

IN THE HIGH COURT FOR ZAMBIA

2017/HP/1030

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN: -

**QUEENS ROYALLE INTERNATIONAL
LIMITED**

1ST APPLICANT

MAMBWE KENNEDY

2ND APPLICANT

AND

KISEMBO KABALE T/A CLUB VEGAS

RESPONDENT

**BEFORE THE HONOURABLE MADAM JUSTICE P. K. YANGAILO
ON 18TH AUGUST, 2017.**

For the 1st Applicant: N/A

For the 2nd Applicant: N/A

For the Respondent: Mr. N. Okware - Messrs. Okware & Associates

RULING

CASE REFERRED TO:

1. *Salomon vs. Salomon & Company Limited (1897) AC 22;*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *High Court Act, Chapter 27 of the Laws of Zambia;*

2. *The Companies Act, Chapter 388 of the Laws of Zambia;*
3. *Gower: Principles of Modern Company Law, Sweet & Maxwell, 4th Edition; and*
4. *The Supreme Court Practice 1999 Edition (The White Book).*

The genesis of this case is that on 27th June, 2017, the Applicants launched proceedings against the Respondent. The reliefs sought from the Respondent as contained in the Originating Notice of Motion are: -

1. *For declaratory order that the Applicants are not liable for the sum of K70,000.00 and/or any rentals accruing during the period that the Respondent unlawfully locked the warehouse;*
2. *That the Respondent's verbal notice made on 23rd June, 2017 to terminate the tenancy agreement is null and void;*
3. *An order of injunction restraining the Respondent from locking out the Applicants or interfering with the Applicants' quiet enjoyment of the warehouse situate in Buseko along Mzilikazi Road;*
4. *Damages for loss of business; and*
5. *Costs of the proceedings.*

The Originating Notice of Motion was accompanied by an Affidavit in Support sworn by one Mambwe Kennedy, the 2nd Applicant herein and Managing Director of the 1st Applicant company. In the said Affidavit in Support, the 2nd Applicant averred, *inter alia*, as follows: -

1. *That sometime in 2016, the Applicants executed a verbal tenancy agreement with the Respondent to rent its warehouse situated in Buseko along Mzilikazi Road at a monthly sum of K10,000.00;*
2. *That the premises were initially used by the Applicants to make iron sheets and has since ventured into manufacturing of paints;*

3. *That sometime in November, 2016, the Applicants' business suffered financial setbacks due to the instability of the foreign exchange rate thereby leading to the Applicants to default in payments of the rentals for the month of September and October, 2016;*
4. *That while the Applicants were raising the funds, the Respondent's Managing Director ordered his caretaker a Mr. Sakala to lock up the premises and prevent the Applicants' agents from accessing the premises;*
5. *That the premises were locked up for seven (7) months and the Applicants were only allowed access to the premises on 9th May, 2017 upon paying the sum of K20,000.00 for the month of May and June, 2017;*
6. *That the Respondent insisted that the Applicants further make an undertaking to pay the accrued K70,000.00 that had accrued during the period that the Respondent had locked up the premises;*
7. *That the Applicants on 23rd June, 2017 paid a further sum of K10,000.00 for the month of July, 2017 but the Respondent demanded for a sum of K20,000.00 to be paid for the period of closure thereby causing a dispute;*
8. *That instead of resolving the dispute amicably, the Respondent locked up the premises thus preventing the Applicant from conducting it business;*
9. *That the act by the Respondent has gravely affected the operations of the Applicants as the chemicals are unsecured and it is not able to supply its clients, some of whom paid money in advance, which money was used to pay the Respondent;*
10. *That due to the Respondent's actions, the Applicants will fail to pay its employees and statutory obligations, thereby making the Applicants to suffer irreparable damages;*

11. *That the chemicals and equipment which are unsecured in the warehouse are in excess of K1,300,000.00 and over fifteen (15) employees have been left languishing;*
12. *That unless restrained, the Respondent's actions of preventing the Applicants from accessing its business premises will lead to the closure of the company and negatively affect its capacity to pay its employees and meet other financial obligations including the payment of rentals to the Respondent;*
13. *That the Applicants' have lost business in excess of K700,000.00 during the seven (7) months period.*

The Applicants also applied *Ex Parte* to this Court for an Interim Injunction pursuant to **Order XXVII Rule 4 of The High Court Rules**¹, which application I directed that it be heard *Inter Parte* on 11th July, 2017.

On 11th July, 2017, the Respondent filed herein a Notice of Intention to raise preliminary issues. The issues that the Respondent intended to raise are whether the Court process as commenced by the Applicants is defective and ought to be dismissed with costs. The Respondent did not file herein an Affidavit in Support of the preliminary issues but filed a Notice to Produce a Certificate of Incorporation showing that Klub Vegas Limited was incorporated as a private company limited by shares on 19th March, 2012.

