

**THE REPUBLIC OF UGANDA,**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**  
**MISCELLANEOUS APPLICATION NO 817 OF 2015**  
**(ARISING FROM HCCS NO 594 OF 2015)**

**NIKO INSURANCE (U) LIMITED}.....APPLICANT**

**VS**

- 1. SOUTHERN UNION INSURANCE BROKERS (U) LTD}**
- 2. ALBERT NDUNA}**
- 3. M.M. BAGALAALIWO}**
- 4. S.R. SHAM}**
- 5. COSTEN MUTUKWA}.....RESPONDENT**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**RULING**

The Applicant brought this application under the provisions of section 98 of the Civil Procedure Act, Order 1 rule 3, Order 38 rule 5 (d), Order 1 rule 10 (2), and Order 52 rules 1 and 3 of the Civil Procedure Rules as well as section 20 of the Companies Act 2012 for orders that the corporate veil of the first Respondent is lifted and the second, third, fourth, and fifth Respondents are added as parties to HCCS 594 of 2015 in their individual capacity as directors of the first Respondent. Secondly for costs of the application be provided for.

The grounds of the application as contained in the Notice of Motion are as follows:

1. The first Respondent is a corporate body existing separately from its shareholders and directors.
2. The second, third, fourth, and fifth Respondents under the guise of the first Respondents corporate veil, transacted business and gained trust of the Applicant fraudulently.

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*~\*~?+: maXimum728securityx 2016 style*

3. The second, third, fourth and fifth Respondents are directors of the first Respondent and were the directing minds and will of the first Respondent at the material time it transacted with the Applicant.
4. The second, third, fourth and fifth Respondents committed acts of fraud in the business relationship with the Applicant.
5. It is in the interest of justice that the second, third, fourth and fifth Respondents are added as parties to the suit and the suit proceeds against them in the person.

The application is supported by the affidavit of Anthony Ngalika, the Applicant's operations manager who deposes that he has full knowledge of the facts of the application and made the affidavits in that capacity. The facts disposed to in the affidavit are as follows:

The Applicant is engaged in the business of soliciting for provision of all types of insurance cover for various clients from numerous insurance companies. Between 22 February 2010 and 23 November 2012, the first Respondent operating under the direction or control of the named directors solicited for and secured various insurance policies from the Applicant on behalf of their several clients and defaulted in payment of the full consideration in premiums of Uganda shillings 156,225,632/= according to a list of clientele showing premiums payable attached to the affidavit. It had been the practice of both parties that the first Respondent operating under the direction and control of the second, third, fourth and fifth Respondents, would solicit and take out insurance policies from the Applicant on behalf of their clients, then receive payments for the respective premiums and remit the same to the Applicant. The clients duly remitted premium payments to the first Respondent on diverse dates for onward transmission to the Applicant by the first Respondent operating under the direction and control of the named directors who have to date not remitted the premium payments. The Applicant made efforts to recover his money from the first Respondent which efforts were futile and they are longer at their last known address and their telephone contacts are unavailable.

The second, third, fourth and fifth Respondents are directors of the first Respondent with control of the first Respondent at the time the first Respondent took out the insurance policies from the Applicant and received payments of the respective premiums. According to the annual return forms registered on 21 September 2011 there are no changes in directorship of the first

Respondent according to the documents annexed to the affidavit. The first Respondent's place of business cannot be found and because the monies were received by the first Respondent but not remitted to the Applicant as required and it constitutes an act of fraudulent misappropriation of the monies with deliberate intention to wilfully deprive the Applicant of the said money. The directors operated the company as a conduit, or as a device, a sham, a cloak, a mask which they held before their faces in order to perpetrate their fraud. The first Respondent is still on the company register but its directors have closed the business and are keeping their whereabouts unknown with an intention to use the company subsisting corporate registration as a sham, and mask in order to attempt to avoid liability for monies swindled. The Applicant asserts that the directors have been using the first Respondents name to transact business and gain trust fraudulently.

The Applicant further asserts that there are no known assets of the company and by resolution dated 31<sup>st</sup> of January 2013 the directors purportedly and allegedly sold the first Respondent's operations and business to Kinkizi Development Company. By the same resolution authorised by Mr W.J. Mhonde and J. Katsidzira to negotiate the purported sale thereby perpetrating the fraudulent act of defeating the Applicants attempt to recover its monies. In the latest attempt to reply to the Applicants demands, the fifth Respondent writing from Zimbabwe purportedly under a certain Zimbabwe Insurance Brokers Ltd, while acknowledging by implication, the first Respondent's indebtedness, was noncommittal and evasive with regard to settlement of the monies and was alleging that the aforementioned W.J. Mhonde had since left ZHL group, another conduit of the Respondents and the effect of which is to perpetually deprive the Applicant of its right to recover its monies according to a copy of the letter attached. On the basis of advice of his lawyers and the deponent believes that there are grounds disclosed for lifting the corporate veil of the first Respondent and holding the second, third, fourth, and fifth Respondents personally liable by adding them as parties to HCCS 594 of 2015.

The affidavit in reply filed on behalf of the first, second, third, fourth and fifth Respondents is that of Dr Juliet Kamuzze, the Managing Partner of Messieurs Fides Legal Advocates engaged by the Respondents to represent them in the matter. She deposes that she is duly authorised to depose to the affidavit on behalf of the Respondents.

Having read the contents of the affidavit of Mr Anthony Ngalika in support of the application Dr Juliet Kamuzze has instructions to make the deposition.

In her deposition the application is misconceived in law and in fact and does not disclose grounds necessitating the lifting of the corporate veil of the first Respondent. The Plaint in HCCS 594 of 2015 does not plead, particularise or prove fraud against any of the Respondents. Furthermore the notice of motion in the application does not and could not particularise the alleged fraud. On the basis of information from the second up to the fifth Respondents, the first Respondent was dealing with the Applicant as an insurance brokerage firm. The first Respondent was never an agent of the Applicant who at all material times transacted acted as an agent of disclosed principals namely the insured. At all material times the Respondents diligently performed their duties as directors of the first Respondent. Furthermore the Respondent has never refused, ignored or neglected to remit premium to the Applicant. The first Respondent's duty as an insurance broker was and continues to be that of remitting only premium that has been collected from the insured. The first Respondent contends that it was never paid by the insured on the insurance policies mentioned by the Applicant. Consequently the insurance policies issued by the Applicants to the insured became voidable at the instance of the Applicant when the client's alleged premiums continue to be outstanding 60 days after the issuance of the purported policies. The Applicant chose not to avoid the insurance policies even after the expiry of the statutory period within which an insured ought to pay premium and as such voluntarily assumed the risk of non-payment. The Applicant allowed the insurance policies on credit and as such is barred by the doctrine of estoppels from claiming remittances from the first Respondent who was an agent of disclosed principals who are the insured instead of claiming directly from the insured. The duty to remit premium to the Applicant arises only after the first Respondent which is the brokerage firm has collected premium from the insured. At all material times the Applicant was aware that the premium had not been collected but they continued dealing with the management of the first Respondent, thereby acquiescing to the conduct of management which acquiescence the Applicant cannot run away from and proceed against the Respondents who are directors of the first Respondent. At all material times the Applicant was aware that the first Respondent acted as an agent of the insured and the Applicant does not have to claim against agents of disclosed principals.

