

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**  
**MISC. APPLICATION NO. 551 OF 2018**  
**(ARISING FROM CIVIL SUIT NO. 546 of 2017)**

**KYANINGA ROYAL COTTAGES LIMITED:::::::::::::::::::::::::::::::::APPLICANT**  
**VERSUS**  
**KYANINGA LODGE LIMITED :::::::::::::::::::::::::::::::::::RESPONDENT**

**BEFORE: THE HON. JUSTICE DAVID WANGUTUSI**

**R U L I N G:**

Kyaninga Royal Cottages Limited the Applicant herein filed this Application against the Respondent Kyaninga Lodge Limited for orders that;

1. The Respondent's Complaint in Civil Suit No. 546 of 2017 be struck out and or rejected;
2. The Respondent's Civil Suit No. 546 of 2017 be dismissed with costs;
3. And costs of the Application.

This Application is grounded on the following;

- a) That the Respondent's Civil Suit No. 546 of 2017 was commenced in the name of a non-existent company.
- b) Civil Suit No. 546 of 2017 does not reveal a maintainable cause of action since there is no trademark registered in the favour of " Kyaninga Lodge Limited" as alleged
- c) Civil Suit No. 546 of 2017 is frivolous and vexatious and has no likelihood of success because;

1. The alleged mark “ KYANINGA ELEGANCE AT ITS PEAK” comprises a combination of a geographical name and words in common parlance incapable of distinguishing the services of the Respondent from any other person
2. The impugned word combination at best only refers to the alleged quality or character of services of the registered owner’s services;
3. The Respondent’s complaint is only as respects the Applicant’s use of the word “ Kyaninga” which is a geographical name;
4. There is no pleading that the said word combination has achieved distinctiveness and it indeed has not;

d) Civil Suit No. 546 of 2017 is barred by Articles 21 and 40 of the Constitution of the Republic of Uganda and the Trademarks Act, 2010.

The background as discerned from the pleadings is that the Respondent carrying on business of safari lodge and hospitality services filed Civil Suit No. 546 of 2017 against the Applicant/ Defendant for infringement of its trademark and passing off its goodwill and reputation, cyber squatting and typo squatting of its domain, unfairly profiting from its reputation/unjust enrichment.

The Respondent/ Plaintiff also seeks a permanent injunction restraining the Defendant and its agents from passing off the Plaintiff’s trademark and style of trading; an order for delivery of any infringing material in print or otherwise, an inquiry as to damages, aggravated damages ,punitive damages and costs of the suit.

The Respondent/Plaintiff contends that as a safari lodge and hospitality service provider she widely advertised and promoted her services under the name and style of “ Kyaninga Lodge”

through bill boards, the internet and social media among others enabling her to gain reputation and goodwill overtime from architectural design of the lodge, lodging services and hospitality.

When the Application came up for hearing Mr Tabaro Counsel for the Respondent raised a preliminary objection stating that the Application had no summary, list of documents and authorities and witnesses therefore contravening Order 6 Rule 2 of the Civil Procedure Rules.

I shall first proceed to rule on the legality of the plaint in the head suit.

Counsel for the Respondent submitted that the Plaintiff is not a limited liability company. According to the Respondent's counsel the registered trademark is in the names of the Respondent and the company that is registered before the Companies Registry is Kyaninga Estates Limited.

He further contended that from the conduct of the Applicant it is clear that the Applicant knows who his adversary is and this being a misnomer it could be cured. He relied on the decision in ***Attorney General vs Sanyu Television (1998) CS No. 614 of 1998*** that held that a misnomer would be curable under the provisions of Order 27 rule 10 and Order 1 Rule 10(2) (ii) of the Civil Procedure Rules.

A misnomer refers to a mistake in naming a person, place or thing in a legal instrument which can be corrected by an amendment to the pleadings. In this instant case the Applicant Company as Plaintiff filed a suit against the Respondent describing herself as an incorporated company.

It is now well established that a misnomer can under certain circumstances be rectified by amendment replacing the name appearing on the Plaint or Written Statement of Defence with what the parties believe to be the right litigant. The correction of name is however only possible

where the Plaintiff or Written Statement of Defence speaks the truth and the misnomer was done out of good faith.

In the present Plaintiff it is not just misnomer. The Plaintiff itself is tainted with falsehood. The falsehood is clear in the first paragraph of the Plaintiff. It reads;

*“ The Plaintiff is a company incorporated in the Republic of Uganda with capacity to sue and be sued, carry on business of Safari Lodge and hospitality business.”*

From the submission of Counsel it is clear that the Plaintiff misrepresents the Plaintiff as a company incorporated capable of suing or being sued. This is what makes the pleadings incurable because they have not only been brought by a nonexistent person, but also gone ahead to tell a lie about the “person.”

This cannot be regarded a bonafide mistake. It is a deliberate act to create an incorporated company that never was. Counsel for the “Plaintiff” did not provide proof of incorporation. In fact he conceded to the search results of the Applicant, namely that the Plaintiff was not registered as a company.

It sought to maintain an action when in the law it was “not a party at all but a mere name only” with no legal evidence; ***Fort Hall Bakery Supply Co. Ltd vs Fredrick Muigai Wangoe [1959] EA 474***

In the case mentioned above, their Lordships held;

*“ A nonexistent person cannot sue and once the court is made aware the plaintiff is nonexistent, and therefore incapable of maintaining the action, it cannot allow the action to proceed. The order of the court is that the action be struck out, as the alleged plaintiff has no existence.”*

It is on that ground that this “suit” be and is hereby struck out.

Having found that the suit was a non starter, I shall not belabour the issue of a “scandalous defence” or one lacking summary of evidence and list of authorities because they purported to reply to an incurably defective pleading.

As for costs Counsel for the Defendant submitted that they should be borne by the firm, lawyers who filed the Plaint. I think this should only arise under circumstances where no one from the purported company exists. Perusing the court record I found Misc. Application No. 324 of 2018. This Application asking court to strike out the Defendant’s Written Statement of Defence was supported by one Steve Williams. In paragraph one he deponed;

*“ 1. That I am a male adult Ugandan of sound mind, the Managing Director of the Applicant and swear this affidavit in that capacity.”*

In my view it is this Managing Director of the nonexistent “company” who instructed the Advocates to file the suit. He must have been the one who paid the court fees.

He was in my view the person who was behind the Plaint. It is he therefore who should pay the costs. It is so ordered.

**Dated at Kampala this 20<sup>th</sup> day of September 2018**

**HON. JUSTICE DAVID WANGUTUSI  
JUDGE.**