THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

SMALL CLAIMS PROCEDURE REVISION NO. 06 OF 2019

(Arising from Mengo Chief Magistrates Court Small Claims Case No. 825 of 2019)

1. **NAMULI LILLIAN**
2. **LUTALO MARK :: APPLICANTS**

VERSUS

ABDULHAKU KAGGWA :: RESPONDENT

BEFORE: HON. MR. JUSTICE BONIFACE WAMALA

RULING

This was an application for revision brought by Notice of Motion under *Section 83 (a) and (c), Section 98 of the Civil Procedure Act, Rules 3 and 4 (4) of the Judicature (Small Claims Procedure) Rules 2011* seeking orders that:

1. The Judgment and Orders made on the 25th day of September 2019 in the Small Claims Court Case No. 825 of 2019 at the Chief Magistrates Court of Kampala at Mengo be set aside and revised.
2. Costs of the application be provided for.

The grounds of the application were set out in two affidavits that were sworn in support of the application by the 1st and 2nd Applicants respectively. Briefly, the grounds are as follows:

a) The learned trial Magistrate erred in law when she exercised a jurisdiction of a dispute not vested in her by law.

b) There are material irregularities in the small claims proceedings which caused a miscarriage of justice to the Applicants.
c) The trial Magistrate wrongly entered judgment for the Respondent in absence of proof to the required standard.
d) The learned trial Magistrate erred in law when she denied the 2nd Applicant an opportunity of defending himself thereby being condemned unheard.
e) The learned trial Magistrate erred in law when she misdirected herself on the law.
f) It is in the interest of justice that the Honorable Court revises the said judgment and orders made therein.

In her affidavit in support, **Namuli Lillian (the 1st Applicant)** stated that the Respondent filed Small Claims Case No. 825 of 2019 at the Mengo Chief Magistrates Court against her and the 2nd Applicant, Lutalo Mark, alleging that they had breached a loan agreement/ hire purchase agreement for motor cycle Reg. No. UER 780E. The 1st Applicant filed her reply on 4th September 2019 denying liability to the Respondent. The 1st Applicant stated that on the day of hearing the case, she went to the Court together with the 2nd Applicant who was also a defendant in the matter but had not filed a reply to the claim, and who also was a witness to the 1st Applicant; ready to proceed and defend themselves. The 1st Applicant stated that although the Respondent (then claimant) stated his claim, the trial Magistrate intimidated the 1st Applicant to admit liability or else she would be put in custody for perjury.

The 1st Applicant further stated in her affidavit that in the course of disputing the claim, she had witnesses who had come with her including the 2nd Applicant to defend her but she was not allowed to

call them. The 1st Applicant stated that on the other hand, the trial Magistrate allowed the evidence of the Respondent's witnesses whose testimonies were not related to the execution of the contract in question. The trial Magistrate then made a decision spontaneously and entered judgment in favour of the Respondent and in absence of proof. The 1st Applicant stated that the decision ordering her to pay UGX 6,000,000/= to the Respondent was made unfairly and against the principles of natural justice, fairness and impartiality.

The 1st Applicant further stated that she was informed by her lawyers that had the trial Magistrate weighed the Respondent's claim against the 1st Applicant's reply, the trial Magistrate would have realized that the dispute was no longer one of small claim and as such she had no jurisdiction to handle it. The 1st Applicant stated that she was further informed by her advocates that the Respondent did not prove his claim against the 1st Applicant to the required standard and that there were material irregularities on court record which caused an injustice to the 1st Applicant.

The **2nd Applicant, Lutalo Mark**, stated in his affidavit that the Respondent filed a small claims case in the Chief Magistrates Court at Mengo against the 1st Applicant and himself alleging breach of a loan agreement which did not exist. The 2nd Applicant stated that he was an employee of the 1st Applicant in addition to doing side brokerage services by bringing motor cycle riders to the 1st Applicant. The 2nd Applicant stated that he was approached by the Respondent who was in need of motor cycle riding and the 2nd Applicant took him to the 1st Applicant who allowed him to ride her motor cycle Reg. No. UER 780E, upon payment of UGX 10,000/= per day and parking it as directed. The 2nd Applicant stated that there was no written agreement between

the parties. The 2nd Applicant further stated that none of the witnesses brought in the lower court by the Respondent was present when the 1st Applicant employed the Respondent. It was only the 2nd Applicant and one Nalwoga Hellen who were present.