Furthermore Dr Juliet Kamuzze deposes that the application is speculative and an abuse of process and seeks to impose liability on the second, third, fourth and fifth Respondents based on mere claims which are contested by the first Respondent in HCCS 594 of 2015 and are yet to be determined by the court. The application does not disclose any justifiable cause to add the second, third, fourth and fifth Respondents. The Respondent's maintained that they have never committed any fraud or illegality against the Applicant or any other person and the assertion of the Applicant in the application is false. The second, third, fourth and fifth Respondents have never been involved in the day-to-day running of the business of the first Respondent as that was the role preserve of the management team. The first Respondent's returns and references in relation to the address were always duly filed with the registrar of companies and available to the public for inspection. There are no assets of the first Respondent which are being held by any of the directors/Respondents for their personal or private benefit or otherwise.

None of the Respondents has admitted liability to any of the Applicants claims. The transactions complained about in the plaint which is the subject matter of the suit and the ordinary business transactions of an insurance brokerage firm are not illegal or fraudulent and it does not involve the mandate of the directors of the brokerage firm but its management. The dealings of the directors with the Applicant were not illegal or fraudulent.

In rejoinder Anthony Ngalika deposed that he read and understood the contents of the affidavits in reply of Dr Juliet Kamuzze. As the Applicant's operations manager having knowledge of the facts of the application. On the strength of advice of his lawyers he deposes that Dr Juliet Kamuzze is not duly authorised to swear an affidavit on behalf of the first, second, third, fourth, and fifth Respondents and did not attach any evidence of such authorisation or appointment. On the strength of advice of his lawyers he further deposes that both the plaint and the affidavit in support of the application clearly disclose fraud against the Respondent on the ground of failure to remit premiums received on behalf of the clients to the Applicant, failure to disclose the whereabouts of the office of the first Respondent, illegally and fraudulently attempting to sell the first Respondent to Kinkizi Development Company among other grounds. These grounds are sufficient for an order to lift the veil of incorporation of the first Respondent.

Fraud against the second, third, fourth, and fifth Respondents can only be pleaded against them in the main suit after the same has been amended and the said Respondents are added as parties thereto and not in the suit wherein they are not yet parties. The Applicant intends to prove fraud against the directors for the action of instructing the Applicant to give insurance cover for the first Respondent's clients but then absconding from their statutory duty to remit the requisite premiums as they were the directing mind and will of the first Respondent. Secondly where guilty intent or responsibility of a corporation is to be considered, it can be discerned from the minds of the directors. Indeed the Applicant dealt with the first Respondent as a brokerage firm and for that matter the law imposes a duty on the first Respondent as a broker to remit premiums from the Applicant insurer for insurance covers issued through the brokerage of the first Respondent therefore it was the liability of the first Respondent for the premiums unpaid. The first Respondent operating under the direction or control of its directors instructed the Applicant to give insurance cover for the Respondent's clients whose details are annexed to the application but they ignored or refused or neglected to remit the requisite premiums and therefore fell short of their statutory duty. The first, second, third, fourth and fifth Respondents admitted their indebtedness towards the Applicant as evidenced by annexure "E" to the affidavits in support of the application which is a letter written by the fifth Respondent to the Applicant's operations manager on the question of indebtedness of the first Respondent worth Uganda shillings 156,225,631.89. Furthermore one Robert Mujuzi in an e-mail sent to the deponent on 13 December 2012 attaching the first Respondent's statement of accounts as at 11 December 2012 and the respective schedules thereof confirmed and admitted that the first Respondent had so far received premiums amounting to Uganda shillings 129,060,952/= which is yet to be remitted to the Applicant.

On the strength of information and advice of his lawyers he further deposes that the statutory period within which credit on premium is allowed is 30 days but even then, it does not apply where a business emanated from an insurance broker. The first Respondent is an insurance broker. The Applicant only dealt with the first Respondent and had no contact or direct dealing with the first Respondent's clients. It was the first Respondent who would instruct the Applicant to issue insurance policies to their clients with specific instructions and would collect premiums and remit the same to the Applicant. The Applicant never dealt with the first Respondents clients

at any one time. The directing minds of the first Respondent who are the other Respondent directors deliberately refused or omitted or neglected to pay the premiums so as to defraud the Applicant and kept moving offices further making it impossible for the Applicant to access the first Respondent.

The Respondents further purported to sell the first Respondent's operations to Kinkizi Development Company so as to disguise and evade responsibility for monies not paid to the Applicant.

In a further affidavit in sur rejoinder of Dr Juliet Kamuzze in response to the affidavit in rejoinder of Mr. Anthony Ngalika, she deposes that she was duly authorised and competent to depose any affidavit on behalf of the Respondents in her capacity as a lawyer working with Fides Legal Advocates, duly instructed by the Respondents to handle the matter without further need to attach evidence of authorisation. She further argues that there was no legal authority requiring duly authorised Counsel to attach authorisation to validate his or her capacity to swear an affidavit on behalf of clients who have duly authorised a law firm to act on their behalf. The affidavit in reply relates to matters of law raised in the Applicant's affidavit in support of the application which she was suited to respond to. Furthermore the allegations of fraud raised against the Respondents are serious and contentious and cannot be conveniently resolved by the application and in an affidavit in support thereof. The intention to prove fraud against the second, third, fourth and fifth Respondents in the future is speculative and does not give a ground for lifting the veil of incorporation as fraud must be pleaded and proved before lifting the veil to proceed against the first, second, third, fourth and fifth Respondents. There is no evidence adduced to prove that the first Respondent was fraudulent and there was no guilty intent or responsibility transferred to the management thereof. Furthermore the law does not impose a duty on the first Respondent who is an insurance broker to make remittances of unpaid premium. On the basis of information from the Respondent she deposes that the Applicant has never at any material time dealt with the second, third, fourth and fifth Respondents in their personal capacities for their personal benefit and in the relation to the alleged fraudulent transactions. She reiterated that there are no grounds disclosed for lifting the veil of incorporation or to cause a

addition of the second, third, fourth, and fifth Respondent to High Court Civil Suit Number 594 of 2015.

