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THE HIGH COURT OF UGANDA
COMMERCIAL DIVISION
HIGH COURT CIVIL SUIT NO. 796 OF 2000

M/S SRI JAYA LTD:.....PLAINATIFF

VERSUS

1. JOHN HOPE MUSKA]
2. M/S LITHO PACK LIMITED]:.....DEFENDANTS

BEFORE: JUSTICE GEOFFREY KIRYABWIRE

RULING:

This is a relatively old case that was filed in 2000 and has gone through the hands of 2 lawyers for the Defendant and 2 trial Judges. When the file came before me an interlocutory application for security for costs was first heard by the courts Registrar and an appeal thereafter was heard by and disposed off by myself.

Thereafter on the 27th May 2004 the parties to this case agreed with court that the scheduling conference should be held on the 17th June 2004. In a bid to expedite the process it was further agreed that the parties file in court in advance of that date their scheduling memoranda. Counsel for the Defendant then informed court that he had a preliminary objection, which he intended to

file with his memorandum. Court allowed him to do so to allow for the better management of the case.

The Defendant's counsel filed in court his scheduling memorandum dated 14th June 2004 on the same date. The said memorandum contained the outline submissions of his preliminary objection. The Plaintiff on the 16th June 2004 filed in court a reply to the preliminary objection dated the same day. On the 17th June 2004 I directed that the scheduling proceed and that I would rule on the preliminary objection on the 28th June 2004 just before the trial.

The issue as put by counsel for the Defendant to be determined as a preliminary objection was;

"Whether the 1st Defendant is wrongly sued?"

The basic objection is that the dispute in this case is between two companies namely the Plaintiff M/S Sri. Jaya Limited and the 2nd Defendant M/S Litho Pack Limited and therefore it is wrong to join the 1st Defendant Mr. John Hope Mukasa who is a Director of the 2nd Defendant as a Defendant in the suit.

For the Plaintiff it is submitted that the 1st defendant who is the Managing Director of the 2nd defendant, is being sued in his own right and in any event the plaintiff intends to pierce the veil of incorporation.

The applicable law on the subject of preliminary objections is order 6 rr 27 and 28 of the CPR. These provide as follows: -

"27 any party shall be entitled be entitled to raise by his pleadings any point of law, and any point so raised shall be disposed of by the court at or after the hearing.

Provided that by consent of the parties, or by order of the court on the application of either party, the same may be set down for hearing and disposed of at any time before the hearing.

28 If, in the opinion of the court, the decision of such point of law substantially disposes of the whole suit, or of any distinct cause of action, ground of defence, set off, counterclaim or reply therein, the court may ther upon dismiss the suit or make such other order therein as may be just."

The Supreme Court in the case of Attorney General -vs- Major General David Tinyefuza Constt Appeal 1/97 gave elaborate guidelines on the procedure for preliminary objections. Justice J.N. Mulenga (JSC) while referring to order 6 rr 27 and 28 held;

" Clearly under these provisions, the court has options. It may or may not hear the point of law before the hearing. It may dispose of the point before, at or after the hearing and it may or may not dismiss the suit or make any order it deems just. I would therefore not hold a court to be in error, which opts to hear a preliminary objection but postpones its decision to be incorporated in its final judgment, unless it is shown that material prejudice was thereby caused to either party; or that the decision was reached at an judicially..."

Clearly the procedure to be used in handling a preliminary objection is flexible and one of judicial discretion.

In the instant case the preliminary objection seeks to strike out the 1st Defendant Managing Director and leave his company as the only Defendant. The 1st Defendant regularly attends court in his own capacity and that of representative of the 2nd Defendant Company. In my view if I were to uphold the preliminary objection at this time it would probably give some comfort to the 1st Defendant on the issue of personal liability but it would not substantially disposed of the dispute at hand. The 1st Defendant is going to be a primary witness for the 2nd Defendant and will probably remain in court throughout the trial. I do not therefore see any

material prejudice if I postpone my ruling on the objection now to be incorporated in my final judgment on the merits after the hearing.

I accordingly defer my ruling on the preliminary objection until my final judgment in this case.



Geoffrey Kiryabwire
Ag. JUDGE

Date.....28/06/04