THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

MISCELLENEOUS APPLICATION N0.900 OF 2014

(ARISING OUT OF MISC. APPLICATION NO. 850 OF 2014)

(ARISING OUT OF MISC. APPLICATION NO. 452 OF 2014)

(ARISING OUT OF MISC. APPLICATION NO. 13 OF 2014)

MK FINANCIERS LIMITED.....APPELLANT

VERSUS

N. SHAH & CO. LTD.....RESPONDENT

JUDGMENT

This appeal was brought under Section 98 of the Civil Procedure Act (CPA) and Order 50 rule 8 of the Civil Procedure Rules (CPR). It is seeking for orders that the decision of the Registrar in Misc. Application No. 850 of 2014 be set aside and costs of the application be provided for. It is supported by the affidavit of Mr. Male H. Mabirizi K. Kiwanuka, the managing director of the appellant company.

The grounds of appeal as set out in the notice of motion and the affidavit in support are

that:-

- The Assistant Registrar illegally proceeded with the hearing of the application before conclusion of the recusal proceedings.
- The Assistant Registrar erred in law when he entertained an application for review in which he had no jurisdiction.
- The Assistant Registrar erred in law when he proceeded with the application exparte when he should have adjourned it.

. That it is just and equitable that the appeal is allowed.

In reply, the respondent's country director Mr. Hetal Parikh swore an affidavit and averred that the assistant Registrar on the 19th day of June 2014 issued an interim order of stay of execution in misc. Application no. 456 of 2014 which was to stay in force until 25th August 2014 when misc. Application no. 452 of 2014 would be heard. Further that the application extracted an erroneous order that provided that the interim order was to remain in force pending the hearing and determination of misc.application no. 452 of 2014.He deposed that he instructed his lawyer to apply for amendment, correction or review of the interim order which was extracted without an expiry date so as to bring it in line with the ruling of the court. This court gave an elaborate history of this case in its ruling in misc. application no.764 of 2014, MK Financiers ltd Vs. N. Shah & co Ltd I find it imperative to reproduce part of that history in this judgment so as to arrive at a decision in that perspective.

"The applicant was the plaintiff in Mengo Civil Suit No, 849 of 2014 and the applicant in Misc. Applications No.414 & 415 of 2014 arising from that suit I have not had the benefit of looking at the pleadings in that suit and the applications so I am not able to state the nature of the applicant's claim therein and the orders sought for in those applications. However, what is important is that on 5th June, 2014 the learned Chief Magistrate, Mengo Her Worship Atukwasa Justin delivered a ruling In Mengo Civil Suit No.849 of 2014 and Misc. Applications No.414 & 415 of 2014. I have also not had the benefit of looking at the ruling and the orders but I can glean from the preliminary ruling of Madrama, J in Misc. Application No. 563 of 2014 that the applicant's suit was dismissed by the Chief Magistrate.

Being dissatisfied with that ruling and orders, the applicant filed Civil Appeal No. 13 of 2014 at the Commercial Court challenging the same. He also filed Misc. Application No. 456 of 2014 for an Interim order of stay of execution of the order of the Chief Magistrate and Misc. Application No. 452 being the main application for stay of execution. Despite the presence in court of the respondent's country director and counsel the learned registrar of this court heard the application for interim order of stay ex-parte on 19th June 2014 having ruled that counsel had no audience since the respondent had not filed an affidavit in reply. His Worship then made a brief ruling in the following words

"Application granted. Interim order of stay of applicant issued and it shall remain in force till 25th /8/ 2014 when the application no. 452 of 2014 shall be heard. Costs of this application shall abide the outcome thereof' following that ruling, an interim order was extracted for the Registrars signature in the following words!