Subsequently the fourth Respondent Mr. S.R. Sham filed a supplementary affidavit in reply. His deposition discloses that he is a resident in India Bangalo and understood the affidavits in support of the application. He reiterates that the first Respondent was a brokerage firm engaged in the business of soliciting insurance covers on behalf of its clients and at all times the clients were disclosed and in whose favour policies were taken out by the Applicant at all times and if premiums were due and recoverable, they were recoverable by the Applicant. He was not involved in the day-to-day running of the company as alleged by the Applicant but was on the board as a member to provide guidelines in corporate matters. At all times the Applicant had contact with the clients who were disclosed by the management of the first Respondent in the processing of the respective policies and allegations as to payments being made in the first Respondent and not been remitted were not within his knowledge and were mere verbiage with no proof of payment having been made or not remitted to the Applicant as claimed. He resigned from the directorship of the first Respondent in June 2012 following other pressing responsibilities in this private consultancy business and having diligently served the first Respondent as a board member according to an extract of the board meetings of the board attached. Since his resignation he lived in India and settled therein with no knowledge of the business transactions of the first Respondent. He was contacted by old friends in Uganda informing him of an advertisement in the monitor newspaper serving him with a notice of motion which he has since come to learn seeks to add him as a party. Some factors which happened when he was out of the country were not within his knowledge. On the advice of his lawyers he believes that the Applicant's application against him is misconceived and allegations of fraud are unfounded, unsubstantiated, and premised on mere verbiage and devoid of any grounds for adding him as a party. He prays that the application is dismissed as against him with costs.

In a further supplementary affidavit in support of the application Evelyn Nkalubo – Muwemba, the Director Legal and Compliance in the Insurance Regulatory Authority of Uganda (the authority) deposes that she has knowledge of the facts regarding the Respondent's actions. The first Respondent was first licensed in 2003 and the subsequent years and till 23<sup>rd</sup> of November



2012 when it subsequently failed to meet the requisite statutory requirements. The first Respondent's license was revoked on 23 November 2012 for failure to satisfy capital requirements and complying with an order of the authority to submit satisfactory management accounts. The second, third, fourth and fifth Respondents were directors of the first Respondent during the committal of illegitimate transactions as they have been actively engaged, managed, transacted and the daily business of the first Respondent and have been in the foremost directing mind and will of the first Respondent according to copies of resolutions and other documents attached to the affidavit. As the directing mind and will of the first Respondent, directors of the first Respondent committed illegalities, they abused, plundered and grossly mismanaged the first Respondent's business in the following ways namely:

The first Respondent's directors endorsed and continued trading in the name of the Respondent while aware that the first Respondent had a working capital deficit and never took tangible steps to address the statutory breach. Secondly there was tax evasion. Thirdly there was collection and non-remittances of premiums to insurers. Fourthly there was condoning of abuse of insurers funds for operational expenses. Fifthly there was settlement of claims which is not a broker's but an insurer's duty. There was a repayment of the bank overdrafts using the brokers trust account. There was prior selling of the first Respondent as a going concern to Kinkizi Development Company minus its liabilities and deliberately concealing the sale from the authority while seeking its subsequent approval.

The second, third, fourth and fifth Respondents ought to be held accountable through the lifting of the corporate veil on the above grounds. The first Respondent during 2012 and under the directorship of the second, third, fourth and fifth Respondents collected premiums amounting to about Uganda shillings 540,012,991/= for onward remission to insurers. The first Respondent through the management of the rest of the Respondents never remitted the said premiums and it is still indebted to numerous insurance companies in Uganda namely Lion Assurance to the tune of Uganda shillings 157,128,435/=; NIKO (Sanlam) Uganda shillings 156,225,632/=; APA Insurance Uganda shillings 59,939,879/=; Leads Insurance Uganda shillings 57,050,776/=, Jubilee Insurance Uganda shillings 27,729,774/=; East African Underwriters Uganda shillings 11,626,480 and many others according to copies of the letters and premiums due attached.

She further deposes that the second, third, fourth and fifth Respondents as the directing mind and will of the first Respondent mismanaged and depleted the first Respondents working capital into deficit consequently causing a statutory breach and never took genuine material steps to address the same. The directors of the first Respondent furthermore condoned the abuse of insurer's funds for the first Respondent's operational expenses in total disregard of insurance norms consequently facilitating the first Respondent to engage in illegalities which acquiescence they ought to be held responsible for.

The first Respondent's directors as the directing mind and will of the first Respondent engaged in settling of claims which is an insurer's duty and which actions are illicit. Two claims were settled whereby the chairman Board of Directors gave authority and the matter was ratified by the board. The said directors ran down the business of the first Respondent by paying themselves hefty bonuses and permitting the Chief Executive officer colossal benefits. Consequently the first Respondent accumulated enormous debt including banks and channelled broker trust funds for the repayment of bank overdrafts and other debts unlawfully. They never fulfilled their obligations as expected of directors that took advantage of their position as the directing mind and will of the first Respondent to misappropriate and embezzle premiums due to the insurers. They sold the first Respondent to Kinkizi Development Company with the said company and not taking on its liabilities including the unremitted premiums despite refusal of authorisation by the authority. The actions of the directors in notifying the authority that they were in negotiations with Kinkizi Development Company while resolutions had been made and filed with the registrar of companies were deliberate misrepresentations constituting fraud. They ran down the first Respondent Company by making questionable, unethical, and illegal transactions in total disregard of statutory obligations and had the directorship in the first Respondent terminated by the authority according to copies of termination letters attached. The Respondent directors committed to clearing the premium amounts demanded might have time and again failed to honour their obligations despite numerous extensions and timelines set by the authority. An attempt to recover premiums following an order that the Uganda Commercial Court in HCCS 586 of 2012 where Lion Assurance was awarded Uganda shillings 157,128,435/= against the first Respondent was deemed futile as the premiums were misappropriated by the Respondents. The Respondents are shielded by the veil of incorporation in order to frustrate the recovery of

premiums due to insurers. The location and loss of premiums of Uganda shillings 540,012,991/= from different insurers and particularly Uganda shillings 156,225,632/= to NIKO (Sanlam) and should not be allowed to hide behind the veil of incorporation of the first Respondent.

The fifth Respondent Mr Costen Mutukwa further deposes a supplementary affidavit in which he states that he is an adult Zimbabwean of sound mind and the fifth Respondent and one of the directors of the first Respondent with knowledge about the facts of the application. He makes the affidavit having read and understood the contents of the application and other affidavits sworn in reply by Dr Juliet Kamuzze as well as a supplementary affidavit of Mrs Nkalubo Muwembo and that of Mr S.R. Sham. He deposes that on the basis of advice of his lawyers he believes that the application is misconceived in law and fact and does not disclose any grounds for lifting the veil of incorporation of the first Respondent or grounds to join the second, third, fourth and fifth Respondents as parties to HCCS 594 of 2015. An affidavit sworn by one Nkalubo Muwemba in her capacity as an officer of insurance regulatory authority supporting the lifting of the veil is a partial affidavit and an abuse of her statutory mandate. The first Respondent was licensed by the authority to transact business in 2003 and at all times were subjected to external audit by the authority which continuously renewed the first Respondents license thereby confirming that the first Respondent was meeting the requisite statutory requirements. At all material times the insurance regulatory authority was aware of how the business of the first Respondent was being managed otherwise it couldn't have continuously renewed the licence of the first Respondent if there were any deficiencies. As directors of the first Respondent, the second, third, fourth and fifth Respondents were not involved in the day-to-day running of the first Respondents business as this was the mandate of the management. The board members of the first Respondent never directed management committee on their personal capacities to commit any irregularities as alleged. At all material times the directors were very judicious in their approach and diligently performed their duties as directors of the first Respondent because they held regular board meetings and minutes were taken. Secondly in a letter dated 27<sup>th</sup> of July 2012 the Insurance Regulatory Authority commended the first Respondent's board for doing very well. Thirdly the books of accounts of the first Respondent were audited annually and balances outstanding confirmed with insurers. Fourthly the board was aware of the working capital deficit and various initiatives were pursued. The Insurance Regulatory Authority was kept informed of all the

initiatives taken and continued to renew the first Respondent's insurance license. The board advised its management to clear unpaid taxes and never condoned the non-payment of taxes if at all.

