

UGANDA / JUDGMENT

Sanyu v China Railway Group &
Another (Civil Suit 11 of 2024)
[2024] UGHC 1063 (22 October 2024)
[2024] UGHC 1063

COURT
High Court of Uganda

BEFORE
David S.L. Makumbi, J

CASE / FILE NUMBER
Civil Suit 11 of 2024

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KASESE

HCT-25-CV-CS-0011-2024

(FORMERLY FORT PORTAL HCT-01-CV-CS-0017-2022)

SANYU SARAH=====PLAINTIFF

VERSUS

1. CHINA RAILWAY GROUP
2. UGANDA NATIONAL ROADS AUTHORITY===== DEFENDANTS

BEFORE JUSTICE DAVID S. L. MAKUMBI

JUDGMENT

REPRESENTATION:

Plaintiff represented by M/S Interlink Associated Advocates

1st Defendant represented by M/S Masereka C. & Co Advocates

2nd Defendant represented by Directorate of Legal Services UNRA

BACKGROUND:

This matter is brought by way of ordinary suit by which the Plaintiff’s cause of action against the 1st and 2nd Defendants in brief is as follows.

The Plaintiff is the proprietor and owner of Sannin Guest House located at Hima Town Council in Kasese District which she alleges was damaged as a result of the actions of the Defendants.

The 1st Defendant, registered entity, was contracted by the Government of Uganda through the 2nd Defendant, a Government Entity, to construct the Kasese- Kasagama road and due to the 1st Defendant's work drainage channels were blocked which led to irreparable flood damage to the Plaintiff's premises. Two employees of the 1st Defendant visited the suit premises and promised to effect repairs.

The damage to the suit premises resulted in losses to the Plaintiff to the tune of UGX 175,858,000. The Plaintiff claimed further damages to her poultry and hotel business run at the same premises.

The Plaintiff further averred that the Defendants reckless and unprofessional conduct had caused her losses and mental anguish as she was left with no source of income for her five children. She accordingly prayed for Court to enter judgment against the Defendants for:

1. An order for the Defendants to pay UGX 691,785,000
2. Compensation of UGX 40,000,000 for damages
3. Interest on (a) above from date of judgment till payment in full
4. An Order for general damages
5. Punitive and Exemplary damages
6. Specific damages of UGX 175,858,000
7. Costs of the suit
8. Any other Order that this court may deem fit.

The 1st Defendant filed a Written Statement of Defence by which it was contended that the Plaintiff had no cause of action against the 1st Defendant and that the damages to the Plaintiff's property and business were a result of pre-existing drainage challenges and not on account of the work done by the 1st Defendant. The 1st Defendant further contended that the Plaintiff had been compensated for damage associated with their activities to the tune of UGX 17,850,000. To that extent the 1st Defendant contended that the Plaintiff's claim lacked merit and prayed the matter be dismissed.

The 2nd Defendant filed also filed a Written Statement of Defence by which it submitted that the Plaintiff's suit was misconceived, frivolous and vexatious and disclosed no cause of action against the 2nd Defendant.

The 2nd Defendant further averred and contended that it entered a contract with an independent contractor, China Railway No. 3 Engineering Group Co. Ltd for the rehabilitation of Hima-Katunguru Road. It was further contended that 2nd Defendant was not responsible for any damages and losses arising out of the 1st Defendant's execution and completion of works.

It was further contended that no Notice of Intention to sue was served on the 2nd Defendant.

During the Scheduling Conference held on 19th October 2023 the parties agreed to incorporate the preliminary objections of the 1st and 2nd Defendants as part of the issues in dispute before the Court. These objections laid out in their respective Written Statements of Defence were jointly framed as the first two issues out of four as follows issues:

1. Whether the Plaintiff sued a non-existent entity.
2. Whether the plaint discloses a cause of action against the 2nd defendant.
3. Whether the 1st Defendant's payment of UGX 17,850,000 was adequate compensation for the damages.
4. Remedies available.

The matter was heard to conclusion and a locus visit conducted in March 2024.

ANALYSIS OF ISSUES:

I shall address the issues in the order agreed at the Scheduling Conference.