The 2nd Applicant further stated that the Respondent defaulted in remitting the said sum of UGX 10,000/= several times and he was given many chances to pay which he did not until when the Applicant withdrew the said motor cycle from him. The 2nd Applicant stated that although he did not file a reply to the Respondent's claim, he appeared in court as summoned but was not allowed to defend the claim against him even when the 1st Applicant informed the trial Magistrate that he was the 2nd defendant. The trial Magistrate only allowed the 1st Applicant to testify but denied the 2nd Applicant the opportunity of being heard in his defence.

The 2nd Applicant also stated that he was as well a witness for the 1st Applicant but was not allowed to testify even when the 1st Applicant informed the court that his testimony was relevant for dismissal of the Respondent's case. The 2nd Applicant further stated that he was informed by his lawyers that the trial Magistrate did not follow the law thereby arriving at a decision which is prejudicial to him and ought to be set aside and revised.

The Respondent neither made a response to the application nor appeared at the hearing. At the hearing, the Applicants were present and were represented by Mr. Kayondo George from M/s Kaweesa & Co. Advocates. Since there was evidence of service of the application and the hearing notice upon the Respondent, who was not in court

and had furnished no reason for his absence, the Court allowed the hearing of the matter to proceed exparte.

Counsel for the Applicants was directed to file written submissions which he did. In their submissions, Counsel for the Applicants argued each ground separately. I intend to handle the grounds of the application in the manner they were argued by the Applicants' Counsel.

But before I consider the grounds of the application on merits, let me first deal with a preliminary matter of crucial concern regarding the role of this Court in Small Claims proceedings. It is clear in the interpretation section, *Rule 3 thereof*, that in the Judicature (Small Claims Procedure) Rules, "Court" means the High Court and in particular the Commercial Court Division, a Chief Magistrates' Court and a Magistrate Grade 1 Court. It is also clear from the Rules and from the general framework of the Small Claims Procedure that there is no provision for appeal (in the sense of civil appeals) from Small Claims proceedings. The jurisdiction of the High Court in small claims matters cannot therefore be invoked for appeal purposes.

The High Court is however endowed with supervisory powers over magistrates' courts handling small claims matters. *Rule 4 (4) of the Rules* provides –

> *"The High Court shall have general powers of supervision over matters claims in magistrates courts".*

This power is similar to the supervisory powers of the High Court over magistrates courts provided for under *Section 17 (1) of the Judicature Act*, which provides –

"The High Court shall exercise general powers of supervision over magistrates courts".

It is trite that one way the High Court exercises its powers of supervision over magistrates' courts in the judicial sense is through the function of revision. This therefore calls in the invocation of *Section 83 of the Civil Procedure Act Cap 71*. Therefore, provided the complaint against the proceeding conducted in a small claims court is within the ambit of *Section 83 of the CPA*, this Court is empowered to consider that complaint under *Rule 4 (4) of the Judicature (Small Claims Procedure) Rules*. I need to emphasize that in exercising this function in respect of matters under the Small Claims Procedure, the High Court strictly operates within the confines of the provisions of *Section 83 of the CPA* and ought to avoid the temptation of being induced by an applicant to consider matters that would otherwise be handled by way of appeal, which course is not available under the Small Claims Procedure Rules. In other words, the High Court should not be led into handling a disguised appeal.

For avoidance of doubt, *Section 83 of the CPA* provides as follows:

"The High Court may call for the record of any case which has been determined under this Act by any magistrate's court, and if that court appears to have—

(a) exercised a jurisdiction not vested in it in law;

(b) failed to exercise a jurisdiction so vested; or

(c) acted in the exercise of its jurisdiction illegally or with material irregularity or injustice,

the High Court may revise the case and may make such order in it as it thinks fit; but no such power of revision shall be exercised—

(d) unless the parties shall first be given the opportunity of being heard; or

(e) where, from lapse of time or other cause, the exercise of that power would involve serious hardship to any person".

In practice, for the High Court to exercise the power of revision over a record of a case before a magistrates' court, the impugned record is normally drawn to the attention of the High Court by either the trial Magistrate, or the Chief Magistrate supervising the trial Magistrate or an aggrieved party or their advocate. This same procedure is available in case of matters handled under the small claims procedure provided the matters complained of are within the ambit of *Section 83 of the CPA*.