Furthermore the collection and non-remittances premium, if any, was a function of management and not the board and at no material time did the board condone any abuse of insurer's funds for operational expenses. The Respondents never at any material time condoned or sanctioned the abuse of any trust funds, if at all. After realising that shareholders were struggling with the requisite capital, management and not the board, took some initiatives and engaged some suitors. The proposed buyers had unfettered access to all information including audited accounts to enable them to do their due diligence. The first Respondent was a going concern with known liabilities. There was nothing wrong in selling the company less liabilities as long as there is full disclosure. The allegations made in the affidavit of Ms. Nkalubo Muwemba are baseless, vindictive, misdirected and falls short of satisfying the conditions necessary for lifting the veil of incorporation. The second, third, fourth and fifth Respondents as directors never engaged in the business of collecting premiums. In any case, at all material times, the clients were disclosed to the Applicant. The allegations of misappropriation of alleged collected premiums by the board are malicious and unfounded. The first Respondent's indebtedness to various insurance companies as alleged in the supplementary affidavit is unknown to the board as the considerations have never been completed and asked the first Respondent's board was prematurely dissolved by the insurance regulatory authority before the considerations could be finalised. There is no known claim lodged by the listed insurance companies against the first Respondent. The premiums billed collected and allegedly abused have never been verified, if at all. There is no material time at which the board depleted the first Respondent working capital as the first Respondent was a start-up company, not fully capitalised and the insurance regulatory authority had full knowledge of its status.

The second, third, fourth and fifth Respondent did not at any material time, condone the abuse of alleged insurers funds. Operational expenses were supposedly covered by commissions collected, as capital is never meant to cover operational expenses in a brokerage model. The

board never condoned the abuse of any funds and were very transparent in their dealings and continuously gave the insurance regulatory authority unfettered access to their records.

This authority of the chairman of the board to an insurer's claim and the boards subsequent ratification of this matter was an ex gratia as the claimant was a key customer whose supposedly legitimate claim was thrown out by insurers for some reason. Management was desperate to retain the account and made a business case to the chairman in favour of the first Respondent settling the claim on an ex gratia basis. There is nothing unusual about such payments in the insurance business for as long as they make business sense. It is not true that the Respondent's received any bonuses at all. The first Respondent only covered subsistence and fair expenses for externally based directors. It is a fabrication to say the Respondents have access to company funds which the Respondents never did or embezzled money which the Respondents never did. Only legitimate expenses were incurred for purposes of attending meetings. Board meetings per year were reduced from 4 to 3 to save costs. The Respondents never instructed management to conceal any information. The board was very professional in this approach and never understated any liabilities and always instructed management to comply with the right thing.

At all material times the second, third, fourth, and fifth Respondents acted within this court as directors of the first Respondent and never engaged in questionable, illegal or unethical transactions as alleged. No commitment to clearing the premium amounts could be made as no reconciliations have ever been made and completed. In those circumstances the second, third, fourth, and fifth Respondents have no obligation to remit premiums allegedly collected by the first Respondent. The transactions complained about in the Plaintiff/subject of the Plaintiff are the ordinary business transaction of an insurance brokerage firm, not illegal, not fraudulent and not the mandate of the directors of the brokerage firm but that of its management. The second, third, fourth and fifth Respondents have never been involved in the day-to-day running of the business of the first Respondent as that was the role and preserve of the management team. The directors never caused or procured the first Respondent into any kind of fraud or illegality.

At the hearing of the application Counsel Robert Irumba and Tumusiime Justus represented the Applicant while Counsel Anthony Wabwire represented the 1<sup>st</sup> 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents. Counsel Kenneth Akampurira represented the 4<sup>th</sup> Respondent.

Further evidence was taken through cross examination of Evelyn Nkalubo – Muwemba on her supplementary affidavit in support of the Application deposed on the 27<sup>th</sup> of November 2015. Thereafter the court was addressed in written submissions.

In the written submissions the Applicants Counsel objected to the affidavit in reply of Dr Juliet Kamuzze, the Managing Partner of Messieurs Fides Legal Advocates who had been engaged by the first, second, third, fourth and fifth Respondents in respect of this matter and authorised by them to make a deposition of the contents of the affidavit in reply. The main argument is that Dr Juliet Kamuzze did not attach any documentation of appointment/authorisation to the affidavit in reply. He submitted that an advocate who swears affidavits for and on behalf of his or her client must have explicit authorisation in writing in line with the provisions of Order 3 rule 1 and Order 19 rule 3 (1) of the Civil Procedure Rules. The Applicant's Counsel relies on the case of **Mugoya Construction and Engineering Ltd versus Central Electricals International Ltd, Miscellaneous Application Number 699 of 2011** where it was held that there is a world of difference between a duly authorised agent and a duly appointed advocate. The words "duly appointed to act" are clearly distinguishable from an advocate who has been duly instructed. An appointment to act on behalf of the client must be in writing. That requirement would be consistent with Order 7 rule 4 of the Civil Procedure Rules. No written authority of Counsel Dr Juliet Kamuzze was attached and she could not purport to act on behalf of the first, second, third, fourth and fifth Respondents. Furthermore Counsel submitted that the affidavit of Dr Juliet Kamuzze deposes to contentious matters. The actions of the first Respondent, operating through the second, third, fourth and fifth Respondents are contentious particularly annexure E to the application and I of the supplementary affidavit is authored by the fifth Respondent and points to the first, second, third and fourth Respondents admission of indebtedness of the Applicant and therefore at the very least the fifth Respondent ought to have deposed an affidavit as the contents of annexure "E. Counsel relied on the case of **Nsubuga Jonah versus Electoral Commission and Another HCEP No. 3 of 2011** which case was cited with approval in **Kasule, Abdul Rajab, Gulberg Hides & Skins vs. Kwong Fat Yuen Hong Ltd HCMA No. 66 of 2013** where it was held that when a statement is made to a witness by a person, who is himself or herself not called as a witness, such evidence is inadmissible when the object of the evidence is to establish the truth of what is contained in the statement.

