

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT MPIGI  
CIVIL SUIT NO. 26 OF 2020

5 KING’S COLLEGE BUDO STAFF  
SAVINGS SCHEME LIMITED.....PLAINTIFF

VERSUS

1. LUKANGA BOSCO }  
2. ZAVERIO SAMULA .....DEFENDANTS

10

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE

Ruling

**Brief facts:**

15 The plaintiff a company limited by guarantee brought this suit against the  
defendants jointly and severally for; breach of contract; unlawful sale of land  
comprised in Block 172 Plot 205 at Kyanja, Mawokota, Mpigi measuring 5 acres;  
trespass on land comprised in block 172 Plot 205 at Kyanja, Mawokota, Mpigi; an  
order for a permanent injunction against the defendants and or their  
agents/servants, restraining them from selling, transferring, constructing,  
20 committing any further interference and or any dealings with the suit property  
comprised in Block 172 Plot 205 at Kyanja, Mawokota, Mpigi; an order for  
cancellation of the illegal entry of the 2<sup>nd</sup>defendant on the certificate of title for  
the suit land comprised in Block 172 Plot 205 at Kyanja, Mawokota, Mpigi;  
immediate vacant possession of the suit land by the 2<sup>nd</sup> defendant; an order for  
25 mesne profits from February 2020 for wrongful occupation and degradation of  
the plaintiff’s property; general damages for inconvenience, harassment and  
embarrassment; costs of the suit and interest on the decretal sum and costs at  
commercial rate.

30 The 2<sup>nd</sup> defendant in his Written Statement of Defence denied all the claims in the  
plaint and stated that he intended to raise preliminary objections.

The 1<sup>st</sup> defendant never made appearance even though he was served.

**Representation:**

M/s Kibukamusoke & Tendo represented the plaintiff and M/s Murangira Kasande & Co. Advocates represented the 2<sup>nd</sup> Defendant.

**Submissions:**

- 5 The 2<sup>nd</sup> defendant at the commencement of the suit raised a number of preliminary objections as follows;
- a. That the plaint does not disclose a cause of action against the defendants.
  - b. That the suit is frivolous and vexatious.
  - c. That the suit is bad in law.
  - 10 d. That the suit is an abuse of the court process.
  - e. That the plaintiff has no locus standi to sue.
  - f. That the plaintiff never paid the required filing fees of this suit.

Counsel for the 2<sup>nd</sup> defendant submitted that the plaint ought to be rejected as it discloses no cause of action as per **Order 7 Rule 11(a)** of the Civil Procedure Rules and the case of **Kapeka Coffee Works Ltd v. NPART, Court of Appeal Civil Appeal No. 3 of 2000**, where it was held that;

*“In determining whether a plaint discloses a cause of action, the court must look at the plaint and the annexures if any and nowhere else.”*

Counsel for the 2<sup>nd</sup> defendant went on to submit that the plaintiff brought the suit for breach of contract and there was no proof that it ever entered into a contract with the 2<sup>nd</sup> defendant. That the sale agreement **annexture “A”** which is attached to the plaint has **John Bosco Lukanga** as the vendor and **King’s College Budo Staff savings scheme** as the purchaser. That in the instant case the parties to the suit are different, the plaintiff is **King’s College Budo Staff savings scheme limited** and the 1<sup>st</sup> defendant is **Lukanga Bosco** who are totally different from the parties that entered into the said sale agreement.

Counsel also argued that the plaintiff is not a legal entity with the capacity to sue or be sued and therefore has no *locus standi* since saving schemes are not provided for under law.

Further, that the suit land has been described as **Block 172 plot 205 at Kyanja** measuring 5 acres yet in the sale agreement the land is described as **Block 172 Plots 52-67** measuring 20 acres. That the agreement says that there will be a future

agreement to be made on 11/4/2017 for purchase of 13 acres of land comprised in Block 172 plots 65 and 60 at Kyanja. That this has nothing to do with the 2<sup>nd</sup> defendant's land comprised in Block 172 Plot 205.

5 Counsel for the 2<sup>nd</sup> defendant also challenged the sale agreement **Annexture "B"** which provided the balance of the consideration as UGX 174,500,000/= as opposed to the correct figure which was UGX 175,000,000/= and that the buyers were Walusimbi Edson and Kyamukwaya Robert and not the plaintiff.

10 Counsel for the 2<sup>nd</sup> defendant added that Annexture "C" has no relevance to the plaintiff's claim and the plaintiff has no cause of action against the 2<sup>nd</sup> defendant in particular who is not a party to purchase agreements under Annexture "A" and "B".