"ITS HEREBY ORDERED AS FOLLOWS:

1. *An interim order doth issue staying the execution of the ruling and orders of the learned Chief Magistrate of Mengo Her Worship Atukwasa Justin in Mengo Civil Suit No.849 of 2014 and Misc. Application No.414 & 415 of 2014 delivered on 5th June 2014 until 25th August*
2. *An interim order doth issue maintaining the status quo of the parties pending the hearing and determination of Misc. Application No.452 of 2014.*
3. *Costs be in the cause."*

The learned Registrar duly signed that order on 19th June 2014. However, on 24th September, 2014, the respondent filed Misc. Application No. 850 of 2014 under Sections 98 and 99 of the CPA seeking for amendment, correction and or review of the above order by deleting clause 2 thereof on the ground that it was not contained in the learned Registrar's ruling and order reproduced above. An affidavit in reply and opposition to that application was deposed by the managing director of the respondent (applicant herein), Mr. Male H. Mabirizi Kiwanuka who averred that the learned Registrar had no jurisdiction to entertain the application for review of his orders and the respondent would raise a preliminary objection if the matter is called before the same Registrar.

The records show that when the application came up for hearing, the respondent's managing director who represented the respondent objected to the proceedings on the grounds that they had applied for recusal of the learned Registrar from hearing the case. He then prayed that the Registrar steps down from hearing the case. The learned Registrar then made a brief ruling stating that he had studied the letter asking him to step down but he did not see any plausible ground for doing so. He stated that he believed it was within his jurisdiction to hear the application. He overruled the objection and ordered that the application be heard on its merits

The records indicate that after that ruling Mr. Male caused confusion in court and he was drugged out by police and the application proceeded ex-parte and was granted with the following orders.

IT IS HEREBY ORDERED that:-

1. ***This application is granted.***

2. ***The Interim Order in <u>Misc. Application No. 456 of 2014</u> be extracted in the very words used in the ruling therein.***
3. ***Costs of this application shall be in the cause."***

Pursuant to that ruling an amended/corrected interim order was extracted in the following words:-

"ITS HEREBY ORDERED AS FOLLOWS:

1. ***This application is granted.***
2. ***The Interim Order of Stay of execution against the Respondent is issued and it shall remain in force till 25/08/2014 when Miscellaneous Application No. 452 of 2014 shall be heard.***
3. ***Costs of this application shall abide the outcome of Miscellaneous Application No. 452 of 2014."***

The applicant then filed this appeal against that ruling." [Emphasis added].

The appellant also filed Misc. Application No. 524 of 2014 and Misc. Application No. 528 of 2014. In Misc. Application No. 524 of 2014 the applicant was seeking for a declaration that the respondent's act of extracting a hearing notice for Misc. Application No. 452 of 2014 was irregular and amounts to contempt of court and the hearing notice so extracted was null and void and should be set aside. It was also prayed that the respondent be committed to civil prison for contempt of court or in the alternative be made to pay UGX 10,000,000/= as punitive remedies.

In Misc. Application No. 528 of 2014 the appellant was seeking a declaration that the respondent's act of moving court to fix an earlier date than the one indicated in the court order and the notice of motion and extracting a hearing notice for Misc. Application No. 452 of 2014 dated 23rd June 2014 was irregular and amounts to contempt of court and abuse of the court process. The appellant also sought a declaration that the Deputy Registrar's act of acting on a letter written by the 1st respondents counsel after delivering the ruling and order and issuing a hearing notice was null and void because he was functus officio having issued a court order for a life span of up to 24th August 2014.

In this appeal, the appellant objected to the affidavit in reply because it *had* attachments from newspapers which he contended Section 59 of *the evidence Act which provides that evidence must be direct.* He submitted that there is no affidavit in chief of the red paper newspaper reporter to prove that the appellant has intention to harass, disrespect and intimidate all judges. It is the submission of the appellant that such evidence contradicts Section 4 of the Evidence Act which provides that evidence must only be given for relevant facts or facts in issue. He then argued that the newspaper articles are neither relevant facts nor facts in issue. The appellant further referred to a recent Constitutional Court decision on newspaper articles in

Hon. Lt. (RTD) Kamba Saleh v AG, Constitutional Petition No. 38 of 2012 where the Court held that newspapers articles are not admissible in evidence. He prayed that on that account the affidavit be struck out or the newspaper be disregarded.