It is also important to point out that the said provision of *Section 83 of the CPA* has two other limiting factors which have to be excluded before the Court goes ahead to revise the record, namely, that; (a) the parties shall first be given the opportunity of being heard; and (b) where, from lapse of time or other cause, the exercise of that power would involve serious hardship to any person.

In the instant case, the court was satisfied that the Respondent was duly served with the court process and chose not to participate in the proceedings. I am therefore satisfied that the parties to the impugned proceedings were given an opportunity of being heard. There is also nothing on record or from the surrounding circumstances to make the Court infer that any orders made pursuant to the revision sought would involve serious hardship to any of the parties or other person. There is therefore no factor barring the Court from exercising the power of revision in the instant case.

With the foregoing in hindsight, I will now proceed to consider the grounds of the application as argued by Counsel for the Applicants.

<u>Ground 1</u>: The learned trial Magistrate erred in law when she exercised a jurisdiction of a dispute not vested in her by law.

Counsel for the Applicants submitted that *Rule 5 (2) (g) of the Judicature (Small Claims Procedure) Rules 2011 (hereinafter referred to as "the Rules")* provides that contracts for services cannot be handled by small claims courts. Counsel pointed out that the 1st Applicant in her defence denied the Respondent's claim and indicated that the Respondent was just riding the motor cycle on a temporary and daily basis for as long as he reported with the motor cycle for parking with UGX 10,000/=, which in law was a contract for employment. Counsel argued that upon learning that the dispute included a hire purchase contract against that of a contract for employment, the judicial officer ought to have advised the parties to proceed to the court with the appropriate jurisdiction under *Rule 26 (2) of the Rules* other than proceeding with the matter in a wrong jurisdiction of a small claims court.

Counsel relied on the **World Bank Journal on Just Development, page 2,** which indicates that the small claims court is limited to simpler disputes usually involving recovery of money. Counsel argued that although the instant claim was for recovery of UGX 6,000,000/= which was within the pecuniary jurisdiction of the small claims court, the nature of the dispute was not simpler and straight forward as required under the small claims procedure. Counsel submitted that under *Rule 26 (1) of the Rules*, *"if a court is of the opinion that a case*

contains complex questions of law or fact which cannot be adequately adjudicated upon by it, it shall suspend the proceedings". Counsel argued that the said opinion ought to be exercised judicially with the help of the rules of statutory interpretation otherwise absurdity may arise. Counsel relied on the case of **WICKS VS DPP (1947) A.C 362** in which it was held that where the words are plain, clear and unambiguous, they must be interpreted according to their ordinary meaning, commonly known as "the literal rule doctrine".

Counsel for the Applicants submitted that the framers of the Small Claims Procedure Rules had the literal rule doctrine in their mind of settling simple disputes to avoid case backlog among others where matters are non-contentious. However, when a matter is complicated, it becomes ambiguous and therefore subject to interpretation of ordinary court with jurisdiction and with legal representation (if the parties choose) to avoid absurdity that might arise out of misrepresentation of the conflicting rules.

Counsel further submitted that the two questioned contracts of hire purchase and employment between the Applicants and the Respondent created a lot of questions of law which could not be handled by the small claims court. Counsel argued that the judicial officer therefore erred in law when she entertained a matter within a wrong jurisdiction even after noting that a *"misunderstanding had arose (sic) between a contract of hire purchase and that of employment"*.

Although Counsel for the Applicants did not specifically state so, this ground of the application appears to be based *on Paragraph (a) of Section 83 of the CPA* i.e. *that the trial court exercised jurisdiction not vested in it in law*. The argument of Counsel for the Applicants is that

under *Rule 5 (2) (g) of the Rules*, contracts for service are excluded from those cases to which the Small Claims Procedure Rules apply. This is true. The question however is whether the subject matter before the trial court herein involved a contract for service.

The law makes a distinction between a contract of service and a contract for service. A **contract of service** is an agreement between an employer and an employee. In a **contract for service**, an independent contractor, such as a self-employed person or vendor, is engaged for a fee to carry out an assignment or project.

According to the **Black's Law Dictionary, by Henry Campbell Black, 5th Edition, Page 1227**, a contract of service connotes duty or labour to be rendered by one person to another, the former being bound to submit his will to the direction and control of the latter. "Service" and "employment" go together and generally imply that the employer, or person to whom the service is due, selects and compensates the employee, or person rendering the service. Selection is what is commonly known as recruitment. Compensation under a contract of service is by way of salary, wages, allowances or other such form of remuneration.

