THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)
HCT-00-CC-MA-48 OF 2007
(Arising out of CS No. 751 of 2005)

BETTY K. KABACHENGA==========APPLICANT

VERSUS

STANHOPE FINANCE COMPANY LTD======= RESPONDENT

BEFORE: HON. JUSTICE LAMECK N. MUKASA

RULING:

This is an application by Notice of Motion for orders that:

(i) The exparte decree in Civil Suit No. 751 of 2005 be set aside and that the consequential execution proceedings be stayed.

(ii) Costs of the application be provided for.

The application was brought under Order 9 rules 9 and 25, Order 48 rules 1 and 2 of the Civil Procedure Rules and section 98 of the Civil Procedure Act.

When the application was called for hearing Mr. Mathias Sakatawa, Counsel for the Respondent, raised a preliminary objection that the application was brought under a wrong law. That the application arose from a summary suit filed under Order 36 of the Civil Procedure Rule. He agued, and rightly so, that the application should have been brought under rule 11 of Order 36 which provides:

> *"After the decree court may, if satisfied that the service of the summons was not effective, or for any other good cause, which shall be recorded, set aside the decree, and if*

necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the court so to do, and on such terms as the court thinks fit".

Counsel further pointed out that the application did not apply for anything else other than setting aside the decree and staying the execution thereof.

Order 9 rule 9 of the Civil Procedure Rules refers to assessment where some defendants have filed a defence where there are several defendants, while rule 25 of the order refers to procedure in case of non-attendance of one or more of several defendants. It has no application to the instant application. Also Order 48 CPR which concerns district registries has no application to this application. In his reply Mr. Dalton Opwonya, Counsel for the Applicant, did concede that the provisions under which the application was brought were not applicable. He submitted that the insertion of the wrong orders and rules was what he termed a copy and paste error in typing on the computer. Counsel argued that the body of the Notice of Motion and the affidavit in support did clearly show the gist of the application that the exparte decree be set aside and that the consequential execution thereof be stayed. He invited court to invoke the provisions of section 98 of the Civil Procedure Act, section 33 of the Judicature Act and Article 126 of the Constitution.

Clearly this application was brought under the wrong provisions of the law. However in **Intraship (U) Ltd Vs- G.N Combine (U) Ltd [1994] VI KALR 42** having established that the application therein had been brought under the wrong law Justice Sempa-Lugayizi ruled that the question should be whether the irregularity is serious enough to prevent the court from hearing and determining it on its our merit. That the answer would depend on whether non observance of the procedural rules in issue would lead to injustice. If it would not, then the Court should be willing to over-look it otherwise it should not. Chief Justice Benjamin Odoki in his judgment in **Col. (Rtd) Dr. Besigye Kiiza -Vs- Museveni Kaguta & Electoral Commission SC. Electoral Petition No. 1 of 2001.** Observed that a liberal approach is in line with the Constitutional enactment in Article 126 of the Constitution that courts should administer substantive justice without undue regard to technicalities. That rules of procedure should be used as handmaids of

justice but not to defeat it. In **Alcon International –vs- Kasirye Byaruhanga & Co Advocates [1995] 111 KALR 91** Justice Musoke Kibuuka held that procedural defects can be cured by the invocation of Article 126 (2) (e) of the Constitution. See also **Allen Nsubuga Ntanaga –vs- Uganda Microfinance Ltd & other HCT-00-CC-MA-0426-2006.**

Mr. Sekatawa submitted that to enjoy the protection of the provision of section 33 of the Judicature Act the application must be properly brought before court. An application under Order 36 rule 11 of the Civil Procedure Rules must be by Notice of Motion accompanied by an affidavit. See **Order 52 rules 1,2 and 3 of the CPR.** The instant application is by Notice of Motion, accompanied by an affidavit and was served on the opposite party. It was therefore brought by the right procedure but under the wrong provisions of the law. It was responded to by the Respondent who filed an affidavit in reply sworn by Mr. David Mulumba. Therefore to disregard the error and hear the application on merit will not prejudice the Respondent or cause injustice to any party.

Considering all the above I would have allowed this application to proceed on its merit. But if I were to hear and probably allow the application then what next!!. As pointed out by Mr. Sekatawa the application is only for orders setting aside the decree and staying the execution. The applicant does not make any application beyond that. Particularly she makes no application for leave to appear and defend the suit. I get an impression that there is an intention to delay justice. It is a constitutional principal that justice shall not be delayed – see Article 126 (2) (b) of the Constitution.

On a total evaluation of all the circumstances of this application the preliminary objection is upheld and the application struck out with costs to the Respondent.

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Lameck N. Mukasa

JUDGE

25/05/07