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*~\*~?+: maXimum728securityx 2016 style*

In reply Counsel for the first, second, third and fifth Respondents submitted that the preliminary objection to the affidavit of Dr Juliet Kamuzze on behalf of the first, second, third and fifth Respondents be overruled. He contended that the objection is misconceived and authorities cited by the Applicants are quoted out of context. The relevant provisions of the law are Order 3 rule 1 and Order 19 rule 3 (1) of the Civil Procedure Rules. Dr Juliet Kamuzze as an advocate instructed by the Respondents to represent them in the instant matter is legally competent to depose to affidavits on behalf of the Respondents. The Respondents Counsel relies on the authority of **Joy Kainganna vs. Dabo Boubou [1986] HCB 59** that Order 19 rule 3 (1) allows a person to depose to facts based on his or her knowledge to prove or based on disclosed sources of information. The application being premised on mainly matters of law, Dr Juliet Kamuzze as an advocate representing the Respondents is competent and best suited to depose to the same without contravening the provisions of Order 19 rule 3 (1). This is illustrated by several paragraphs of the said affidavit in reply. Furthermore the sources of factual information are disclosed.

In the alternative and without prejudice the Respondents Counsel submitted that if the court is inclined to find any part of Dr Juliet Kamuzze affidavit to offend the rules, the justice of the case dictates that the offending parts are severed from the rest of the paragraphs. He relied on the case of **AIC Progetti & Others vs. Data Systems and Engineering and Research Corporation HCMC 184 of 2013** as well as the case of **Kizza Besigye versus Museveni Yoweri Kaguta and another Presidential Election Petition Number 1 of 2001**. The authorities are to the effect that offending paragraphs of an affidavit can be severed and rest of the paragraphs considered. On those grounds the first, second, third, and fifth Respondents prayed that the objection is overruled with costs.

The fourth Respondents Counsel further replied but did not make any comments about the preliminary objections to the affidavit of Dr Juliet Kamuzze. Instead Counsel for the fourth Respondent objected to the supplementary affidavit in reply of Evelyn Nkalubo Muwemba. The basis of the objection is that the Applicant listed witnesses, documents and authorities as provided for by Order 6 rule 2 of the Civil Procedure Rules. The Applicant however did not include Ms Evelyn Nkalubo Muwemba as a witness. Order 6 rule 2 is couched in mandatory

terms because it provides that every pleading shall be accompanied by a list of witnesses. The only exception is to provide an additional list of authorities and not witnesses or documents. The exception is with the leave of court. The practice where leave is required to introduce a new witness is to seek for leave under section 98 of the Civil Procedure Act by invoking the discretion of the court. However no application has been made for leave to introduce the supplementary affidavit and the witness. When a reference to the affidavit in support of the application of Mr Anthony Ngalika, the Applicants operations manager, it makes no mention of any interaction between Ms Evelyn Nkalubo thereby not laying grounds for her supplementary affidavit or any information obtained from the said Insurance Regulatory Authority concerning the first Respondent as a licensed entity.

In her cross examination she informed the court that they filed an affidavit as an interested party being a regulator and her affidavit evidence was in support of lifting the first Respondents corporate veil. In the premises the Respondents Counsel prayed that the supplementary affidavit ought to be struck out.

He further contended that the deponent has no locus standi because the Insurance Regulatory Authority is not a party to the suit or the application and neither was the deponent invited by the court as amicus curiae. Moreover the supplementary affidavit was filed by the Insurance Regulatory Authority and while the Applicant attempted to own the alien witness, the affidavit was not drawn by lawyers of the Applicant but rather by the Legal Department of the Insurance Regulatory Authority of Uganda. The Insurance Regulatory Authority illegally joined court proceedings where it had not been invited and neither was it a party. It attempted to do so during the proceedings contrary to normal procedures for joining parties. Moreover it has not applied to be joined as Plaintiff or Applicant to the application. In the premises the supplementary affidavit is alien to the application and ought to be struck out or disregarded in determining the application. The deponent has no relation to the Applicants and was not invited by the court under Order 19 rule 1 of the Civil Procedure Rules. The affidavit could only be salvaged if the insurance regulatory authority applied for and was joined as a party/Applicant for purposes of prosecuting the application. He therefore prayed that the affidavit of Evelyn Nkalubo Muwemba is struck out because she is a stranger to the proceedings with no locus standi.



In rejoinder the Applicant's Counsel contended that the affidavit of Dr Juliet Kamuzze is incurably defective for the reason that the much needed letter written authority to act was never adduced as required by Order 3 rule 1 of the Civil Procedure Rules and Order 19 rule 3 (1) of the Civil Procedure Rules. An appointment to act on behalf of a party must be in writing according to the case of **Mugoya Construction and Engineering Ltd vs. Central Electricals International Ltd HCMA 699 of 2011**. Secondly the case of **Joy Kaingana vs. Dabo Boubou [1986] HCB 59** is distinguishable from the circumstances of this application because the affidavit was sworn by an advocate whereas in that case the affidavit was sworn by a spouse. The position of the law has since been clarified in the case of **Nakalema & 3 Others vs. Mucunguzi Myers HCM in 0463 of 2013**. The affidavit of Dr Juliet Kamuzze contains information that is not only inaccurate but also contradictory to the affidavit in rejoinder by the fourth Respondent and documentary evidence attached as annexure to the supplementary affidavit sworn by Evelyn Nkalubo – Muwemba. In the premises the information contained in the affidavit of Dr Juliet Kamuzze ought to be treated as hearsay.

Furthermore Dr Juliet Kamuzze purported to swear an affidavit under the authorisation and on the behalf of the fourth Respondent who is also apparently represented by Kenneth Akampurira Advocates and Solicitors. The fourth Respondent himself highlights the numerous factual inconsistencies and factual falsehoods contained in the affidavit of Dr Juliet Kamuzze. Moreover there is no notice of joint instructions served upon the Applicant's lawyers or a court order. He concluded that Dr Juliet Kamuzze did not have the purported authorisation to swear an affidavit on behalf of the Respondent let alone represent them as Counsel. Order 19 rule 3 (1) is critical and intended to cure such mischief.

The Applicant's Counsel submitted that contrary to the authorities cited of the case of **Dr Kizza Besigye versus Museveni (supra) Election Petition No. 1 of 2001 and others**, the court should find that severance does not cure the defect in the affidavit which is void ab initio as held in **Nakalema and Three Others vs. Mucunguzi Myers HCM the zero 416 of 2013** and the case of **Mohammed Majyambere vs. Bhakresa Khalili [2012] UGCOMMC 15**.