15 Counsel for the 2<sup>nd</sup> defendant further submitted that the plaintiff did not pay the required fees as there is no revenue stamp indicating that the fees had been paid and the same should be struck out under **Order 7 Rule 11** of the Civil Procedure Rules.

Counsel for the 2<sup>nd</sup> defendant concluded that the suit be dismissed with costs and that Block 172, Plot 205 belongs to the 2<sup>nd</sup> defendant.

20 Counsel for the plaintiff on the other hand in reply cited the case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A 697** where it was held that;

*"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which if argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."*

25 Counsel for the plaintiff submitted that the instant preliminary objections do not fall under what qualifies as points of preliminary objections. That the preliminary objections raised in the instant case require court to go through evidence for it to determine them.

30 In regard to the preliminary objection on the lack of a cause of action, counsel for the plaintiff submitted that the 1<sup>st</sup> defendant bought the suit land in 2017 to which he acquired an equitable interest pending changing ownership on the certificate of title. That the suit land was again sold to the 2<sup>nd</sup> defendant and in connivance with the 1<sup>st</sup> defendant transfer was made fraudulently and the 2<sup>nd</sup> defendant was

registered as the owner of the suit land. That in the circumstances there is a cause of action against the 2<sup>nd</sup> defendant.

Counsel for the plaintiff noted that the omission of the word “**Limited**” on the sale agreement is trivial and was the mistake of the drafters of the agreement and has no bearing on the legal status of the plaintiff. That the representatives of the plaintiff are the ones that signed on the sale agreements Annexures “A” and “B”. Counsel relied on the case of **Davies v. Elsby Brothers Ltd [1903] 3 ALLER 672 (C.A)** cited with approval in **Kilembe Mines Ltd v. Uganda Gold Mines Ltd, HCT – 00 – CC – MA – 2012/312, [2012]**, where Devlin L.J. held that;

*“...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 many continental systems. In English laws as a general principle the question is now 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 a misnomer.”*

That in the instant case it is easy to tell what the intention of the drafter of the agreement was and it was the plaintiff reference was made to. And that there is no legal requirement for the plaintiff to attach their certificate of incorporation while filing and if court so directs; the same can be produced by the plaintiff.

Lastly, that court fees were paid for the plaint and the lack of a revenue stamp is not conclusive proof that there was non-payment of the fees. Counsel cited **Section 97** of the Civil Procedure Act which provides that;

*“Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person by whom the fees payable to pay the whole or part, as the case may be, of that court fee, and upon payment, the document, in respect of which the fee is payable, shall have the same force and effect as if the fee had been paid in full in the first instance.”*

That interpretation of that section was in the case of **Standard Chartered Bank Uganda Ltd v. Mwesigwa, Miscellaneous Application No. 477 of 2012** where it was held that;

5 *“... the provision gives court discretion to allow the person at any stage to pay fees or part of the fees not fully paid. In such cases, the proceedings are not a nullity. The provision supposes that it is an incurable defect. In such cases, proceedings would be stayed pending the payment of the fees. In this particular case, the court will allow the applicant to have the fees reassessed and the applicant shall pay the fees so assessed on the documents filed on the court record... because failure to pay the full fees does not render the applicants application a nullity...”*

10 Counsel for the plaintiff concluded that if court finds that the court fees paid are insufficient it may order that they are reassessed and leave be granted to pay the full filing fees.

15 Further, that in regard to annexure “B” not being translated into English is not fatal as the same is a mere attachment and has not yet been tendered in court as evidence as per the provision of **Section 88** of the Civil Procedure Act and the case of **Assumpta Sebunya v. Kyomukama Jmaes, Miscellaneous Cause No. 55 of 2012**. That this preliminary objection therefore be overruled as it will force court into ascertaining evidence and this is not the stage at which to do so.

20 Counsel for the plaintiff added that the suit was not frivolous and vexatious and not an abuse of court process as alleged by the 2<sup>nd</sup> defendant. (See: **Muchanga Investments Limited v. Safaris Unlimited (Africa) Ltd & 2 Others, Civil Appeal No. 25 of 2002, [2009] KLR 229**.)

