IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA FIRST INSTANCE DIVISION

(Coram: Jean-Bosco Butasi, PJ, Isaac Lenaola, DPJ, John Mkwawa, J, J, Faustin Ntezilyayo, J, Monica Mugenyi, J)

APPLICATIONS NOs. 8 and 9 of 2014

(Arising from Reference No. 5 of 2013)

BETWEEN

M/S QUALITY CHEMICAL INDUSTRIES LTD.....1ST APPLICANT

M/S NATIONAL MEDICAL STORES .....2ND APPLICANT

AND

GODFREY MAGEZI.....RESPONDENT

19TH JUNE 2014

RULING OF THE COURT

1. The Applications herein, namely, **Application No. 8 of 2014** dated March 31, 2014 and filed in Court on April 1, 2014; and **Application No. 9 of 2014** dated April 3, 2014 and filed in Court on April 4, 2014 arise from **Reference No. 5 of 2013** which is dated July 24, 2013 and filed in Court on July 25, 2013. Those Applications are brought under Rules 21 (1) and (5) and 51 (2) of the Rules of this Court and were consolidated and heard together on 2nd June 2014.

2. It is common ground that in **Application No. 8 of 2014,** the Applicant (then named as the Fifth Interested Party), is M/s Quality Chemical Industries Ltd. It is also common ground that in **Application No. 9 of 2014** the Applicant (then named as the Fourth Interested Party) is M/s National Medical Stores Ltd.

3. It is on record that on September 20, 2013, Quality Chemical Industries (hereinafter to be referred as **"the First Applicant"**) engaged the services of M/s Semuyaba, Iga & Co. Advocates of P. O. Box 12387 Kampala, Uganda whereas, National Medical Stores (hereinafter to be referred as **"the Second Applicant"**) engaged the services of M/s Kiwanuka & Karugire Advocates; Plot 5A Acacia Avenue, Kololo – P. O. Box 6061, Kampala, Uganda to represent them in **Reference No. 5 of 2013.**

4. The Attorney General of Uganda (then and now the Respondent) appeared on behalf of other Interested Parties

including the Inspector-General of Government (then named as the First Interested Party).His address for purposes of this matter is Plot No. 1, Parliament Avenue, Kampala, Uganda.

5. The Respondent in the instant matter is Godfrey Magezi (the Applicant in the aforesaid Reference) who engaged the services of M/s Nyanzi, Kiboneka & Mbabazi Advocates, Plot No. 103 Buganda Road, P. O. Box 7699, Kampala, Uganda.

6. In the proceedings before us, the Parties were represented as follows:

    i) Mr. Peter Kauma, holding brief for Mr. Justin Semuyaba for the First Applicant;
    ii) Messrs Peter Kauma and Kiryowa Kiwanuka appeared for the Second Applicant;
    iii) Mr. George Karemera advocated for the Attorney General of the Republic of Uganda hence also the Inspector-General of Government and;
    iv) Mr. Mohammed Mbabazi and Ms. Amnest Nayasheki appeared for the Respondent.

7. The facts leading to the instant Application are generally not in dispute. On July 25, 2013 the instant Respondent filed **Reference No. 5 of 2013** and named the Inspector-General of Government as the First Interested Party (hereinafter referred to as **"the IGG"**). The First and Second Applicants in this matter were named as the Fifth and Fourth Interested Parties, respectively.

8. On August 15, 2013, the Registrar of this Court served the IGG with a notification of summons requiring him to file a response or written statement in regard to the Reference aforesaid. The First and Second Applicants were on August 13 and 14,2013, respectively served with the notification of summons requiring them to file a response/reply to the aforesaid Reference. Consequently, the First Applicant filed its Response/Reply on September 20, 2013. The IGG filed his Response/Replies upon the Respondent on September 27, 2013.

9. Thereafter, on November 25, 2013, the Respondent filed an Amended Statement of Reference which also purported to withdraw the Reference as against all the Interested Parties.

10. On December 11, 2013, the Respondent then wrote a letter to all Interested Parties informing them that he had withdrawn the Reference against them. For ease of reference we have found it necessary to reproduce in full the contents of the aforesaid letter. It reads as follows:

> *"Dear Sir/Madam,*
>
> ***RE: AMENDMENT OF EACJ REFERENCE NO. 05 OF 2013 AND DISCOUNTINUANCE OF THE REFERENCE AGAINST INTERESTED PARTIES***
>
> *This is to give you notice that the above Reference was amended and the Reference against yourselves/Clients as Interested Parties was withdrawn and/or discontinued. A*

copy of the amended Reference (without annexures) is attached.

As you are aware, there is no such Party called Interested Party. We regret any inconvenience caused.

