

Last Updated: 12 July 2007

DFCU Leasing Co Ltd V Nasolo Faridah- HCT-00-CC-MA-0074-2007 [2007] UGCommC 24 (23 March 2007)

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CC-MA-0074-2007

(Arising From HCT-00-CC-CS-0432 & 0536 -2006)

Dfcu Leasing Co Ltd Applicant/Defendant

Versus

Nasolo Faridah Respondent /Plaintiff

23 March 2007

BEFORE: HON. MR. JUSTICE LAMECK N MUKASA

RULING NO 1

This is an application for consolidation of HCCS No. 432 of 2006 and No. 536 of 2006. When the application came up for hearing Mr. Tugume Counsel for the Respondent, raised a preliminary objection on two points of law:-

1. The Application is brought under Statutory Instrument No. 75 – 1 a non – existent law.
2. The Application did not comply with the provisions of Order 6 rule 2 of the Civil Procedure Rules.

The application was brought by Chamber Summons under Order 11 rules 1 and 2 of the Civil Procedure Rules S I 75-1. Mr. Tugume submitted that the Application should have been under Statutory Instrument 71-1. Mr. Kabiito Karamagi in reply did concede the mistake but invited court to be practical and allow the application to be heard on its merit as the Respondent could not have been misled by the mistake. Counsel referred to **Development Finance Company of Uganda Ltd Vs Stanbic Bank Uganda Ltd & Another C.C. Misc. Application No. 88 of 99** where an affidavit accompanying a Notice of Motion was headed "Affidavit in Reply" instead of "Affidavit in Support". Their Lordships accepted Counsel's explanation that this was a "Slip of the pen" and held that it was such a minor irregularity which was of no consequence.

Article 126 of the Constitution requires that Court should administer substantive justice without

undue regard to technicalities. This provision can be involved to cure procedural defects. See **Alcon International Vs Kasiry Byarugaba & Co Advocates (1995) III KALR 91, Col (Rtd.) Dr. Kiiza Besigye Vs Museveni Yoweri Kaguta & Electoral Commission SC Electoral Petition No. 1 of 2001.** The test applicable is whether the irregularity is serious enough to prevent the Court from hearing the application and determining it on its own merit. If the non observance of the procedural rules in issue would not lead to injustice court should be willing to over look it, otherwise it should not. See **Intraship (U) Ltd Vs GN Combine (U) Ltd (1994) VI KALR 42, Remonde Enterprises Ltd Vs Florence Atto & Anor H C Miscellaneous Application No. 403 of 2006.**

Save for the wrong Statutory Instrument number quoted this application was for consolidation brought by the right procedure that is by Chamber Summons, and under the right provision of the law, that is under Order 11 rules 1 and 2 of the Civil Procedure Rules. Therefore, the misquotation of the Statutory Instrument Number will not cause any injustice and could not have misled the Respondent. The first preliminary objection is accordingly overruled.

The Chamber Summons was accompanied by an affidavit sworn by Mrs. Ruth Sebatindira. In paragraph 7 of the affidavit it is averred:

"7. That in both cases, the parties will rely on closely related facts similar documents, correspondences and witnesses to prove their respective cases."

This application was not accompanied by a brief summary of evidence to be adduced , a list of witnesses, a list documents and a list of authorities to be relied upon as required by Order 6 rule 2 of the Civil Procedure Rules. Mr. Tugume submitted that the above rule is mandatory and argued that the averment in paragraph 7 above shows that there were documents intended to be relied upon which should have been listed and the list attached to the application. Counsel relied on **Kenfreight (U) Ltd Vs Henry Sebuunya H.C. Misc. Appl. No. 0353 of 1998; Sule Pharmacy Ltd Vs The Registered Trustees of the Khoja Shia Hana Shar Janati; .C. Misc Appl. No. 1 of 1999 and Rajab Kyangwa Vs Pallisa Town Council & Anor H.C. Misc. Appl. No. 19 of 2000.**

In **Kenfreight Vs Sebuunya** (above) Ntagoba P.J. held that non-compliance with the then equivalent of Order 6 rule 2 CPR rendered an application improperly filed before Court and could be dismissed. Also in **Richard Mwirumubi Vs Jada Ltd H.C.C.S No. 978/96** His Lordship upheld a similar objection and stated that the requirement was mandatory. However, in **Sule Pharmacy Ltd** case (above) Justice James Ogola distinguished the holding in **Kenfreight Vs Sebuunya** (above) and held that there are special circumstances that are recognized in the Civil Procedure Rules in which the rule does not and cannot apply with full force and effect.

In **Kyangwa Vs Palisa T.C.** Justice Maniraguha held that the requirement that the pleadings shall be accompanied by the list of witnesses, documents and authorities is subject to their being necessary for that particular pleading. That what is to be relied upon is what should be listed, hence if you have no witnesses nor documents nor authorities to rely on there is no logic to list Nil, but if you have them and they are not listed you do so at your peril, as you will have nothing then to rely on.

The Civil Procedure Rules provide circumstances under which pleadings can be struck out but they do not include where a party fails to attach the lists mentioned in Order 6 rule 2 CPR. My view is that in the event of non-attachment, the party would have only foregone his/her right to rely on the witnesses, documents, or authorities not listed. In the instant case it was stated in the Chamber Summons that "it is premised on the grounds detailed in an affidavit of support deponed by Mrs. Ruth Sebatindira..." It was averred in paragraph 5 of thereof as follows:-

"The master lease agreement and the vehicle lease schedules are attached hereof and marked "A", "B" and "C".

The said documents were actually attached. As observed by Justice Ntabgoba PJ in **Richard Mwirumubi Vs Jada Ltd** (above) Order 6 rule 2 CPR was intended to avoid a situation in which parties ambush their opponents with matters not contemplated. In the instant application the Chamber Summons contains the summary of the case and is accompanied by an affidavit which is the evidence to be adduced. The witness is the deponent, the documents are annexed to the affidavit and the most relevant authority is the particular provisions of the law under which the application was brought. There is no issue of being ambushed and though not listed the required documents are already supplied. Therefore the second objection is also over ruled.

The objection is overruled. The application shall proceed to be heard on its merit. Costs shall be bound by the order as to costs in the main application.