On the said date of 11th July, 2017, the Respondent's Learned Counsel Mr. Okware applied to adjourn the matter to enable him to serve on the Applicants, the Notice of Intention to raise preliminary

issues, which application I granted. At the following date of hearing on 21st July 2017, the 2nd Applicant submitted that he was not ready to proceed and needed more time to study the preliminary issues that the Respondent intended to raise. He thus requested for an adjournment, which I granted. On the subsequent return date on 8th August 2017, only the Respondent's Counsel was in attendance. The Applicants were not in attendance, despite the matter being adjourned to the said date, in the presence of the 2nd Applicant and no reasons were advanced to justify their non-attendance. Accordingly, I proceeded to hear the preliminary issues as raised by the Respondent.

In addition to the contents of the Notice of Intention to raise preliminary issues, the Respondent's Counsel submitted *viva voce*, that the Applicants have cited Kisémbó Kabale T/A Club Vegas as Respondent and addressed him as Kisémbó Kabale T/A Club Vegas Limited in the body of the Originating Notice of Motion, thereby acknowledging the fact that Klub Vegas Limited is a limited liability company, which fact is confirmed by the Notice to Produce filed herein by the Respondent, that shows that Klub Vegas Limited is a private company limited by shares. Learned Counsel Mr. Okware, referred the Court to **Section 22 (1)** of **The Companies Act²**, which provides that: -

"Capacity and powers of a company

A company shall have, subject to this Act and to such limitations as are inherent in its corporate nature, the capacity, rights, powers and privileges of an individual."

He further referred the Court to the celebrated case of **Salomon vs. Salomon**¹, which espoused the principle of separate legal personality and to **Chapter 5** of **Gower: Principles of Modern Company Law**³, where the learned author elucidated that the company is at law a different person from its subscribers. Mr. Okware, contends that Klub Vegas Limited is clearly a company distinct from its owner Kisémbó Kabale and that it is incompetent to sue Mr. Kisémbó Kabale trading as Club Vegas Limited, for the two, are distinct personalities. On that basis, Mr. Okware submitted that this action as framed is bad at law and prayed that it be dismissed with costs.

I have considered the preliminary point of law raised by the Respondent, the evidence produced herein, the authorities which this Court was referred to and the *viva voce* submissions by Counsel for the Respondent, for which I am grateful.

Two questions must be decided and these are whether the Court process as commenced by the Applicants is defective and if found to be defective, whether it ought to be dismissed with costs.

I will start by considering the issue of whether the originating process is defective for citing the Respondent as Kisémbó Kabale T/A Club Vegas. Firstly, I must point out that the name of the company, as it appears on the originating process is misspelt by the Applicants as Club Vegas, when it is actually Klub Vegas Limited as shown on the Certificate of Incorporation. The spelling of the word Klub as Club on the Originating Notice of Motion was not pointed

out by the Respondent. According to the Notice to Produce exhibiting the Certificate of Incorporation, Klub Vegas Limited is a private company limited by shares and was issued with a Certificate of Incorporation under Company Registration No. 100447 by the Assistant Registrar of Companies on 19th March, 2012.

It is trite law that a Company is a legal entity on its own, separate and distinct from its members. In the celebrated English case of **Salomon vs. Salomon and Company Limited**¹, that the Respondent referred this Court to, the House of Lords laid down the following principle: -

“A company which has complied with the requirements relating to the incorporation of companies contained in the Companies Acts is a legal entity separate and distinct from the individual members of the company. It matters not that all the shares in the company are held by one person, excepting one share each held by the persons who, as required by the Acts, have subscribed their names to the memorandum of association to enable the company legally to be formed, nor does it matter that those persons are merely the nominees of the principal shareholder. Once a company has been legally incorporated it must be treated like any other independent person with rights and liabilities appropriate to itself, and the motives of those who promote the company (e.g. to enable them to trade with the benefit of limited liability) are absolutely irrelevant in discussing what those rights and liabilities are. A company is not the agent of the shareholders to carry on their business for them, nor is it the trustee for them of their property.”

As can be seen from the above authority, a company is a distinct legal person different from its Members or Shareholders. Members or Directors are not primarily liable for the company's debts or liabilities because the company acts in its own right and Members or Directors enjoy a limitation on their personal liability for the company's debts. Accordingly, the point of law raised on this issue succeeds and I find that Kisembo Kabale was wrongly cited as a party to this proceedings. The correct party that ought to be cited is Klub Vegas Limited.

