THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION

HCT-00-CC-MA-0656 OF 2005
(ARISING OUT OF HCT-00-CC-CS-0384 OF 2001)

SAMWIRI KIBUUKA ……..…….. APPLICANT

VERSUS

ERIYA LUGEYA LUBANGA…….RESPONDENT

BEFORE: HON JUSTICE LAMECK N. MUKASA

RULING:

On 1st October 2004 the Respondent closed his case in High Court Civil Suit No. 0384 of 2001. On 25th August 2005 the case having been adjourned five times to enable the applicant produce his evidence but on all those occasions the applicant having so failed this court ordered the case closed and directed the parties to file in their written submissions. This was in the absence of the applicant and his counsel, then Ms Gloria Basaza Ochieng of the FIDA (U) Legal Aid Clinic. On 2nd September 2005 the applicant filed this application by Notice of Motion for orders that:

1. The proceedings be reinstated interparties
2. In the interest of justice the defence be heard and the matter be determined on its merits.

The application was supported by the affidavit of Ms Gloria Ocheing, counsel for the applicant, wherein she stated that:-

1. She was delayed in the Nakawa Court before Justice Oumo Oguli in H.C.C.S No. 103 of 2005 and therefore failed to be in Court in time for hearing of this case on 25th August 2005.
2. The matter was of such a rare nature that a family was partially evicted.
3. She informed the Registrar that she would be late but this information was not communicated to the Court.
4. The applicant and his witnesses were all present in Court.

Mr. Kabanza for the Respondent objected to the application on the grounds that:-

1. The application contravened Order 6 rule 1 (b) of the Civil Procedure Rules in that it was not accompanied by a brief summary of evidence to be adduced, a list of witnesses, and a list of authorities as required by the rule
2. The affidavit in support was defective that it did not indicate whether the facts deponed to therein were based on the deponent's knowledge, information or belief.
3. The application was not brought under any provision of the law.

Starting with ground 1 above a Notice of Motion is a pleading and Section 2 of the Civil Procedure Act, and Order 6 rule 1 (b) of the Civil Procedure Rules require every pleading to be accompanied by a brief summary of the evidence to be adduced, and a list of witnesses, documents and authorities to be relied upon. As was observed by Justice Ntabagoba P.J., in Richard Mwirivumbi V/S Jada Limited HCCS No. 978 of 1996 the above rule was intended to avoid the situation in which parties ambush their opponents with matters not contemplated. However, Order 48 of the Civil Procedure Rules specifically provides for Motions and other applications. Rule 3 of the Order provides:-

> " Every Notice of Motion shall state in general terms the grounds of the application and where any motion is grounded on evidence by affidavit a copy of the affidavit intended to be used shall be served with the notice of motion"

This is a specific provision as to what shall accompany this particular type of pleading as opposed to the general provision under Order 6 rule 1 CPR. It is trite law of statutory constitution that where there is a specific legislative provision and a general provision on a particular matter or procedure, the specific provision takes precedence over the general provision. See Sule Pharmacy Ltd V/S Registered Trustees of Khoja Shia Janati H.C. Misc. Appl. No. 147 of 1999. The instant application is by Notice of Motion and accompanied by an affidavit, therefore, the evidence is by affidavit. Therefore the evidence to be relied upon its already availed to the opposite party. Similarly the witness was the deponent to the affidavit, the documents are normally annexed to the affidavit and in most cases the authority will be the law under which the application is brought. Therefore, an application by Notice of Motion supported by an affidavit is an exception to the general requirements in Order 6 rule 1 (b) CPR. That ground fails

With regard to the second ground of opposition Order 17 rule 3 (1) CPR provides as follows:

> "Affidavits shall be confirmed to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which states of his belief may be admitted, provided that the grounds thereof are stated"

An affidavit will normally contain a paragraph where it is stated what particular facts are true to the knowledge of the deponent and what is stated as information believed to be true by the deponent. The grounds of belief must be stated with sufficient particularly to enable the Court to determine whether it would be safe to act on the deponent's belief. In the affidavit in support of this application such a paragraph is lacking. In her reply Ms Basaza Ochieng argued that it is obvious from the affidavit that the matters deponed to mere in her own knowledge. This might be true with regard to matters she deponed to in paragraph 1 to 5 of the affidavit but not paragraph 6 since she herself was not in Court to see the applicant and his witnesses in Court. An affidavit must disclose the matters based on the deponent's knowledge and those based on

information and belief. An affidavit, which fails to do so is defective and cannot be relied upon, see Kabwimukya V/S Kasigwa 1978 HCB 251. That ground succeeds.

Thirdly, the application did not indicate under what provision of the law it was made. Ms Basaza Ochieng was not bothered by this anomaly. However, citing of a wrong rule in the notice of motion has been held to be a mere technicality, which is not fatal to application as it does not occasion any failure of justice to the other party. See Patrick Kawoya V/S C. Naava (1975) HCB in line with Article 126 (2) (e) of the Constitution, where the essence of the application is clearly brought out but the law under which the application is made is not indicated I think that should be a technicality, which can be disregarded.

However, having held that the affidavit is support of this application was defective, I find that there was no evidence to support the application. The application is accordingly dismissed with costs.

Hon. Lameck N. Mukasa

Judge

30th September, 2005