

Kirima & 4 Others v Kabushenga (Civil Suit 18 of 2022) [2024] UGCommC 295 (6 May 2024)

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BEFORE: HON. LADY JUSTICE ANNA. B. MUGENYI**RULING****BACKGROUND**

The Plaintiffs filed civil suit no. 18 of 2022 in this court against the Defendant. While filing their defense, the Defendant raised a preliminary objection in paragraph ³ averring that civil suit no.18 of 2022 was commenced without the authority of the board and such authority if it existed had been contested by the 4th and 56 plaintiffs. When the said suit came up for scheduling and hearing on the 7s of November 2022, the said objection was reiterated by the Defendant's Advocate who contended that MMAKS Advocates do not have instructions to represent the 4th and 5th Plaintiffs.

During the hearing of this preliminary objection, the Plaintiff led two witnesses Honest Natukwasa (PW1) and Eleanor Nyamishana (PW2) whereas the Defendant led two witnesses Wilson Kabushenga Kakuru(DW1) and Hamlet Kabushenga Mbabazi(DW2).

REPRESENTATION

The Plaintiffs were represented by M/s MMAKS Advocates whereas the Defendant was represented by M/s Alvarez Advocates.

SUBMISSIONS

The Plaintiffs contend in their submissions that Honest Natukwasa(PW1) and Eleanor Nyamishana(PW2) were directors of the 4th and 5th Plaintiffs. Counsel submitted that the Defendant resigned as a director and PW1 was appointed as a director of the 4th and 5th Plaintiffs through company resolutions as evidenced in Exh P42 and Exh P43. Counsel also averred that it is not in dispute that PW2 was a founding Director of the 4th and 5th Plaintiffs. Counsel relied on the testimony of PW2 who testified that she was not aware of any resolution that stripped her of her directorship in both companies and she also confirmed PW1's appointment as a director and stated that these appointments were duly lodged with the Uganda Registration Services Bureau (URSB).

Counsel for the Plaintiffs further submitted that both PW1 and PW2 testified that they were directors of the 4th and 5th Plaintiffs at the time the suit was filed and they are not aware of any resolutions removing them from that position and that both DW1 and DW2 also testified during cross-examination that they do not have any resolution by the 4th and 5th Plaintiff removing PW1 and PW2 as directors of the said companies.

Counsel for the Plaintiff relied on section 195 of the Companies Act stating that a director of a company can be removed by ordinary resolution and a special notice is required to remove such a director and this special notice ought to be sent to the affected director entitling them to be

heard on the resolution at the company meeting. He submitted that there is no evidence that the set procedure under section 195 of the Companies Act was followed to remove PW1 and PW2 as directors before the 12th of January 2022. Counsel relied on the case of *Fang Min v Uganda Hui Neng Mining Ltd & Others* HCCS No 318 of 2016 where it was held that; 'In this I rely on *Serembe Mark VS Isanga Emmanuel & 3 Others* (In the matter of *Green vine College Ltd Companies Cause 27 of 2004*) wherein the court found that the Applicant had not been notified of the company meeting and that a quorum had not been realized but the company went ahead to allot shares and appoint other

directors, the learned Judge found that; 'In conclusion I find that the meeting of the 15th August 2002 was improperly convened and therefore was illegal. All resolutions passed at the meeting therefore are null and void. It therefore follows that Mr. William Muwaya (the 2nd Respondent) and Steven Isabirye (the 3rd Respondent) did not become members, shareholders and or officer's bearers of the company as a *result of that meeting.*'

Counsel for the Plaintiff concluded by stating that in the absence of any special notice issued by the company to remove PW1 and PW2 and failure to comply with section 195, the purported removal of PW1 and PW2 is null and void.

Counsel for the Defendant while referring to Exh DE9 and Exh DE10 submitted that PW1 and PW2 could not lawfully purport to represent the 4th and 5th Plaintiff after the 20th of October 2021 on account that they were both suspended from their positions and thus by the time the said suit was filed, they had no mandate to be officers and instruct M/s MMAKS Advocates. Counsel averred that during the extraordinary meeting of the 4th and 5th plaintiffs held on 30th October 2021 both PW1 and PW2 were suspended and similarly in the extraordinary meeting held on the 3rd of April 2022, the 4th and 5th plaintiff passed a resolution in which they resolved that the commencement and prosecution of the instant suit and all related matters were not sanctioned by the board of directors and trustees and they also noted that no organ of the company instructed MMAKS advocates to prosecute the instant suit.