Yours faithfully,

NYANZI, KIBONEKA & MBABAZI
ADVOCATES"

11. Upon receipt of the aforementioned letter, both Applicants immediately reacted and on December 14, 2013, the First Applicant's counsel wrote to the Registrar of this Court and copied his letter to the Respondent, complaining about the manner in which the Reference was withdrawn against his client. The gravamen of his complaint was that the terms of the withdrawal or discontinuance were not agreed upon and that there was no provision made in the said letter for payment of costs.

12. Counsel for the Second Applicant, not unlike the First Applicant's Counsel, on December 16, 2013 wrote to the Respondent's Counsel whereupon he also demanded for payment of legal costs, incurred in defending the Reference.

13. For unknown reasons, Counsel for the Respondent did not find it necessary to respond to both Applicants, and the duo found it compelling to seek redress from this Court as is evident from the grounds of their Applications as set out in their supporting affidavits. The Affidavits in question are

those of one Terry Nantongo for the First Applicant, sworn on March 31, 2013 and her Supplementary affidavit dated May 20, 2014.

14. The Second Applicant on his part relies on the affidavit of one Apollo Newton Mwesigye sworn on April 3, 2014.

15. In rebuttal the Respondent, through his Counsel denied any liability for costs and in support of his denial relied on his own affidavit sworn on May 14, 2014.

16. On June 2, 2014 when the matter was before us, all Parties conceded to the consolidation of the two Applications, and so they were duly consolidated. At the hearing of the consolidated application, Counsel for the Applicants, in a nutshell, submitted to the following effect:

    i. That their application was premised on Rules 51(2), 21 (1) and (5) of the Rules of this Court. It was their argument that the Respondent had impleaded them as interested parties and that the withdrawal/discontinuance of the matter against them was made on December 11, 2013 which is well over five (5) months since they were joined as Parties in the aforementioned Reference;

    ii. It was their further argument that by the time the Respondent decided to withdraw/discontinue the matter against them, they had already filed their respective responses and it was also their contention that they were compelled to do legal research as the matter was not

by any stretch of imagination of a simple nature. They further contended that they therefore made extensive research in preparation for the hearing of the Reference and in the process incurred expenses. It is on the basis of the foregoing and having regard to other costs that they had incurred in the process, that they are now before this Court pursuing their allegedly entitled costs;

iii. It was the Applicants' further contention, that they are in full agreement with the Respondent, as is evident in paragraphs 4, 5, 6 and 7 of Godfrey Magezi's affidavit in reply, that there is no provision for Interested Parties under the Rules of this Court. It was, however, the argument of both learned Counsel for the Applicants that as the Applicants were served with notification to respond within forty five (45) days, and that being an order of the Court they could not, as suggested by the Respondent in his affidavit aforesaid (paragraphs 7 and 8), simply ignore the Court's notification;

iv. It was also the Applicants' case that the Respondent impleaded them when he was fully aware that the Rules of this Court do not provide for interested parties and that the Respondent's Counsel cannot avail himself of the defence of an honest mistake or inadvertence on his part;

v. Counsel for the Applicants also urged that given the factual background of the matter now in Court and being guided by previous decisions in East Africa on similar matters, they could not simply ignore a court order or

simply sit idly by, while there was a Court notification of summons requiring them to file their response(s). Learned Counsel further contended that those who choose to ignore court orders do so at their own peril;

vi. They further argued that absence of rules of the Court setting the procedure to be followed when a party is wrongly sued does not also warrant a litigant to idle away;

vii. In support of what they did in the matter now in question, they referred us to a decision of the High Court of Uganda viz. **PCCW Global (HK) Ltd vs Gemtel Ltd,Misc.Civil Application No.0247 of 2011** where the Court held that where a suit is withdrawn and the parties have filed no consent on costs, then the Court has to determine as a matter of discretion whether costs are payable by the party withdrawing the suit;

viii. Counsel for the Applicants concluded by submitting that although they were improperly brought before this Court and yet by appearing they have incurred costs, then they were entitled to costs as provided under Rule 111 (i) of the Rules of this Court, which unequivocably states that costs follow the event, unless the Court for good reasons orders otherwise;

17. Mr. George Karemera, Senior State Attorney, representing the IGG associated himself with the submissions of Messrs Peter Kauma and Kiryowa Kiwanuka ,learned Counsel for the Applicants and further urged the Court to uphold Rule 111

(1) of this Court's Rules and grant the IGG costs incurred consequent to being improperly brought to Court;

18. The Respondent through the submissions of Mr. Mohammed Mbabazi, learned Counsel appearing for him, made a spirited defence against the Application. The reasons for his opposition are clearly spelt out in the affidavit in reply sworn by the Respondent on May 14, 2014.

19. It was the Respondent's further case that:-

(a) There was no provision in the Rules of this Court for a party to a Reference filed in this Court to be referred to as an Interested Party;

(b) The Applicants ought to have applied as interveners or amicus curiae rather than file responses as they did;

(c) That the responses filed by the Applicants were not a chargeable item under the Third Schedule of this Court's Rules. Hence, the Respondent is not entitled to the costs sought;

(d) That the Application under Rule 51 (b) is incompetent and procedurally irregular.