## **Ruling**

I have carefully considered the preliminary objections. The first preliminary objection is raised by the Applicant and it attacks the affidavit in reply of Dr Juliet Kamuzze for want of authority. The circumstances of this case are that the Applicant on 14 September 2015 filed this action against the first Respondent. The first Respondent put in the written statement of defence. The first Respondent is represented by Messieurs Fides Legal Advocates and among the Advocates therein is Dr Juliet Kamuzze. Subsequently the Applicant filed this application to lift the veil of incorporation of the first Respondent so as to proceed against the second, third, fourth and fifth Respondents. The application was filed on 12 October 2015 and the affidavit in reply thereto is that of Dr Juliet Kamuzze who is described in the affidavit as an adult female Ugandan and Managing Partner of Messieurs Fides Legal Advocates. The affidavit was sworn to on 9 November 2015 and filed on court record the same day. She indicates that the law firm of Messieurs Fides legal advocates were instructed by the 1st, 2nd, 3rd, 4th and 5th Respondents to represent them. In paragraph 1 she further deposes that she is duly authorised by the 1st, 2nd, 3rd, 4th and 5th Respondents to depose the affidavit in that capacity and on their behalf. In paragraph 2 she deposes that the Respondents have read and understood the contents of the affidavit of Anthony Ngalika in support of the application and they instructed her to respond in the following paragraphs. The Applicant's contention is that the affidavit is not supported by any documentary proof of instructions attached to the application. He relied on the case of **Mugoya Construction and Engineering Ltd vs. Central Electricals International Ltd HCMA 699 of 2011**. In that case I held that there was a world of difference between a duly authorised agent and a duly appointed advocate. The question was whether an advocate needed authority to swear an affidavit in matters of his client and especially in contentious matters. An appointment to act on behalf of a client must be in writing. This applied to making an affidavit in the capacity of a party to the action. I further held that having a written authority would shield an advocate from committing an offence under the Advocates Act namely the Advocates (Professional Conduct) Regulations and regulation 15 thereof which provides that an advocate shall not include in any affidavit any matter which he or she knows or has reason to believe is false. The basis of the ruling is Order 3 rule 1 of the Civil Procedure Rules which provides that "an appearance or act in any court required or authorised by the law to be made or done by a party in such court may, except where expressly provided for by any law, be made or done by the party in person or by

his or her recognised agent, or by an advocate duly appointed to act on his or her behalf". There is a difference between a recognised agent and an advocate duly appointed to act on behalf of the client. Recognised agents are defined by Order 3 rule 2 of the Civil Procedure Rules. They include persons holding powers of attorney authorising them to make such appearances and applications and do acts on behalf of parties. Secondly they include persons carrying on trade or business for and in the names of the parties not resident within the local limits of the jurisdiction of the court.

The provision deals with parties and recognised agents and advocates. In the facts of this case reference was also made to Order 19 of the Civil Procedure Rules which deals with affidavits. Order 19 rules 1 of the Civil Procedure Rules gives the court power at any time and for sufficient reason to order that any particular fact may be proved by affidavit. However that is not the situation in this application. What is material is that the rule clearly provides that facts may be proved by affidavit evidence and therefore affidavits are clearly meant to prove the Applicant's case or to disprove the Applicant's case depending on whether it is the Applicant or the Respondent respectively. A deponent to an affidavit may be cross examined and is a witness. Order 19 rule 3 Of the Civil Procedure Rules provides that affidavits shall be confined to such facts as the deponent is of his or her own knowledge able to prove except in interlocutory applications on which statements of his or her belief may be admitted provided the grounds thereof are stated.

The Applicant's Counsel relies on two limbs of argument. The first concerns the authority to make the affidavit in support of an application at all. As a matter of fact the affidavit of Dr Juliet Kamuzze clearly deposes that she is a Managing Partner of the firm representing the Respondents and the law firm had been engaged by the Respondents. Secondly she adds that she is duly authorised by the 1st, 2nd, 3rd, 4th and 5th Respondents to depose to the affidavit on their behalf. In paragraph 2 she deposes as follows:

"That the Respondents have read and understood the contents of the affidavit of Mr. Anthony Ngalika in support of the application, and have instructed me to respond as follows:"

She does not depose to the contents of the affidavit in her capacity as an advocate representing the Respondents. But as someone deposing on behalf of the Respondents on the basis of whatever she was told. That notwithstanding I have considered regulation 9 of the Advocates (Professional Conduct) Regulations, Statutory Instrument 267 – 2 which bars an advocate who is appearing before any court or tribunal and has reason to believe that he or she will be required as a witness to give evidence, whether verbally or by affidavit to appear in the matter as Counsel. The rule does not however bar an advocate from giving evidence whether verbally or by declaration or affidavit on informal or noncontentious matter of fact in any matter in which he or she acts or appears. I have underlined the words: in which he or she acts or appears. Dr Juliet Kamuzze necessarily states that she was instructed to depose an affidavit on behalf of the Respondents. She says this in paragraph 25 of the affidavit in reply in the following words:

"THAT I depose this affidavit on behalf of the Respondents in opposition to the application for lifting the first Respondents veil of incorporation, and further joinder of the second, third, fourth and fifth Respondents as parties to HCCS No. 594 of 2015."

The affidavit does not purport to be made in the deponent's capacity as an advocate. She does not say that she's an advocate handling the matter and deposes the affidavit in that capacity. That is the issue with this deposition. In paragraph 1 she says that she was duly authorised by the first, second, third, fourth and fifth Respondents to depose to the contents of the affidavit in that capacity and on their behalf. What other capacity? Though she deposes as the managing partner of Messieurs Fides Legal Advocates? I have carefully perused the affidavit and paragraph 2 indicates that she was instructed to respond in the following paragraphs. Though some of the paragraphs indicate that she deposes on the ground of her knowledge of the law as an advocate because in paragraph 4 she says she has read the plaint and ascertained that the Plaintiff has neither pleaded, particularised nor proved fraud against any of the Respondents. Paragraph 5 it seems also to be in her capacity as a lawyer. However paragraph 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15, seem to be based on information of the Respondents. Paragraphs 16 and 17 seem to be based on her knowledge as a lawyer. Paragraphs 18, 19, 20, 21, 22, 23, 24 are on the basis of information from the Respondents.

Going to Order 3 rule 1 of the Civil Procedure Rules, the rule applies to any application to or appearance or act in any court required or authorised by law to be made or done by a party in such court and which may be done by an advocate or an agent. This application was made under Order 1 of the Civil Procedure Rules as well as section 98 of the Civil Procedure Act and section 20 of the Companies Act 2012. The affidavit in reply was made on behalf of the Respondents as parties. There are five Respondents. The affidavit was not made in the capacity of the deponent as an advocate.

I have further considered the authorities cited. The decision of my brother honourable Mr justice Bashaija K Andrew in **Lena Nakalema Binasisa & 3 Others vs. Mucunguzi Myers Land Division HCMA No.0460 of 2013** relies on Order 1 rule 12 (1) of the Civil Procedure Rules which provides inter alia that where there are more Defendants than one, any one or more of them may be authorised by any other of them to appear, plead or act for the other in any proceedings. Secondly sub rule 2 of the rule 12 of Order 1 of the Civil Procedure Rules provides that the authority shall be in writing and signed by the party giving it and shall be filed in the case. In the above decision the first Applicant in her affidavit in support of the application deposed that she had been authorised by the second and third Applicants and deposes the affidavit on their behalf.

That is the situation in this case particularly in considering paragraph 25 of the affidavit of Dr Juliet Kamuzze where she deposes that she deposes the affidavit on behalf of the Respondents and in opposition to the application.