The next issue which this Court has to determine is whether incorrectly citing a Party should be cause for dismissal of the proceedings. Judicial proceedings are governed by the rules of Court that are designed to ensure a fair hearing and should be interpreted in such a way as to advance, and not reduce, the scope of the entrenched fair trial right. *In casu*, the Applicants cited Kisembo Kabale trading as Club Vegas as the Respondent. In the body of the Originating Notice of Motion, the Applicants addressed the process to Kisembo Kabale trading as Club Vegas Limited, of Northmead, Lusaka. As I found above, this clearly is an inaccurate description of the Respondent. However, in order to ensure that the real disputed issues are defined in pleadings and ventilated in Court, a misdescription of a litigant may, in certain circumstances, be rectified. Where a misdescription involves using the wrong name for the party concerned, in such an instance, an amendment is permissible, since this is not tantamount to a substitution of that party nor pointing to a new relief.

I refer to **Order XVIII of The High Court Rules**¹, which provides that: -

" Amendments - Under what circumstances

The Court or a Judge may, at any stage of the proceedings, order any proceedings to be amended, whether the defect or error be that of the party applying to amend or not; and all such amendments as may be necessary or proper for the purpose of eliminating all statements which may tend to prejudice, embarrass or delay the fair trial of the suit, and for the purpose of determining, in the existing suit, the real question or questions in controversy between the parties, shall be so made. Every such order shall be made upon such terms as to costs or otherwise as shall seem just." (emphasis mine)

I also refer to **Order 20 Rule 8 (1)** of **The Rules of the Supreme Court**⁴, which provides that: -

"...For the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct."

Order 20 Rule 8 (1)⁴ cited above deals more generally with the power of the Court to order any document (other than a judgment or order) to be amended. It empowers the Court to order an amendment to be made of its own motion.

I further refer to **Order 20 Rule 19** of **The Rules of the Supreme Court**⁴, which provides that: -

"Correcting name of party

An amendment to correct the name of a party may be allowed, even if made after the expiry of any relevant period of limitation and even if it is alleged that the effect of the amendment will be to substitute a new party, provided the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading, or such as to cause any reasonable doubt as to the identity of the person intending to sue or to be sued..."

On the foregoing authorities, I am of the view that the Respondent's incorrect citation as Kisembo Kabale T/A Club Vegas instead of Klub Vegas Limited, on the facts, is a mere misdescription caused by the 2nd Applicant, a lay person, who issued the originating process. The incorrect citation of the Respondent, in this case, amounts to a misdescription capable of being rectified. Citing an incorrect Party is a curable defect, as it is not fatal and could be amended to show the correct party so that the matter proceeds to be tried on its merits. The law reports are replete with instances where the incorrect description of a party is allowed, in the absence of prejudice to the other parties involved, to be changed to reflect the true state of affairs. The Court's view is that an amendment will always be allowed unless it is *mala fide* or would cause prejudice to the other party which cannot be compensated for by an order for costs or by some other suitable order such as a postponement.

The Applicants herein did not respond to the point of law raised by the Respondent and there is no application for leave to amend the incorrect citation in this action. However, I have gone further to consider whether I would have granted an application for leave to amend, if it were presented. The above cited authorities reveal that the Court or a Judge has power, *inter alia*, to allow any proceedings to be amended at any stage of such proceedings in order to allow the real question in controversy between the parties to an action to be determined. Accordingly, I find that it is necessary for this Court to order the Applicants to amend the pleadings so that the real question in controversy between the parties to this action could be determined. Allowing the amendment, in my view, will not in any way prejudice the Respondent. I am fortified in the view that I take by **Order III Rule 2 of the High Court Rules**¹, which provides that: -

" What orders to be made

Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not."

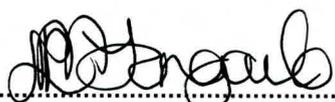
The effect of this order is that it gives the Court wide discretionary powers to grant any interlocutory order that the justice of the case deserves. Such interlocutory order may be given whether or not the beneficiary party has requested for it. Accordingly, I invoke the powers under **Order III Rule 2 of The High Court Rules**¹ and

grant an order that the justice of the case deserves by directing the Applicants to amend the pleadings within a period of fourteen (14) days from the date hereof, in order for the pleadings to reflect the correct party.

The net result is that the preliminary issues raised by the Respondent partially succeeds, in that the Respondent was incorrectly cited by the Applicants, thereby necessitating this application. Accordingly, I order that costs of and occasioned by this application be borne by the Applicants, to be taxed in default of agreement.

Leave to Appeal is granted.

Delivered at Lusaka this 18th day of August, 2017.


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P. K. YANGAILO
HIGH COURT JUDGE