

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL COURT DIVISION)**

**HCT - 00 - CC - MA - 121 - 2012**  
**(Arising from HCCS No 406 of 2009)**

1. ISMAIL KARMALI  
2. VICTORIA TRADING CO.LTD  
3. PAYLESS SUPERMARKET LTD

} .....APPLICANT/DEFENDANT  
VERSUS

**SHAILESH RUPARELIA .....RESPONDENT/PLAINTIFF**

**BEFORE: HON. JUSTICE GEOFFREY KIRYABWIRE**

**Ruling**

The applicants but more particularly the first applicant Mr. Ismail Karmali filed this application to quash and set aside the decree of HCCS 406 of 2009 dated 13<sup>th</sup> February 2012. He also seeks to quash and set aside a warrant of arrest issued against him under the said decree.

The case for the applicants is that on the 6<sup>th</sup> September 2010 the parties entered into a partial consent judgment which was followed by a judgment of this Court on the outstanding issues on the 19<sup>th</sup> January 2012. It is the case for the applicants the judgment of the 19<sup>th</sup> January 2012 was for general damages and interest however costs were not provided for.

The Respondent then filed a bill of costs which was set for determination and also concluded on the 9<sup>th</sup> February 2012. The applicant's counsel was unable to be present in court on the day of the taxation hearing due to sickness and asked Mr. Geoffrey Otim Advocate to hold his brief and pray for an adjournment. However, the Learned Assistant Registrar did not grant the adjournment and proceeded to determine the bill of costs ex parte. The Registrar then awarded costs of 45,007,500/= plus VAT standing at 8,101,135/=. On 13<sup>th</sup> February 2012 a decree was extracted by counsel for the

respondent and this was followed by an application for execution of a decree following which a warrant of arrest was issued.

The case for the respondents is that the learned Registrar acted properly and that this application is misconceived.

Mr Jimmy Muyanja appeared for the applicants while Mr Joel Olweny appeared for the respondent.

The applicant submitted that the Registrar exceeded her jurisdiction in three instances;

- a) In attending to the Application for Taxation of Costs by the respondent and
- b) In signing off the Decree which provided for costs which had not been awarded either in the Partial Consent judgment or judgment. Furthermore the Registrar erred in signing the certificate of costs contrary to Order 21 Rule 8 of the Civil Procedure Rules
- c) In issuing the ex parte taxation and taxation award orders in favour of the Respondent

on the issue of the attending to the Bill of Costs when no costs had been awarded by Court, counsel for the applicant submitted that the Decree offends Order 21 rule 6 (1) of the CPR which provides that the Decree must agree or tally with the Judgment. Connected with this the said Decree also has further defects in that it is not dated contrary to Order 21 Rule 7 (1) of the CPR and that it was not submitted to opposite counsel for approval contrary rule 7 (2) of the same Order.

On the issue of the ex parte taxation of the Bill of Costs counsel for the applicant submitted that the Learned Registrar did not properly exercise her power as she was notified that counsel in conduct of the case was sick but she went ahead to tax the bill none the less. It is the case for the applicants that sufficient cause had been shown for the absence of counsel for the applicant during the taxation and by not granting the adjournment the present applicant was locked out of court without a being given a right to be heard. He referred Court the case of **Jim Muhwezi V AG & anor** MA 18/2007 (CA) where it was held that the right to be heard and a fair hearing are sacrosanct.

Counsel for the applicant also submitted that the applications for execution of the Decree were also defective. He referred Court to the Application for Execution of the Decree dated 14<sup>th</sup> February

2012 and submitted that it should have been made by Chamber Summons or Notice of Motion under Order 22 rule 8 (2) rather than by way of a form. Counsel for the applicant submitted that such an application ought to have been heard by a judge but not a Registrar. He further submitted that a Registrar had no powers under the Order 22 Rule 35 to issue a warrant of arrest as Legal Notice No 04 of 2003 did not give Registrars such powers

He further pointed out that the application for execution was only against the first applicants by way of arrest and detention without recourse to attachment of property first.

He also pointed out that only the first applicant had been cited for execution yet he was not the only the defendant to the said head suit.

Counsel for the applicant also observed that a previous warrant for arrest had been applied for on the 8<sup>th</sup> February 2011 but had been deferred to the trial judge for determination which had not been done.

Counsel for the applicant also submitted that the tests for determining whether or not to grant a warrant of arrest had not been met. These included the right of the judgment debtor to declare insolvency under Section 39 (3) (4) of the Civil Procedure Act (CPA); an investigation as to whether the judgment debtor has means to pay off the debt under Order 22 rule 37 (1) of the CPR or evidence that the judgment creditor had misconduct himself under Order 22 Rule 37 (2) of the CPR.

Counsel for the applicant further submitted that there was a Constitutional issue that it would be wrong to deprive a civil debtor of his or her liberty unless due process had been followed. In this regard he referred me to the case of **Tatiana Malachi V Cape Dance Academy International (Pty) Ltd** [2010] ZACC 13.

Counsel for the respondent submitted that the Decree did conform to the Judgment but the issue of costs was yet to be determined.