20. It was also the Respondent's case that the notification of summons that the Applicants had received was from the Registry and not the Respondent and so the Respondent cannot be penalized for an act that was committed by the Court.

21. For the above reasons, the Respondent urged the Court to dismiss the consolidated Applications.

22. On our part, we have taken a close look at the proceedings before this Court, commencing on July 25, 2013 when the instant Respondent filed **Reference No. 5 of 2014** and named the Applicants in this matter and the IGG as Interested Parties. We have then, travelled the whole way up to June 2, 2014 when the learned Counsel for the Parties appeared before us, and made their oral submissions in support of their respective stances on the matter.

23. The matter is now before us for a formal determination as to whether or not the instant Applicants and the IGG (previously named as Interested Parties) are entitled to costs as prayed.

24. It is common ground between the Parties that the Respondent had on July 25, 2013 brought to Court the instant Applicants and the IGG in **Reference No. 5 of 2014** and that on November 25, 2013 he withdrew the Reference against them. This is when he filed in this Court an amended statement of the Reference. It is also on record, as amply shown earlier in this Ruling, that the Respondent went another step further, namely, on December 11, 2013 he wrote a letter to all the then Interested Parties informing them that he had withdrawn the Reference against them.

25. It is plainly clear from the Respondent's answer to the Application that he is not denying the fact that the Applicants and the IGG were misjoined in the Reference.

26. The Parties in this matter are also in full agreement that neither the Rules of our Court nor the Treaty provide for what is called Interested Parties.

27. It can also be gathered from the submissions of Counsel for the Parties that the so-called Interested Parties were therefore not properly brought before this Court as they were sued in a capacity unknown to the law of the East African Community.

28. The Respondent on his part has not at all denied that the Applicants and the IGG had received a notification signed by the Registrar of this Court requiring them to file their responses; and that they filed their respective responses and that in doing so they incurred costs.

29. The only question that is now left for consideration and determination is whether or not the Respondent should be condemned to pay the costs incurred by the Parties in the Reference which has been withdrawn against them. This is where, as we can see, the Parties are at issue.

30. Mr. Mbabazi, for the Respondent, unlike his learned colleagues, neither referred us to any authority in support of his stance nor did he give us substantial reasons why this Court should not reimburse the Applicants for their labour and other incidental costs incurred in obeying the notification orders.

31. This Court, like the Court in **PCCW Global** (supra) and in the case of the Court of Appeal of Uganda at Kampala **Civil**

Application No. 109 of 2004 - Amrit Goyal v. Harichund Gayal & 3 Others, is firmly of the following view:-

(a) The discretion to award or not to award costs is a judicial function;

(b) That a court order including a notification of summons is not a mere technical rule of procedure that can be simply ignored. Court orders must be respected and complied with. Those who choose to ignore them do so at their own peril;

(c) Any Court, worthy of its name, cannot condone deliberate acts of litigants who with impunity drag others to court by any names. Those who choose to do so, do so at their own peril;

(d) All canons of fairness dictate that costs in any case, follow the event. The only time the court will deny a successful party costs is when there has been conduct on the part of the successful party which would call a court to exercise its discretion against the successful party.

32. It is on the basis of the foregoing that we are, respectfully, not in agreement with Mr. Mbabazi that the Applicants are not entitled to costs simply because there is no provision for interested parties in our Court Rules.

In fact, in his submissions, Mr. Mbabazi stated that the Applicants were sued as Interested Parties to prod them to join the proceedings as interveners and/or amicus curiae but they

failed to do so. With respect, that argument is speculative and unreasonable. **In McPherson vs. BNB Paribas [2004] 3 AII E. R. 226**, it was held inter-alia that ***"...tribunals should not follow a practice on costs, which might encourage speculative claims, by allowing claimants to start cases in the hope of receiving an offer to settle, failing which, they could drop the case without any risk of a costs sanction."***

33. We are in full agreement with the above holding and it follows from what we have so far found and held, that costs are payable when there is a withdrawal of or discontinuance of a Reference or for wrongly impleading a party, unless parties to the Reference on their own volition do otherwise under Rule 51 (2) of the Court's Rules of Procedure.

34. In light of the above, we hereby make the following orders:

    (a) The Applicants in this matter as well as the IGG, are entitled to costs as prayed from the date of this order until payment in full;

    (b) The Respondent is also condemned to pay costs of this Application.

It is ordered accordingly.

Dated, Delivered and Signed at Arusha this **19th** day of **June 2014.**

……

JEAN BOSCO BUTASI

PRINCIPAL JUDGE

……

ISAAC LENAOLA

DEPUTY PRINCIPAL JUDGE

……

JOHN MKWAWA

JUDGE

……

FAUSTIN NTEZILYAYO

JUDGE

……

MONICA MUGENYI

JUDGE