Under *Section 2 of The Employment Act, 2006*, a contract of employment, otherwise known as a contract of service, means any contract, whether oral or in writing, whether express or implied, where a person agrees in return for remuneration, to work for an employer and includes a contract of apprenticeship.

A contract of employment exists where three conditions are fulfilled, namely; (i) the servant agrees that, in consideration of a wage or other

remuneration, he or she will provide his or her own work and skill in the performance of some service for his or her master; (ii) he or she agrees, expressly or impliedly, that in the performance of that service he or she will be subject to the other's control in a sufficient degree to make that other master; and (iii) the other provisions of the contract are consistent with its being a contract of service. See ***Waga B. Francis versus The Chief Administrative Officer Maracha District & Anor, HC Civil Suit No. 005 of 2016*** **[Mubiru J.]** and ***Ready Mixed Concrete Southeast Ltd v. Minister of Pensions and National Insurance, [1968] 2 QB 497, [1968] 1 All ER 433.***

The difference between a contract of service and for service was more succinctly put by **Shantimal Jain**, in a text titled: **Contract of Service and Contract for Service**, published in the Journal, **The Practical Lawyer**, cited as **(2003) 8 SCC (Journal) 2**. The author states:

> **A contract of service is different from a contract for service. In a contract of service, the employer normally enjoys the power of control over the work of the servant and the servant is bound to obey the orders or instructions of the master. An independent contractor, on the other hand, undertakes to produce the required result, but in the actual execution of the job to produce the result, he is not under the order or control of the person for whom he executes that work. He is free to use his discretion. The line of demarcation between an independent contractor and an employee is very thin and the two concepts sometimes overlap. In such a situation, the question about the relationship of employer and employee needs to be determined with reference to the facts and circumstances of**

each case as to who are the parties to the contract, who pays the wages, who has the power to dismiss, what is the nature of the job, and the place of executing the job; all have to be kept in mind. Out of so many tests, the vastly important test which till now held ground was the element of control and supervision of work.

Counsel for the Applicants in his submissions appears to have mixed up the two legal relationships. While Counsel on one hand stated that the relationship was that of a contract for services, on the other, he stated that it was a contract of employment. It is clear from Counsel's submissions that he was not alive to the distinction between the two contractual relationships.

Be that as it may, on the facts before the Court, the Respondent was not an independent contractor, and was not engaged for a fee to carry out an assignment, project or such other work. Under a contract for services, the independent contractor offers the services while the recipient of the services pays the agreed fee. In the instant case, it is clear from the record that it was the Respondent who was obliged to offer the service and, at the same time, to keep depositing UGX 10,000/= plus parking charges to the 1st Applicant. The relationship between the Respondent and the 1st Applicant cannot therefore be termed as a contract for services.

Regarding the argument by the Applicants' Counsel that the relationship was a contract of employment, which would make it a contract of service, it is true that contracts of service are also excluded from amongst the cases that can be handled under the small claims procedure. The question therefore is whether the relationship between

the Respondent and the 1st Applicant amounted to a contract of service.

As already highlighted herein above, the common features of a contract of service are duty, labour or skill to be rendered by one person (the employee) to another (the employer); the employee is bound to submit his will to the direction and control of the employer; the employer selects/recruits the employee; and the employer compensates the employee by way of payment of salary, wages, allowances or other such form of remuneration.

In the instant case, it may be said that the Respondent was offering his labour by riding the 1st Applicant's motor cycle. It may also be true that the Respondent was bound to submit his will to the direction and control of the 1st Applicant in regard to the duty to be performed, i.e. riding the motor cycle upon such terms and conditions dictated by the 1st Applicant. It was also argued that the 2nd Applicant presented the Respondent before the 1st Applicant and the latter selected the Respondent for the job. However, there is no evidence that any form of payment was agreed upon between the parties. Instead of the Respondent being paid for his labour or offer of a service, it was actually the Respondent who was paying money to the 1st Applicant. The proper conclusion therefore is that the relationship between the Respondent was something else other than a contract of service.