25 Counsel for the 2<sup>nd</sup> defendant in rejoinder reiterated their earlier submissions and added that the suit was bad in law for failure to take out Summons for Direction by the Plaintiff, thus, the suit abated under **Order XIA Rule 6** of the Civil Procedure (Amendment) Rules. And cited the case of **C. C. Chendran and Associates Ltd v. Uganda Revenue Authority, Civil Suit No. 917 of 2019**, where it was held that;

30 *“According to Order XIA Rule 2 of the Civil Procedure (Amendment) Rules, 2019, the plaintiff is required to take out Summons for direction within 28 days from the date of the last reply or rejoinder. According to Rule 6, thereof, if the Plaintiff does not take out the Summons for direction, the suit abates. Since the plaintiff has not taken out Summons for direction within time prescribed for by the rules, the suit hereby abates in accordance thereof. The costs of the suit go to the defendant.”*

Resolution:

I have carefully considered the submissions of both parties. The 2<sup>nd</sup> defendant raised a number of preliminary objections which are resolved as follows;

a. **That the plaintiff has no locus standi.**

5 *Locus standi* was held to mean a right to appear in court, and conversely to say that a person has no *locus standi* means that he/she had no right to appear or be heard in a specified proceeding as per the case of **Njau and Others v. City Council of Nairobi [1976-1985] 1 E.A 397 of 407.**

10 It is trite law that for an entity to sue or be sued it must possess the legal capacity to do so as a suit on behalf of or against a non-existent entity is a nullity and so is any decision arising there from.

15 Counsel for the 2<sup>nd</sup> defendant stated the plaintiff in all the documentation is referred to as **King's College Budo Staff savings scheme** where as in the instant case it is referred to as **King's College Budo Staff savings scheme limited.** That the plaintiff has no legal capacity to bring the instant suit because it is not a corporate body.

20 I have carefully perused all the annextures and it is true that the plaintiff has in all the documentation been referred to as **King's College Budo Staff savings scheme.** Annexature "D" does make reference to the Certificate of Incorporation however, its number is indicated as "O." I am inclined to believe that the plaintiff did not produce a certificate of incorporation or quote its number if at all it exists as they lodged their caveat. There was also no Certificate of Incorporation attached to the plaint by the plaintiff indicating its legal status. However, on orders of court they were able to produce the same before the ruling could be delivered.

25 The plaintiff has not been consistent as to its true name and counsel for the plaintiff stated that the word "**Limited**" was only eliminated in the sale agreement **annexture "A"** by mistake. However, it is not only missing on the sale agreements but to all the documents making reference to the plaintiff.

30 The plaintiff in the instant case initially did not attach any certificate of incorporation and this court could not act on speculation as to its legal status. Legal status of an entity is only acquired upon incorporation. The Plaintiff was however, able to prove eventually that it was a body corporate by producing a certificate of incorporation.

The plaintiff stated that the word “**Limited**” was eliminated only on Annexure “A” by mistake of the drafter. I find this untruthful, the plaintiff and the party in all the other documentation will be treated as different entities since there is no clarity or documentation provided in regard to the true identity and legal status of the plaintiff.

I therefore, find and hold that the plaintiff lacks *locus standi* to bring the instant suit as the party who executed the sale agreements **annextures “A” and “B”** was **King’s College Budo Staff savingscheme** and not the plaintiff.

This preliminary objection is therefore upheld.

**b. That the plaintiff’s suit discloses no cause of action against the 2<sup>nd</sup> defendant.**

Counsel for the 2<sup>nd</sup> defendant submitted that there was no contract between the plaintiff and the 2<sup>nd</sup> defendant therefore; there was no breach of contract or any legal relations between the two so the 2<sup>nd</sup> defendant should not be a party to this suit.

According to the case of **Auto Garage v. Motokov [1971] E.A 514**, there are three essential elements set down on what a cause of action should enunciate and these are; that the plaintiff enjoyed a right; the right had been violated; and that it was the defendant that was liable.

All the three elements should be present in the plaint for there to be a cause of action. In considering whether a suit discloses a cause of action or not, one looks ordinarily only at the plaint and assumes that the facts alleged therein are true as was the finding in the case of **Attorney General v. Oluoch [1972] E.A 392 at 394**. In the case of **Sullivan v. Mohamed Osman [1959] E.A 239 (C.A) (T), Windham J.A at P. 244**, where it was stated that;

*“The plaint must allege all facts necessary to establish the cause. The fundamental rule of pleading would be nullified if it were to be held that a necessary fact not pleaded must be implied because otherwise another necessary fact was not pleaded and could not be true.”*

Counsel for the 2<sup>nd</sup> defendant also argued that annexure “B” was not translated and the same could not be relied upon. **Section 88** of the Civil Procedure Act provides that; the language of all courts shall be English; evidence in all courts shall be recorded in English; and written applications to the courts shall be in English. It is true indeed that the language of court is English and all annexures

not in English to be considered in evidence ought to be translated. At this stage of the suit, court is not admitting evidence and it is not fatal that the annexure has not been translated, it would have however not been admitted in evidence if it was tendered in court as evidence without a translation.