He submitted that there was no miscarriage of justice occasioned by the said Decree in not being sent to counsel opposite for approval and that this could not be a basis for quashing the Decree as this would lead to a multiplicity of proceedings.

On the issue of costs specifically counsel for the respondent submitted that Section 27 (2) of the CPA provides that costs in any action shall follow the event unless Court or the Judge shall for good cause Order otherwise. In this regard he referred me to the case of **Paul Mwiru Versus Hon. Igeme & 2 Ors Election Appeal No 6 of 2011**.

He submitted that the applicant only sought to deprive the respondent of the fruits of his Judgment which was an abuse of Court process contrary to Section 98 of the CPA and 33 of The Judicature Act.

Counsel for the respondent submitted that the Learned Registrar was correct to hear the taxation ex parte because she clearly stated in her Ruling that a mere e-mail notification that one was sick did not amount to sufficient cause for an adjournment under Order 17 Rule 1.

Counsel for the respondent did not agree that application for execution should be by Chamber Summons or Notice of Motion as in Order 22 rule 89. He submitted that the correct procedure was to be found in Order 22 rule 8 which provided that all applications for execution shall be in writing and in a tabular form which was the format followed in the applications for execution in this case.

He further did not agree that the Registrar did not have the power to handle executions of this nature as Order 50 Rule 4 of the CPR specifically empowered Registrars to handle executions.

Counsel for the respondent further submitted that for there to be notice to show cause before execution then under Order 22 rule 19 this should been done if a period of more than one year has passed from the time of the Decree was passed. However the same rule provides that this notice may be dispensed with if there such notice shall cause undue delay.

Counsel for the respondent further submitted that execution by way of warrant of arrest was not a violation of the Constitutional Rights of the applicant.

I have carefully considered the submissions of the parties and the authorities for which I am grateful A lot of the issues referred to are procedural as to how to enforce a judgment. Both counsels gave spirited submissions.

The first ground relates to the issue of costs. It is not in dispute that costs were not awarded in my judgment that was delivered on the 19<sup>th</sup> January 2012. The case for the applicant is that there should have been no taxation of costs as they were not awarded by Court.

Section 27 of the CPA deals with the award of costs and reads,

***“The fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of the powers in subsection (1); but the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”***

In the case of **Kamugisha V Uganda Revenue Authority** HCCS No 311 of 2011 the **Hon. Justice Madrama** addressed this matter of costs and section 27 of the CPA and held that

*“My interpretation of the provision is that costs are at the discretion of the judge and the general rule is that costs shall follow the event unless the court/judge shall for good reason otherwise order. Where the court decides not to award costs, it shall give the reason why. In other words, it is the exception to the general rule that costs shall not follow the event.”*

I agree with this finding of the learned Judge and it was clearly a slip/omission of Court not to have awarded costs in the head suit. Counsel for the defendant on noting this deficiency could have rectified this under the slip Rule under Section 99 of the CPA before proceeding to taxation before the Registrar.

Section 99 Civil Procedure Act provides that,

***“Clerical or mathematical mistakes in judgments, decrees or orders, or errors arising in them from any accidental slip or omission may at any time be corrected by the court either of its own motion or on the application of any of the parties.”***

As it is counsel for the respondent did not do so. It was therefore wrong for the respondents to include under para (e) *“costs of the suit”* when they had not been awarded instead of applying to the Court to resolve that deficiency under the slip rule. I therefore find that it was improper for the Registrar to tax costs in favour the Respondent without them being awarded by the Court. This finding is sufficient without more for me to quash the Decree of the 13<sup>th</sup> February 2012 in so far as it provided for costs of the suit whereas they had not been awarded and set aside the execution and I hereby do so. The respondent is thus free to restart the process of taxation now with a proper Decree and proceed to execute if the applicant does not make good the Decree of this Court.

However before I leave this matter since costs are principally in the discretion of Court and taking Sections 27 and 99 of the CPA together with Section 33 of the Judicature Act it is clear to my mind that Costs should have been awarded to the respondent but this was a slip which I now correct by

awarding the costs to the respondent having been the successful party in the head suit. I am fortified in so awarding the said costs as the Hon Justice Musoke Kibuuka held in the case **Akol International V Kasirye Byaruhanga and Co Advocates [1995] III KALR 91** that procedure defects can be cured by article **126(2)(e)** of the Constitution. I fully agree with that finding.

My findings above are sufficient to dispose of this application. But before I do so there is a general finding that I wish to make regarding to the Powers of Registrars. I fully agree with counsel for the respondents that under Order 50 of the CPR Registrars of this Court are fully empowered to handle all formal Orders for the attachment and sale of property and for the issue of notices to show cause on the applications for arrest and imprisonment in execution of a Decree of this Court.

I accordingly allow the Motion as stated above and award the costs of this application to the applicant.

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Geoffrey Kiryabwire

**JUDGE**

Date: 07/05/2013

7/05/2013

9.37

Ruling read and signed in open court in the presence of;

- J. Muyanja for Applicant

- J. Olweny for Respondent

In court

- None of the parties
- Rose Emeru – Court Clerk

.....  
Geoffrey Kiryabwire

**JUDGE**

Date: 07/05/2013