Whether the Plaintiff sued a non-existent entity:

Concerning this issue Counsel for the Plaintiff argued that the 1st Defendant filed a Written Statement of Defence on 2nd March 2023 and by Paragraph 3 therein stated that the 1st Defendant is a company registered as China Railway No. 3 Engineering Group Ltd. Counsel for the Plaintiff further contended that the 1st Defendant made several admissions whose combined effect was to take responsibility for the damage and losses suffered by the Plaintiff. Counsel further argued that the 2nd Defendant had also admitted to contracting the 1st Defendant.

Counsel for the Plaintiff also contended that it was an agreed fact in the Joint Scheduling Memorandum that the 1st Defendant was contracted by the 2nd Defendant and that furthermore by virtue of Section 57 of the Evidence Act facts admitted need not be proved but are regarded as established. Counsel contended that the 1st Defendant could not turn around to deny what is already admitted in their Written Statement of Defence.

Counsel for the 1st Defendant argued in response that the law on suing a non-existent party was well settled and cited decisions of the High Court in **Waswa Primo v Moulders Ltd –HCCS No. 587 of 2015** and **Trustees of Rubaga Miracle Centre v Mulangira Simbwa HCMA No. 576 of 2006**. In both suits the High Court determined that a suit against a wrong party is incurably fatal and it is automatically dismissed. Counsel further contended that a suit against a wrong party is not among the rectifiable scenarios envisaged under Order 1 Rule 10 of the Civil Procedure Rules and

placed further reliance on the decision of the Court of Appeal in the case of **Abdulrahman Elamin v Dhab Group & 2 Others – Civil Appeal No. 215 of 2013**.

Counsel for the 2nd Defendant did not traverse this issue.

As concerns this issue I find that the argument by the Plaintiff diverts from the real issue and that is whether a wrong party was sued or not. The fact that the 1st Defendant put in a Written Statement of Defence in which they traversed and even admitted to some the issues raised by the Plaintiff could not by and of itself be deemed as confirmation that the 1st Defendant had accepted the description attributed to them in the Plaint. The fact of this comes from the 1st Defendant's expressed intention in the Written Statement of Defence that they would raise a preliminary objection about this very issue. Any other statements following that are, in my view, made without prejudice to the preliminary objection and are made as an exercise in prudence lest the Court should overrule the objection.

The plain and simple fact is that the Plaintiff brought the suit against the 1st Defendant in the names of "China Railway Group" and furthermore described the 1st Defendant as a "registered entity".

The 1st Defendant entered appearance as China Railway No. 3 Engineering Group Ltd. This was clearly different from the entity named and described by the Plaintiff. The Plaintiff not only failed to name the 1st Defendant correctly but also failed to state the legal capacity in which the 1st Defendant was being sued. A registered entity versus a company limited by liability are two vastly different legal concepts with the former lacking any clear basis which one could use to determine legal personality as opposed to the latter. At this stage I must point out that it has been previously been held that if a party has been improperly or imperfectly named, it is not fatal to the action and the misnomer may be cured by an amendment under Order 1 Rule 10 of the Civil Procedure Rules (see **Reliable African Insurance Agencies v National Insurance Corporation [1979] HCB 59**).

However, it has also been held that in determining whether the mistake in the party's name is a misnomer or a non-existing party, court will not look at what the writer meant, but rather, what a reasonable man reading the document would understand (see **Attorney General v Sabric Building and Decorating Contractors Ltd – HCMA 279 of 2012**). In this matter a reasonable man looking at the name and description of the 1st Defendant in the title and 2nd paragraph of the Plaint would have a hard time establishing that China Railway Group being a "registered entity" is the same as China Railway 3rd Engineering Group Ltd for purposes of the suit. The former if described beyond a registered entity as a limited liability company would qualify as a misnomer in my view. However, by applying the misnomer and qualifying it with a vague legal description was akin to the Plaintiff shooting randomly in the dark and hoping to hit something. It is clear that the Plaintiff did not even know whether the "registered entity" was capable of suing or being sued in its own names otherwise this would have been stated in the pleadings.