On the merits of the application, the appellant's managing director argued the second ground first, and then grounds 1 & 3 together and finally argued ground 4. On the 2nd ground, he submitted that under Article 129(3) of the Constitution, judicial power in this country is exercised by court with competent jurisdiction. It is under that power that the Rules Committee passed the CPR which under Order 50 Rule 6 deems the High Court Registrar a civil court while carrying out the functions under Order 50 Rules 1, 3, and 4 thereof.

He submitted that under those rules reviewing of the decision passed by the same Registrar is not provided for instead the CPA under Section 79 (1) (b) gives the right to a party dissatisfied with the decision of the Registrar to appeal within 7 days which is echoed by Order 50 Rule 8 of the CPR.

He argued that clearly from the CPA and the Rules the Registrar has no jurisdiction to entertain a review. Order 46 Rule 2 of the CPR which is headed to whom the application for review may be made provides that a review has to be made to a judge who made the decree/ order. The intention of the framers of the rules was directed by Article 138 and 139 of the constitution which established the High Court as a court of records and vests such powers in the Principle Judge and other Judges and that the Registrar was not empowered to review the order hence the review he purported to do was null and void. The appellant submitted on the effect of illegality, with reference to the case of Gagula Benefansio Vs. Wakidaka Merabu CA no. 29 of 2006 where it was held that orders passed without jurisdiction however precisely certain and technically correct are mere nullities and not only voidable but are of no legal consequence. It was therefore submitted that the decision of the Registrar to review the order is null and void and should be set aside.

On grounds *1* & 3, the appellant submitted that proceeding with the case before recusal proceedings were concluded and proceeding esparto on recusal proceedings was not proper procedure. Mr. Mate retied on the case of Shell Gas (U) Ltd and 9 others v Muwema & Co Advocates SCCA No. 02 of 2013 where Justice Kitumba laid down a procedure for recusal proceedings. He then submitted that from the proceedings before the Registrar, it is clear that the appellant wrote a letter to the Registrar on 2/10/2014 asking him to recuse himself from the case for reasonable apprehension of bias and partly because he had brought disciplinary complaint against him. He however refused to recuse himself then the appellant indicated that he would file a formal application that day but the Registrar proceeded exparte yet he should have allowed the appellant to file a formal application for recusal instead of dragging him out of court proceedings and proceeding exparte. He submitted that the decision to proceed ex-parte should be made with precaution after ensuring that Article 28 (1) and 44 {c} of the Constitution are not derogated. He argued that proceeding with the matter ex-parte was irregular in as much as there was no charge of contempt of court

It is the submission of the appellant on the 4th ground that in a situation where the nonderogable right of a fair hearing was tampered with, where a court exercised jurisdiction which is not vested to the massive detriment of the appellant, it is only fair that such decisions be set aside with costs to the appellant.

In reply to the preliminary objection, the respondent's counsel submitted that the position of the law is that affidavits in interlocutory matters can contain matters of hearsay provided such evidence is not necessary. In that regard, he submitted that Order 19 Rule 3 of the CPR provides that affidavits shall not contain unnecessary matters of hearsay. He then contended that the newspaper articles attached to the affidavit of Hetal Parikh though hearsay are necessary in proving that the applicant knowingly extracted an erroneous Order and then abused the court process to extend the life span of such Interim Order.

He referred to the case of Muhindo Rehema v Winfred Kiiza & Anor Electoral Petition

Appeal No. 29 of 2011, where the court of appeal noted that order 19 rule 3 of the CPR provides that the affidavits can only include facts that the deponent is able on his own knowledge to prove, except in interlocutory applications. The court observed further that election petitions are not interlocutory application and therefore hearsay evidence is not admissible .He argued that the decision in Kamba Saleh Vs Attorney general constitutional petitionno.38 of 2012 which is an appeal on a constitutional petition cannot therefore be a good authority on the admissibility of hearsay evidence because the supreme court did not decide on that point.
Counsel for the respondent argued based on the authority Col, Dr.Kiiza Besigye V Museveni Yoweri Kaguta Electoral Petition No. 1 of 2001 that even it court were to find t at the newspaper articles were wrongly attached to the affidavit it would not warrant striking out the affidavit since as it was held in that case, court can exercise its discretion and sever the inadmissible parts of the affidavit In the circumstances, counsel argued, the affidavit of Hetal Parikh is not defective and does not warrant striking It out