Counsel submitted that if indeed there were instructions to MMAKS on the onset of filing this suit, there should have been ratification of the decision by PW1 and PW2 and no such ratification was done. Counsel referred to the case of *Kenya Commercial Bank Ltd Vs Stage Coach Management Ltd* Civil Case No 45 of 2012 where the court held that in this case that; "there has been no such ratification even after the plaintiff through its advocates or otherwise became aware of the preliminary objection filed by the Defendant dated over a year ago as a result I exercise my discretion to uphold the Defendants preliminary objection and I dismiss this suit with costs to the Defendant". Counsel further relied on the case of *East African Safari Air Ltd vs Anthony Ambaka & Another* Civil Appeal No 42 of 2007 where the court guided that; I think that the true position is simply that a solicitor who starts proceedings in the name of the company without verifying he had proper authority to do so or under an erroneous assumption as to the authority

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does so at his own peril and so long as the matter rests, their action is not properly constituted." In that sense it is a nullity and can be stayed at any time provided the aggrieved party does not unduly delay his application but it is open at any time for the purported plaintiff to ratify the act of the solicitor who started the action to adopt the proceedings and say: 'I approve of all that has been done in the past and instruct you to continue the action' 'When that has been done then in accordance to the ordinary doctrine of ratification, the defect in the proceedings as originally constituted is cured and it is no longer open to the defendant to object on the ground that the proceedings thus ratified and adopted were in the first instance brought without proper authority. Counsel for the plaintiff also relied on the case of Rev Dr Hamlet Kabushenga Mbabazi & Another vs Great Lakes Regional University MA No 904 of 2021, where Justice Ssekaana stated that; persons acting on behalf of the company must have full and uncontested authority to commit and bind the company. A party whose membership is challenged should not freely without a resolution commit the company in any litigation without being joined as a party. Counsel submitted that if PW1 and PW2 considered themselves to have authority to instruct MMAKS Advocates in the present proceedings, then the 4th and 5th Plaintiffs could have ratified the verbal actions and PW1 and PW2 did not confirm in their testimonies ratifying their actions.

Counsel for the Defendant submitted that courts have emphasized the provision of Order 3 Rule 1 of the CPR that the commencement of suits by an advocate on behalf of a party especially a company should be duly authorized. He cited the case of Moneylenders Association of Uganda Limited & Mk Financiers Limited Vs Uganda Registration Services Bureau HCMA No 1 of 2019 and the case of Rubaga Building Co Ltd-v-Gapal Devsi Vekari & Anor CS No 534 of 2014. Counsel concluded by citing section 74 of the Advocates Act regarding disciplinary actions for Advocates which includes acting without instructions and prayed for the court to strike out this suit with costs as it was instituted without instructions being given to the advocates of MMAKS Advocates.

In rejoinder, Counsel for the Plaintiff submitted that the Defendants refer to Exh D9 and D10 in their submissions that purportedly speak of the suspension of PW1 and PW2 yet the same were never tendered as exhibits in trial and that the defense exhibit they are aware of stops at Exh D4. Counsel stated that the Defendant has up to date failed to produce the resolution duly filed at URSB purporting to remove PW1 and

PW2 as directors of the 4th and 5th Plaintiff and during the hearing undertook to avail the same which has never been done. This therefore indicates that the purported removal of PW1 and PW2 have never been executed by law and section 195 of the Companies Act was never adhered to.

