not be settled.

Moreover, as evidenced by annexure "KF", the Applicant already filed his defence and counterclaim without the involvement or addition of Kangaroo Brands Ltd Kenya as a co-Defendant, which, in my view, seems to be an unnecessary afterthought of wanting to add Kangaroo Brands Ltd Kenya as a co-Defendant which is prejudicial to the Respondent at this stage. I also observed that this is a matter which was filed in 2019 and the

application for addition of a party is being filed in 2024 which would seem like an afterthought as submitted by Counsel for the Respondent.

15 The learned authors; M. Ssekaana and S. Ssekaana in *Civil Procedure and Practice in Uganda* 2nd Edition on page 93 state that;

"*Generally, a person cannot be added as a co-defendant against the wishes of the plaintiff, but the Court may add a joint contractor who is within the jurisdiction as a co-defendant despite the wishes* 20 *of the plaintiff."*

Also, in my view, the Applicant's argument that his former lawyers erroneously filed the counterclaim for the trademark in his name instead of in the name of Kangaroo Brands Ltd Kenya, the trademark owner, does not hold because even if they had decided to file it in the name of the trademark owner, the Applicant being a Defendant in the main suit, the former lawyers had no discretion to add any party to the suit because the

import of **Order 1 rule 10(2) of the Civil Procedure Rules** is that an application would have to be filed for addition of parties.

In my view, the Applicant has not demonstrated to Court that Kangaroo Brands Ltd Kenya is necessary for effectual and complete adjudication and

- 5 settlement of all the issues involved in *Civil Suit No. 454 of 2019* and I am convinced that the Applicant will not be prejudiced if Kangaroo Brands Ltd Kenya is not joined as a Defendant. Besides, the Applicant has not persuaded this Court as to how the orders sought in the main suit shall affect Kangaroo Brands Ltd Kenya for it to be joined as a Defendant.
- 10 I am persuaded that without Kangaroo Brands Ltd Kenya as a Defendant, the Court will still effectually and completely adjudicate and settle all the issues involved in *Civil Suit No. 454 of 2019.* This application is accordingly dismissed.

Consequently, it is hereby ordered as follows;

- 15 1. The application is hereby dismissed.
- 2. The costs of this application shall be in the cause.

I so order.

Dated, signed and delivered electronically via ECCMIS this 20th day of November, 2024.

Patience T. E. Rubagumya JUDGE 20/11/2024

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