On the merits of the appeal, counsel for the respondent submitted that Section 2 (h) of the CPA defines a Court as any court exercising civil jurisdiction, He also referred to Section 9S of the CPA which empowers court with inherent power to do anything necessary to achieve the ends of justice. He then submitted that Section 99 of the CPA empowers courts to correct any clerical mistake In Decrees and Orders at any time either on the courts own motion or on the application of the pat ties, He argued that the Registrar has jurisdiction under that provision to correct any clef real mistakes Just as he did in Misc. Application No. 850 of 2014 which was seeking a correction of an error in the extracted Order. He therefore prayed that court finds that Misc. Application No. 850 of 2014 was properly before the Registrar and that he discharged his duties rightly, He also prayed for dismissal of the appeal with costs,

I have carefully addressed my mind to the above submissions based on the affidavits filed in this application and I will first deal with the objection on the admissibility of the newspaper cutting attached to the affidavit In reply, the law on admissibility of newspaper articles is now settled In Uganda as guided by the Supreme Court decision in the case of Attorney General v Tinyefuza, Constitutional Appeal No. 1 of 1997 where Wambuzi, CJ. rejected newspaper copies for contravening the Evidence Act and as being hearsay which is generally inadmissible. This court is bound by that decision and therefore it is inclined to disregard the newspaper articles and so be It. This however does not render the affidavit of Mr. Hetal Parikh defective because of the authority of **Col.** Dr. Kiiza Besigye (supra) which allows severance of the offending paragraphs of affidavits. In this case, the objection as regards the admissibility of the newspaper article is upheld and the paragraphs of the affidavits that rely on the newspaper articles are according severed. On the merits of the application, I must state from the onset that the misc. Application no, 850 of 2014 whose order gave rise to this appeal was brought under section 98 and 99 of the CPA and order 46 rules 12 and 8 of the CPR. Section 98 is the inherent power of court to

prevent abuse of the process of the court while section 99, whose head note is amendment of judgment, gives court power to correct at any time clerical or mathematical mistakes in judgments, decrees or Orders or errors arising in them from any accidental slip or omission**. Order 46 is on review of decrees** and orders. The **applicant in Misc. Application Mo. 250 of 20X4 in paragraph (a)** of the notice of motion **specifically sought for an order that;** ***"The Order extracted by the respondent in Misc. Application Ho. 455 of 2014 be amended, corrected or reviewed by deleting clause 2 in the said Order" w*****ith this** ***position in mind,*** **i will** ***now*** proceed to consider the grounds **of this appeal in the same order** ***in which*** **the appellant** argued them.

Ground 2 faults the Registrar for entertaining the application for review when he had no jurisdiction. As stated above, the applicant in Misc. Application No. 850 of 2014, who is the respondent herein, did apply for amendment, correction or review of the order in Misc. Application n*o.* 456 of 2014 on the ground that it was erroneously extracted without a life span of the *Interim Order,* it is clear from the above quoted paragraph (a) of the notice of motion that review was put as an alternative to amendment/ *correction. To* my mind, the Registrar exercised the power conferred by section 99 of the CPA and granted the application by correcting the mistake in the Interim Order to bring it *in line* with his ruling in Misc. Application No. 456 of 2014. He did not review the Order within the meaning of Order 46 as alleged by the appellant. In the premises, all the appellant's arguments and authorities on review are misconceived as they are not relevant to the instant case.

Be that as it may, the *pertinent* question would be whether the Registrar could exercise jurisdiction under section 53 of the CPA to amend/correct any error in a Decree or Order issued by him. The answer to that question, in my view, is found in the definition of court under section 2 *(b) of* the CPA as submitted by counsel for the respondent. Clearly, the Registrar was exercising civil Jurisdiction when he entertained the matter and I find that *he* had jurisdiction under section 99 of the CPA to entertain that application. Therefore, ground (2) of this appeals most fail and 1 so hold.