Counsel for the Plaintiff further submitted that the Defendant sought to rely on Exh D1 and D2 which were resolutions both dated 10/10/2022 purporting to change the directorship of the 4th and 5th Plaintiffs yet at this time, the instant suit had been filed and an injunction issued against the Defendant, his appointees and agents from interfering with the activities of the 4th and 5th Plaintiffs and thus the notification of change of directors Exh D3 was filed after the instruction of

MMAKS Advocates and during the pendency of this suit. Counsel reiterated that PW1 and PW2 acted within their powers and duties as provided for under section 198 of the Companies Act and regulation 80 of Table A to instruct MMAKS Advocates. It is an abuse of court process for the Defendant to purport to change the directorship of the 4th and 5th Plaintiff during the pendency of this suit.

DECISION

The Issue for determination by this Court is whether MMAKS Advocates was duly instructed to represent the 4th and 5th Plaintiffs.

I have carefully listened to the testimonies of the witnesses, considered the parties' evidence adduced and submissions in the making of this decision.

It is settled law that a company is an artificial person without hands, a heart, or ^a body to execute its day to day calls. Therefore, the company transacts through its directors who are the soul and mind behind its operations.

Section 52 (1) of the Companies Act of 2014 (CA) gives power to the board of Directors to bind the company thus:

"The power of the board of directors to bind the company or authorize others to do so in favor of a person dealing with the company in good faith shall not be limited by the company's memorandum".

Therefore, Directors of a company have the power to authorize others to bind the company in good faith and as well give instructions on behalf of the company to commence legal proceedings.

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Pursuant to Order 3 rule 1 of the CPR:

"Any application to or appearance or act in any court required or authorized by law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his or her recognized agent, or by an advocate duly admitted to act on his or her behalf except that any such appearance shall, if the court so directs, be made by the party in person."

Where representation is made in court by an Advocate, Regulation 2(1) of the Advocates (Professional Conduct) Regulations as stated below ought to be followed:

"No advocate shall act for any person unless he or she has received instructions from that person or his or her duly authorized agent".

It is therefore trite law that an Advocate can only proceed to file a case on behalf of a company after receiving instructions from its directors.

In the instant case, it is important to ascertain who the directors of the 46 and 5s Plaintiffs were at the time the suit was filed and whether PWI and PW2 lawfully gave instructions to M/s MMAKS Advocates to file this suit.

It is without contention that the said suit was filed on the 12th of January 2022 by M/s MMAKS Advocates.

During the hearing, DW I testified that both PW I and PW2 have never been directors of the 4th and 5th Plaintiff and DW2 testified that PW1 and PW2 were removed from their positions and the appointment of PW1 was not sanctioned by the board. However, PWI and PW2 testified that they were both directors of the company.

On evaluating the evidence on record, PWI was indeed appointed as a Director in the 4th and 5th Plaintiff on the 10th of June 2020 as evidenced by resolutions registered with URSB marked as exhibits on pages 229 and 230 of the Plaintiffs trial bundle (PTB) volume 1. Similarly, PW2 was appointed a director in the 4th and 5th plaintiff companies on the 20th of June 2016 and 28th of September 2016 through resolutions marked on pages 127 and 203 respectively of the PTB volume 1. Therefore, I find that both PWI and PW2 were duly appointed directors of the 4th and 5th Plaintiff.

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The question that is left to be determined is whether PW1 and PW2 were legally removed as the directors of the 4th and 5th Plaintiff by the 12th of January 2022 when the said suit was filed.

Section 195 of the Companies Act provides for the removal of directors thus:

\$(1)\$ A company may by ordinary resolution remove a director before the expiration of his or her period of office, notwithstanding anything in its articles or in any agreement between the company and the director but this subsection shall not in the case of a private company authorize the removal of a director holding office for life at the commencement of this Act whether or not subject to retirement under an agreement limited by virtue of the articles or otherwise.

- (2) Special notice shall be required of any resolution to remove a director under this section or to appoint somebody instead of a director so removed at the meeting at which he or she is removed.
- (3) On receipt of notice of an intended resolution to remove a director under this section the company shall send a copy of the notice to the director concerned and the director whether or not he or she is a member of the company shall be entitled to be heard on the resolution at the meeting".

Both PW1 and PW2 testified during the hearing that they were not aware of any resolutions removing them as directors of the 4th and 5th Plaintiff and that they have never resigned from the said position. DW2 testified during cross examination that a

resolution was passed on the 30th of October 2021 removing PW1 and PW2 as directors although it was refiled validly on the 26th of October 2022. Court demanded that the resolutions of 30th October 2021 and that of 3rd November 2021 be produced but none of these were produced.