The Plaintiff therefore did not even know whether the entity had a legal personality and cannot enjoy the benefit of doubt afforded in case of misnomer. Had this been the case then Counsel for the Plaintiff would have applied to amend the plaint but this was not done at any stage of the proceedings.

In the **AbdulRahman Elamin** case cited above the Court of Appeal held that,

“The law is now settled. A suit in the names of a wrong Plaintiff or Defendant cannot be cured by amendment. While Order 1 Rule 10(2) empowers Court to add or strike out a party improperly joined; and Order 1 Rule 10(4) allows amendment of a plaint where the Defendant is added or substituted, such amendments of the plaint can only be made if they are minor matters of form, not affecting the substance of the identity of the parties to the suit where the amendment by way of substitution of a party purports to replace a party that has no legal existence, the plaint, must be rejected as it is no plaint at all.

In essence, a non-existent entity cannot sue or be sued. Any suit against or on behalf of a non-existent entity is a nullity and so is any judgment arising therefrom.

In actions founded on contract, it is important to state the parties correctly; a false start may well incur the delay and expense of an application to amend the proceedings.”

Going by the position of the Court of Appeal, I note in this case that not only is the 1st Defendant incorrectly named but even the legal personality attributed to the actual name of the company cannot be reasonably inferred. The simple question to consider here beyond the issue itself, is that if China Railway 3rd Engineering Group Ltd had not entered appearance, would the Plaintiff have been able to proceed to enforce a judgment decree ex parte against China Railway 3rd Engineering Group Ltd? The answer is clearly no as this Court would be bound by the Plaintiff's own pleadings to grant remedies strictly based on the party or parties named in the Plaint.

Even if the 1st Defendant had proceeded without raising any preliminary objection, the Court would be bound to consider remedies only as would apply to the 1st Defendant as named in the Plaint. This would therefore render the suit nugatory with respect to the 1st Defendant because the remedies granted against the 1st Defendant in the names cited in the Plaint would be useless with respect to China Railway 3rd Engineering Group Ltd.

What I find curious is the fact that even after stating in Paragraph 4(c) of the amended Plaint that the 1st Defendant was contracted by the 2nd Defendant, Counsel for the Plaintiff never saw fit to crosscheck the contract. Even if it had not been readily available, Counsel could have applied to Court for discovery. This would have been an acceptable basis for seeking amendment of the Plaint on the grounds that the correct name of the company was not known at the time of filing the suit. The same contract would also have proven instructive in terms of determining whether or not the 2nd Defendant could be held vicariously liable for the actions of the 1st Defendant. Furthermore, remedies sought in this matter rested to a great extent on understanding the nature of the contractual relationship between the 1st and 2nd Defendants.

To the extent of the above, I uphold the preliminary objection raised by the 1st Defendant and resolve this issue in the affirmative. The Plaintiff proceeded against a non-existent party in respect of the 1st Defendant.

Whether the Complaint discloses a Cause of Action against the 2nd Defendant.

As concerns this issue Counsel for the Plaintiff contended that the Complaint discloses a cause of action by which the Plaintiff enjoyed a right which was violated and the Defendants were liable. Counsel then went on to expound on the evidence led at the trial to prove the cause of action in the Complaint.

Counsel for the 1st Defendant argued in reply that China Railway No. 3 Engineering Group Ltd held a separate insurance policy in respect of any claims arising out of works done to improve roads in Hima Town Council. It was further contended that the 2nd Defendant was not at all liable for damage to the Plaintiff.

On the part of the 2nd Defendant it was argued that no facts were evident in the Complaint or its annexes in terms of actions or omissions attributable to the 2nd Defendant. Counsel for the 2nd Defendant contended that Paragraph 4(c) which alluded to the 2nd Defendant only spoke of a contract between the 1st Defendant and the 2nd Defendant and that there was nothing therein establishing a cause of action against the 2nd Defendant.