In the case of **Lena Nakalema and 3 Others vs. Mucunguzi Myers** (supra) no authority of the other Respondents was included. Honourable Justice Andrew Bashaija held that whether it is a representative action under Order 1 rule 10 (2) and 13 of the Civil Procedure Rules or a suit by a recognised agent under Order 3 rule 2 (a) of the Civil Procedure Rules or by order of the court, the person swearing on behalf of others ought to have their authority in writing which must be attached as evidence and filed on court record. He further cited several other authorities to the effect that an affidavit is defective by reason of being sworn on behalf of another without showing that the deponent had the authority of the other. In the premises he held that the

affidavit was incurably defective for non-compliance with the requirements of the law and cannot support the application and was dismissed.

I have carefully considered the decision of my learned brother and I do not see any grounds for departing from it. The ruling applies to both affidavits in support and in the reply so long as they purport to be made on behalf of other parties. The decision is also consistent with Order 1 Rule 12 of the Civil Procedure Rules which requires the authority to be in writing and signed by the party giving it. In this case the affidavit of Dr. Juliet Kamuzze is not only sworn in a representative character and for emphasis not in the capacity of an Advocate having conduct and swearing to non-contentious matters but it is on behalf of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Respondents. The first Respondent is a limited liability company and the rest of the other Respondents are individual directors residing in different places and countries. While Dr. Juliet Kamuzze may be Counsel for the first Respondent on whose behalf Messrs Fides Legal Advocates filed a written statement of defence in the main suit, there is a requirement to show how she was instructed by the directors of the first Respondent. In addition the deposition of the 4<sup>th</sup> Respondent Mr. S.R. SHAM in his affidavit in reply deposes that he got to learn of the application from old friends who read the Monitor Newspaper but he was not aware of the claims of the Applicant. He got advice from his lawyers Messrs Kenneth Akampurira and Company Advocates & Solicitors and he does not mention anywhere that he authorised Dr. Kamuzze to swear an affidavit in reply on his own behalf. In fact he deposed to his own reply and makes no reference to Dr. Juliet Kamuzze. He is represented by another firm of advocates. Dr. Juliet Kamuzze deposed that he instructed her. Yet her affidavit in reply is dated 9<sup>th</sup> November 2015 while Mr. S.R. SHAM affidavit in reply was notarised in India on the 2<sup>nd</sup> of December 2015. It was filed in the High Court on 7<sup>th</sup> December 2015. He acted on the advice of his lawyers and not Fides Legal Advocates. In the premises the affidavit in reply of Dr Juliet Kamuzze is defective and hereby struck out.

The affidavit having been struck out the affidavit in rejoinder of Anthony Ngalika and that of Dr. Juliet Kamuzze in sur rejoinder are hanging without a foundation of what they were replying to which will not be considered in this application.

The second affidavit under attack is that of Evelyn Nkalubo – Muwemba, the Director Legal and Compliance at the Insurance Regulatory Authority of Uganda. In paragraph 1 she deposes that she is knowledgeable of the facts regarding the Respondent's actions and made the affidavit in that capacity. Her affidavit was filed without the leave of court. The fourth Respondent's Counsel Kenneth Akampurira particularly submitted that she is not even named as a witness in the Applicant's summary of evidence.

I have carefully considered the objection and the reply of the Applicant in the rejoinder submissions that the supplementary affidavit can be sworn by any person even if the person is not a party to the suit. Counsel further submitted that the Respondents were given leave to cross examine Ms Evelyn Nkalubo Muwemba. He relied on article 126 (2) (e) of the Constitution of the Republic of Uganda for the legal doctrine that substantive justice shall be done without undue regard to technicalities.

While the fourth Respondent Counsel's objection has substance in the sense that there is no nexus shown in the affidavit in support of the application so as to introduce the affidavit of Evelyn Nkalubo Muwemba, the objection is belatedly made. On 22 December 2015 when the application came for hearing, Counsel for the first, second, third and fifth Respondents agreed that a letter was written to the Applicant informing the Applicant's Counsel the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> Respondents Counsel intended to have Evelyn Nkalubo - Muwemba summoned and cross examined on her supplementary affidavit. There was no objection from the fourth Respondent's Counsel. The application for adjournment was granted among other grounds to leave room for cross examination of the deponent. When the matter came on 22 January 2016 Evelyn Nkalubo - Muwemba was sworn in as a witness and cross examined by Counsel Anthony Wabwire. She was further re-examined on 2 February 2016 and all the evidence is on record. Thereafter Counsels filed written submissions. She was also cross examined about the role of the regulatory authority.

The right time to object to the supplementary affidavit was before further evidence was taken. The court spent two days listening to cross examination and re-examination of the witness. Objection ought to have been taken to the supplementary affidavit before cross examination.

In the case of **Western Uganda Cotton Company Limited versus Dr George Asaba and three others** an objection was raised by the Plaintiff's Counsel seeking to strike out the counterclaim on the ground that it was not duly served in accordance with the law and ought to be dismissed with costs. He had accessed a copy from the court record and filed a response thereto. Hon. Lady Justice Helen Obura held with reference to several authorities that the object of service of summons in whatever way is to enable the Defendant be informed of the institution of the suit in due time before the date fixed for the hearing. The Plaintiff had not in his submission pointed out any prejudice or injustice that would be occasioned to his client by the Defendant's omission to serve and no injustice had been occasioned to the Plaintiff and the omission to serve could be treated as an irregularity which could be cured under article 126 (2) (e) of the Constitution of the Republic of Uganda. The learned judge held that the object of service in the case was achieved by Counsel for the Plaintiff's action of helping himself to the counterclaim on the record and overruled the preliminary objection.

In **Mukasa Anthony Harris versus Dr Bayiga Michael Philip Lulume** Election Petition Appeal Number 18 of 2007, Hon Justice Tsekooko JSC who delivered the lead judgment held the appellant had helped himself to a copy of the petition probably within the prescribed time and had pre-empted the service and did in effect enter appearance unconditionally. He held that there was no material upon which the court could conclusively say that the appellant did not get the petition within the prescribed time of seven days and that article 126 (2) (e) of the Constitution would be applied.

In this case no question of prejudice can arise where the Respondent cross examined Evelyn Nkalubo – Muwemba before filing written submissions. She was treated as a witness of the Applicant and her evidence was accepted as such. In the premises the Respondent's Counsel having cross examined the witness, is now precluded from objecting to the admission of her supplementary affidavit. The cross examination proceeded with the full consent of the fourth Respondent's Counsel. I agree with the Applicants Counsel that at this stage of the proceedings, the Respondents have not suffered any prejudice. In the premises the objection to the supplementary affidavit of Evelyn Nkalubo - Muwemba, the Director Legal and Compliance at



the Insurance Regulatory Authority of Uganda is overruled with costs to abide the outcome of the main suit.