As required by law, a Company can only remove its members through an ordinary resolution, and on perusal of the evidence adduced by the Defendant, no company resolution was filed at URSB and produced before this court. What is produced before this Court is Company form 20 marked as annexure DE1 filed at URSB on the 26th of October 2022 stating that PW1 and PW2 were accordingly removed as Directors of the 5th Plaintiff and notified the registrar of the appointment of new directors. This notification is not preceded by a resolution and was also filed after the Plaintiffs had instituted the suit against the Defendant. This, therefore, shows that PW1 and PW2 instructed IWS MMAKS Advocates when they still had the authority as directors. I, therefore, find that by the time the 5th plaintiff instructed MMAKS, PW1 and PW2 were still its directors.

similarly, regarding the directorship of the 4th plaintiff, the Defendant produced evidence in form of company form 20 marked as annexure DE3 filed with URSB on the 3rd of November 2021 where new directors were appointed other than pw1 and PW2. Though this notification was filed on a date before the instant suit was filed, there is no resolution filed on record by the directors as required by the law.

It is also a requirement of the law that special notice shall be sent to the director purported to be removed and the director shall be entitled to be heard on the resolution. This requirement is mandatory and there is no evidence on record to show that notice was issued to PW1 and PW2 and an opportunity was given to them to be heard. I am therefore inclined to agree with counsel for the Plaintiffs that indeed if there was a removal, it was irregularly done without following the laid down procedures and is therefore void.

The Defendant contends in the testimony of DWI that they have not seen any resolution appointing MMAKS Advocates as the Advocate to represent the Plaintiffs and also adduced evidence (resolution) marked as annexure DEI filed on the 26th of October 2022 where they resolved that the commencement of this suit was without authority and thus should be discontinued as they never instructed MMAKS Advocates. PW1 and PW2 during the hearing testified that they agreed verbally to have MMAKS represent the Plaintiffs though the same was not reduced to writing or a resolution.

It is now the position of the law as stated in the case of Moneylenders Association of Uganda Limited & Mk Financiers Limited vs Uganda Registration Services Bureau HCMA No I of 2019 where the Honorable Mr. Justice Richardd wejuli wabwire after examining a plethora of decisions on the point concluded that it is indeed a settled position of the law in this jurisdiction, that a resolution to commence a suit is not a necessary pre-requisite, however, a lawyer or Agent who goes out to commence action on behalf of a company must, in the case of a lawyer be duly appointed.

Therefore, much as it is a good practice to pass a resolution to start legal proceedings, this requirement is not mandatory. Provided the directors who are the day to day managers of the company agree to instruct a law firm to commence proceedings on behalf of the company in good faith, then the instructions are deemed to be lawful.

I therefore find that MMAKS Advocates was lawfully instructed by the 4th and 5th Plaintiff since they were still directors of the company when the said suit was filed.

Before I take leave, Counsel for the Defendant submitted that PW1 and PW2 were convicted, I have heard the opportunity of looking at the Judgment of the trial Magistrate in Criminal Case No. 457 of 2022 at the Chief Magistrates Court of Kanungu passed on the 21st of July 2023 where PW1 and PW2 were convicted on the 1st and 2nd counts for forgery of PE3 and PE4 contrary to section 342 and 347 of the Penal Code Act.

PE1, in particular, contains an ordinary resolution appointing PW1 as a director and goes on to state that PW1 and PW2 are directors of the 4th Plaintiff and this was filed on the 19th of November 2021. The resolution that the Court has relied on to find that PW1 and PW2 are directors of the 4th and 5th Plaintiff are not those PW1 and PW2 were convicted of forging. The court relied on resolutions that were filed in 2016 and 2020 appointing PW1 and PW2 as directors.

In conclusion and from all the fore going, I find that MMAKS Advocates was duly instructed to represent the 4th and 5th Plaintiffs.

This suit should be set down for hearing on its merits at the earliest.

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HON. LADY JUSTICE ANNA B. MUGENYI DATED.....

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