On grounds 1&3 the appellant claims he was not accorded an opportunity to file a formal application for recusal and in the result he was dragged out and the proceedings went on expert .He relied on the case of Shell (u) Ltd vs. Muwema & co Advocates & Anor SCCA no. 02 of 2015 where it was held that counsel should have followed the proper procedure if he wanted the judge to recuse herself from the case. The respondent in response averred in paragraph 9 of the affidavit in reply that the applicants managing director acted in extremely violent and disrespectful manner and

banged the table in the registrar's office. In fact the court record indicates that after the registrar

ruled that he did not find plausible the ground for seeking his recusal, Mr. Male caused confusion in court and he

was drugged out by police and the application proceeded ex-parte. Counsel for the respondent submitted that the appellant grossly abused the court process.

It is important at this juncture to point out that part of the history of this case as elaborately stated in the court's ruling in Misc. Application No. 764 of 2014 was reproduced herein above to emphasize the fact that the appellant has indeed abused the process of this court with numerous applications most of which have not been prosecuted while some have been overtaken by events. There were a total of sixteen applications that were filed after the Interim Order was issued and only two were filed by the respondent. Six of them were withdrawn as soon as they were fixed for hearing.

Just to further demonstrate the length and depth of the appellant's abuse of the process of the court, I must point out that the appellant in total disregard of the lower court's decision and its pending appeal against it also filed a fresh civil suit based on the same facts in this court and attempted to obtain an exparte Judgment on the ground that the defendant had not appeared for the hearing. Thankfully the defendant had filed a defence wherein it pointed out that the matter had already been determined and was on appeal before this same court. The trial Judge then based his decision on that information and dismissed the suit. The appellant sought leave to appeal against that decision and it was denied.

It is also important to note that five Judges of the Commercial Court Division at one point or another handled the appellant's cases and three of them were requested to recuse themselves for reason of perceived bias. It can be seen clearly that all those were delaying tactics because the moment the appellant obtained the Interim Order its managing director put up a spirited fight to ensure that it remains in force in perpetuity. Part of the strategy employed was to flood this court with several unmerited applications. No wonder that the appellant has raised the failure by the registrar to allow him file a formal application for recusal as a ground of this appeal basing on the guidelines for recusal given by kitumba JSC in shell gas (u) & 0 others(supra) while I agree that indeed that is the proper procedure to be followed, I hasten to add that each case must be looked at in its unique facts and circumstances when it’s clear to the court that a litigant has come to court not to seek justice but rather to pervert it like in this case, I think then the court would be enjoined to exercise the powers given to it by the law under section 98 of the CPA to prevent abuse of the process of the court and section 33 of the Judicature Act to avoid multiplicity of proceedings.

> In this case, I cannot fault the Registrar for ruling on his recusal based on the letter the appellant had written asking him to do so. There was no need to again allow the appellant to file a formal application for recusal when the letter could suffice in the unique circumstances of this case that the applicant merely wanted to delay hearing of the main application for stay of execution so that he could take advantage of the Interim Order and directly benefit by not paying rent to the respondent.

On the contention that the Registrar erred by hearing the application exparte when he should have adjourned it, as already stated above, the appellant merely wanted to delay proceedings so as to take advantage of the Interim Order and to that end, the appellant's managing director deliberately caused a scene that necessitated getting him out of court with the hope that the matter would not proceed. In the circumstances, I cannot fault the Registrar for proceeding with the matter ex-parte. For the above reasons, grounds 1 & 3 of this appeal must also fail and I so hold.

Following my findings and holding on the above three grounds, I do not find it just and equitable to allow this appeal. Therefore, ground 4 of the appeal also fails.

In the result, the appeal is dismissed with costs.

I so order.

Dated this 11th day of January 2016

ALIVIDZA

JUDGE