Finally the Applicant's application which was strongly opposed is about whether the directors of the first Applicant should be added as parties in their individual capacity as directors. The application cites Order 1 rule 3 and Order 38 rule 5 (d) of the Civil Procedure Rules as well as Order 1 rule 10 (2) of the Civil Procedure Rules

The grounds of the application are set out in the notice of motion. The Applicant is seeking for the lifting of the veil of incorporation of the first Respondent as well as seeking to add a party or parties as Defendants. I have carefully considered the submissions in which several allegations are made against the Respondents who are directors of the first Respondent. They all amount to the assertion that the directors of the first Respondent had the control of the first Respondent at the time the first Respondent is alleged to have committed certain acts by collecting premiums from clients and not remitting the same to the Applicant. The Applicant is the Plaintiff and the first Respondent Company is the Defendant.

The Respondents variously objected to the application on the merits. I do not need to go into the merits of the application to lift the veil. The act of lifting the veil was considered by this court in **Stanbic bank Uganda Ltd versus Ducat Lubricants (U) Ltd & 3 others HCMA 845 of 2013 arising from HCCS 438 of 2012**. It is the final remedy in which directors may be found liable personally. They cannot be found liable on the basis of allegations in an application to add them as parties. Fraud is a serious allegation and ought not to be tried through affidavit evidence. At page 7 of the ruling I considered section 20 of the Companies Act 2012 which gives the High Court jurisdiction in cases of tax evasion, fraud or the membership of the company falling below the statutory minimum to lift the corporate veil. The question of whether the directors were involved in acts of fraud as alleged ought not to be tried in an application to add them as parties. I further considered the case of **Williams and Another versus Natural Life Health Foods Ltd and Another [1998] 2 All ER 577** which a decision of the House of Lords in which they considered the grounds on which a director could be held personally liable. I noted that what was considered was not whether the directors could be sued but whether they can be held liable. The

gist of the decision is that a director can be found liable under certain circumstances. In Uganda there is a statutory provision under section 20 of the Companies Act 2012 which provides that:

"The High Court may, where a company or its directors are involved in acts including tax evasion, fraud or where, save for a single member company, the membership of a company falls below the statutory minimum, lift the corporate veil."

It is quite clear from the statutory provision that the High Court may lift the corporate veil where the directors are involved inter alia in acts of fraud. The acts of fraud if any have to be proved. It cannot be proved unless and until the directors are made a party. The argument that the company was managed by a professional management and not the directors is an argument on the merits. The will and mind of the company is to be discerned from the will and mind of the directors. Specifically I again refer to the decision of Lord Denning in **HL Bolton Co versus TJ Graham and sons [1956] 3 All ER 624** at page 630 where he said:

"A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such...."

This application is basically about whether the directors should be added as Defendants under Order 1 rule 3 of the Civil Procedure Rules which provides as follows:

"All persons may be joined as Defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against those persons, any common question of law or fact would arise."

In the case of **Stanbic bank Uganda Ltd versus Ducat Lubricants (U) Ltd & 3 Others HCMA 845 of 2013 arising from HCCS 438 of 2012** I held that the rule was a reflection of the

general rule that the Plaintiff can sue whomsoever he or she wishes to sue. In that case I noted that the Applicant had framed the application as an application to lift the veil so as to proceed against the directors and shareholders of the Respondent. The Applicant ought to have moved under Order 1 rule 3 of the Civil Procedure Rules.

In this case the Applicant moved under order 1 rule 3 of the Civil Procedure Rules. In other words it is the Plaintiffs liberty to sue whomsoever he chooses at the risk of incurring costs if the suit is frivolous and vexatious or discloses no cause of action.

In the case of **Bank of India Ltd v Ambalal L Shah and others [1965] 1 EA 18** Sheridan J held that the issue to be considered under Order 1 rule 3 of the Civil Procedure Rules is whether the alleged cause of action against the Defendant or Defendants sought to be joined arose out of the same act or transaction or series of acts or transactions. He held at page 20:

“Although the word “same” must govern the words “series of acts or transactions”, as they are the same here, it is not necessary that every Defendant should be interested in all the reliefs claimed in the suit, but it is necessary that there must be a cause of action in which all the Defendants are more or less interested although the relief asked against them may vary.”

The issue for consideration is whether the alleged cause of action against the Defendants arose out of the same act or transaction or series of acts or transactions where if separate suits were brought against the directors, any common question of fact or law would arise. It is not necessary that the reliefs sought against different Defendants should be the same. They may vary. Sheridan J held in **Uganda General Trading Co Ltd v Jinja Cash Stores Ltd and another [1965] 1 EA 469 that:**

“There is nothing in the Order which provides that the causes of action may not arise at different times. Nor is it a bar to joinder that different reliefs are sought.

“It is not necessary that all the Defendants should be interested in all the reliefs and transactions comprised in the suit or that the liability of all Defendants should be the same.”

In the case of **The Pioneer Investment Trust Limited v Amarchand and others [1964] 1 EA 703** Duffus JA of the Court of Appeal sitting at Nairobi also considered Order 1 rule 3 and came to the same common sense conclusion when he held at page 708 that:

“Under O. 1, r. 3, the joinder of several Defendants in the same action is justified if any right of relief accrues to the Defendant arising out of the same act or transaction and further that if separate suits had been brought against such persons then a common question of law or fact arises.”

What needs to be considered is whether there is an alleged cause of action arising out of the same act or transaction and whether if separate suits are brought common questions of law or fact would arise. Finally the Plaintiff cannot be barred from suing the directors. To avoid multiplicity of suits, it is better to try the action once. What the Plaintiff alleges in the application is that the directors were using the first Respondent as a vehicle and gained the trust of the Applicant fraudulently. Secondly at the material time the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents were the directing mind of the first Respondent.

The 4<sup>th</sup> Respondents case is that he was no longer a director or shareholder at the time of the alleged transaction. This application was brought against him as well and it is the Plaintiff/Applicant who makes allegations. The defence of not been a director can await since the timelines of the allegations need to be established before any order is made.

Finally it is alleged that the Respondent committed acts of fraud in the business relationship with the Applicant. For the moment as to whether the Applicant would succeed, there are common questions of fact and law which would arise. Section 20 of the Companies Act 2012 gives the court the requisite jurisdiction to lift the veil where fraud has been established. Fraud or any other ground can only be established in the trial and therefore the veil of incorporation cannot be lifted at this stage. The application to lift the veil of incorporation is premature and stayed. In any case the Respondent Directors have a right to defend the action and even to put Defences to lifting the corporate veil so as to make them or any of them personally liable for the Applicant's claims.

In the premises the Applicant's application succeeds with costs to abide the outcome of the main suit.

The Applicant will amend its Complaint in HCCS NO. 594 of 2015 so as to add the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents to the amended complaint as Defendants with the appropriate prayers and extract fresh summons against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents/as the added Defendants within 7 days from the date of this order and serve them within the prescribed period.

Ruling delivered in open court on the 10<sup>th</sup> of May 2016

**Christopher Madrama Izama**

**Judge**

Ruling delivered in the presence of:

Robert Irumba Counsel for the Applicant

Anthony Wabwire Counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents

Kenneth Akampurira for the 4<sup>th</sup> Respondent

Mazima Robert Credit Manager of the Applicant in court

Respondent not in court

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

**10<sup>th</sup> May 2016**