5 Counsel for the 2<sup>nd</sup> defendant also added that the sale agreement **annexture “A”** had **JohnBosco Lukanga** as the vendor whereas **annexture “B”** had **Lukanga Bosco** and the instant suit has **Lukanga Bosco** as the 1<sup>st</sup> defendant. Counsel for the 2<sup>nd</sup> defendant argued that the seller on the sale agreement annexure “A” is different from the 1<sup>st</sup> defendant as the two have different names.

10 I am unable to tell if this is one and the same person and there was merely an addition of the third name as there is no affidavit or statutory declaration clarifying the issue of the names being different on annexures “A” and “B.” Since no explanation has been forwarded as to why the names differ I will take it that the two are different people. The **National Identity card no. 004664505** whose  
15 photocopy is on file is in the name of **Lukanga Bosco** and that is the 1<sup>st</sup> defendant in the instant case and the vendor on annexure “B” whereas Annexure “A” has John Bosco Lukaga as the vendor.

In the circumstances, even though the plaintiff laid out its claim clearly in the  
20 complaint, it does lack *locus standias* already discussed and thus it cannot have a cause of action against the 2<sup>nd</sup> defendant as the suit is a nullity. (See: **Paul Nyamarere v. UEB (in liquidation) [2008] H.C.B 126**).

This preliminary objection is therefore upheld.

**c. That the suit is frivolous, vexatious and an abuse of court process.**

25 Counsel for the plaintiff cited the case of **Muchanga Investments Limited v. Safaris Unlimited (Africa) Ltd & 2 Others, Civil Appeal No. 25 of 2002, [2009] KLR 229**, where Court of Appeal held that;

30 *“The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient administration of justice. It is a term generally applied to a proceeding, which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it. The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions.”*



Having found that the plaintiff does not have a cause of action against the 2<sup>nd</sup> defendant, this suit is therefore an abuse of court process.

This preliminary objection is also upheld.

**d. That the plaintiff did not pay court fees.**

- 5 Counsel for the 2<sup>nd</sup> defendant argued that no court fees were paid by the plaintiff because there was no revenue stamp appended on the plaint when it was filed in court. Indeed, after looking at the plaint, there was no revenue stamp appended thereon however, there was a payment slip on file to a tune of UGX 170,000/= as filing fees paid by the plaintiff.
- 10 Court does have the power to order a party to pay the balance of the court filing fees if less than what is provided for under the law has been paid as per **Section 97** of the Civil Procedure Act.

The Judicature (Court Fees) Rules under **Rule 4** and its schedule under **part III item 73(h)** provides that;

- 15 *“In all suits otherwise specified where the amount involved for every 3,000,000 shillings or part of that amount in excess of 30,000,000 shillings UGX 3,000/= is paid”*

In the instant case the plaintiff paid UGX 170,000/= as court filing fees and yet the correct amount should have been UGX 497,000/= and not UGX  
20 40,000,000/= since the suit land was said to have been bought at UGX 400,000,000/= as submitted by the 2<sup>nd</sup> defendant. It is therefore, not true that no fees were paid, rather fees were paid but insufficient.

This preliminary therefore fails.

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**e. That the suit is bad in law.**

Counsel for the 2<sup>nd</sup> defendant submitted that the suit abated because the plaintiff failed to extract Summons for direction as provided under **Order XIA** of the Civil Procedure (Amendment) Rules, 2019.

The 2<sup>nd</sup> defendant filed his Written Statement of Defence on 11<sup>th</sup> August 2020. The summons for Direction was extracted on 17/12/2020. I do concur with the submissions of the 2<sup>nd</sup> defendant that the suit abated for failure by the plaintiff to file Summons for direction within the 28 days as provided for under the law.

5 This preliminary objection is also upheld.

The preliminary objections as raised by the 2<sup>nd</sup> defendant are accordingly upheld in part. That notwithstanding the suit abated for failure to extract Summons for direction. The plaintiff is free to file a fresh suit if it so wishes. Each party bears its own costs.

10 Right of appeal explained.

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**OYUKO. ANTHONY OJOK**

**JUDGE**

**4/5/2021**

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Ruling read and delivered in open court in the presence of;

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2.

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**OYUKO. ANTHONY OJOK**

**JUDGE**

**4/5/2021**