Counsels for the 1st and 2nd Defendants cited the decision of the Supreme Court in **Tororo Cement Co. Ltd v Frokina International Ltd – Civil Appeal No. 1 of 2001** in which the Court held that a Complaint must show that the Plaintiff enjoyed a right which was violated and that the Defendant is liable. The Court further held that if any of the elements of the cause of action is missing then the cause of action cannot be established and no amendment will be allowed.

Furthermore, Order 7 Rule 1(e) of the Civil Procedure Rules provides in mandatory terms that the Complaint shall contain the facts constituting the cause of action.

In terms of determining a cause of action both Counsel for the respective Defendants cited the Court of Appeal decision in **Kapeka Coffee Works Ltd v NPART – Civil Appeal No. 3 of 2000** by which the Court held that in determining whether a Complaint discloses a cause of action, the Court must only look at the Complaint and its annexes if any and nowhere else.

When I consider the Complaint in this matter the only reference to the 2nd Defendant in this matter arises in Paragraph 4(c) and no annexes. Paragraph 4(c) of the Complaint states in relation to the 2nd Defendant that,

“The 1st Defendant was contracted by the Government of the Republic of Uganda through the 2nd Defendant to construct a road to wit Kasese-Kasagame road in 2020 ...”

The statement above does not reveal whether in form or substance how the 2nd Defendant becomes liable for the damages complained about by the Plaintiff whether directly or vicariously.

The arguments raised by the Plaintiff in support of the cause of action cannot apply as they arise from evidence adduced in the form of witness statements and documents exhibited during trial. As held by the Court of Appeal in the **Kapeka Coffee Works** case above, the only relevant thing is the Plaintiff and its annexes and nothing more. The rationale behind this is that the Defendant(s) must be able to discern the cause of action early enough in order to respond to the Plaintiff effectively.

To wait until trial to develop the cause of action through witness testimony would obviously prejudice the ability of the Defendant(s) to effectively defend against the suit and would be nothing short of an ambush. It is always imperative in civil suits that the cause of action is clear in the plaintiff to avoid ambushing the Defendant(s) and the likely danger of the Plaintiff(s) shifting goalposts in the course of trial to the detriment of the Defendant(s).

I therefore uphold the preliminary objection as raised by the 2nd Defendant and I find that the Plaintiff discloses no cause of action against the 2nd Defendant.

Decision:

In light of the findings above I find that the suit fails on the basis of the preliminary objections framed as the first two issues and I find no need to delve into the third issue. The findings in the first and second issues effectively render the entire suit a nullity as there was neither a 1st Defendant nor a cause of action against the 2nd Defendant brought out in the Plaintiff.

Before I take leave of this matter I do note that there was a measure of recklessness on the part of Counsel for the Plaintiff responsible for filing the suit in. I find it inconceivable that any reasonable advocate worth their credentials would proceed to file such a suit without taking reasonable steps to correctly identify the 1st Defendant or even whether they have any legal capacity to sue or be sued. It is also absurd that any reasonable advocate would go ahead to file a suit without specifying the cause of action against the 2nd Defendant whether direct or vicarious. Such matters are clearly beyond the Plaintiff's technical knowledge as a client but ought to be fully within the knowledge of any reasonable advocate.

It is evident to me that the responsible advocate simply took fees and filed a suit without ever taking steps to ascertain the terms of the contract between the 1st and 2nd Defendants. Regulation 12 of the Advocates (Professional Conduct) Regulations provides that,

“Every advocate shall advise his or her clients in their best interest, and no advocate shall knowingly or recklessly encourage a client to enter into, oppose or continue any litigation, matter or other transaction in respect of which a reasonable advocate would advise that to do so would not be in the best interests of the client or would be an abuse of court process.”

An advocate who takes fees from a client has a duty to represent the client with the utmost diligence and care and not file suits recklessly. It is one thing for the suit to fail on the substantive merits but another thing entirely when it fails over procedural weaknesses that any reasonable advocate ought to have taken note of. In such instance I should be condemning Counsel to bear the costs in this matter were it not for the fact that I would be doing so without affording Counsel an opportunity to be heard.

ORDER:

This suit is dismissed with costs to the Defendants.

Right of appeal explained.

David S. L. Makumbi

JUDGE

22/10/24

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