The evidence on record is that the trial judicial officer was informed that the relationship between the Respondent and the 1st Applicant was that of a hire purchase agreement, which locally is known as "riding the motor cycle on loan". It can be deduced from the record, and this Court is capable of taking judicial notice, that by this

arrangement, the owner of the motor cycle (in this case the 1st Applicant) hands over the motor cycle to the rider (the Respondent herein) for the rider to use it for transport business (known as Boda Boda) and makes daily remittances to the owner. At the time of handing over of the vehicle, a sum of money is agreed upon as the total remittances the rider is supposed to make within a given period. Upon full payment of the agreed sum, the motor cycle becomes the property of the rider and the contract ends. According to the claimant before the Small Claims Court, this was the arrangement between the parties herein.

The trial judicial officer believed and accepted the claim and evidence as laid before the Court by the Respondent. Going by what I have pointed out above, I have no reason to believe otherwise. The trial judicial officer properly analysed the evidence before her and applied the correct legal position. I am in position to come to the same conclusion as she did that the contract between the parties herein was neither a contract for services nor a contract of service. Rather, it was a contract for hire purchase. Contracts for hire purchase are not excluded from being handled under the small claims procedure.

It is therefore not true that the trial judicial officer exercised a jurisdiction that was not vested in her in law. On the facts and the law as analysed above, the trial judicial officer was properly vested with the jurisdiction to handle the dispute in issue under the small claims procedure. There is therefore nothing to revise in the trial judicial officer's proceedings and decision on basis of the first ground of the application. The first ground of the application therefore fails.

<u>Ground 2</u>: There are material irregularities in the small claims proceedings which caused a miscarriage of justice to the Applicants.

Counsel for the Applicants submitted that although *Rule 25 of the Rules* provides for expeditious hearing of cases without undue regard to technical rules of evidence, the same rule provides that in exercising its jurisdiction, the small claims court shall be guided by the principles of fairness, impartiality without fear or favour and adhere to the rules of natural justice. Counsel submitted that in the instant case, the Respondent did not have a hire purchase agreement and or document in support of his claim for inspection of court and because of that technicality the contract could not be interpreted plainly. Counsel submitted that in so doing, there was no way the court would avoid the rules of evidence because by failure to follow the rules of evidence, the judicial officer would disregard the principles of fairness and natural justice that are provided for under Rule 25 of the Rules.

Counsel for the Applicant pointed out the following irregularities committed by the trial judicial officer contrary to the principles of fairness and natural justice:

a) While *S. 59 of the Evidence Act* provides for direct evidence, which may be oral, the evidence of the witnesses brought by the Respondent (PW2 and PW3) to support his claim were not present while the claimed hire purchase contract was signed by the parties and their testimonies were not attached to its execution. As such their evidence was not relevant to the facts in issue as it amounts to hearsay which is not admissible in court.

b) The witness who was summoned by the court (PW4) clearly testified that he was told by the 2nd Applicant that the Respondent rides the motorcycle on a temporary basis (contract for employment) not hire purchase, but the judicial officer did not consider that evidence and instead entered judgement to the detriment of the Applicants.
c) Generally, the decision of the judicial officer was against the weight of the evidence before her.

Counsel for the Applicants did not specifically state which provision of *Section 83 of the CPA* this ground was related to. It can however safely be assumed that it is in relation to *paragraph (c) thereof;* i.e. *that the trial court acted in the exercise of its jurisdiction illegally or with material irregularity or injustice*. On this ground, there is no allegation before me that the trial judicial officer acted illegally. The allegation by the Applicants appears to be that in her exercise of jurisdiction in the instant case, the trial judicial officer acted with material irregularity or injustice.

Looking at the particulars of irregularities alleged to have been committed by the trial judicial officer in the course of the proceedings, it is apparent to me that the matters raised, as summarised above, consist of criticisms towards the way the trial judicial officer evaluated and believed or disbelieved the evidence before her. That is a matter of exercise of discretion by the trial court that can only be challenged by way of appeal. It cannot be challenged through invoking this Court's power of revision. Secondly, even if the trial judicial officer was wrong in the way she elected which evidence to believe or not, such cannot amount to exercise of jurisdiction with gross irregularity or injustice. It therefore cannot be subject of a revision application. Thirdly, the

manner in which the trial judicial officer evaluated evidence in the present case discloses no manifest breach of the principles of fairness, impartiality or natural justice.

It is apparent to me that, by this ground, the Applicants sought to prefer a disguised appeal which is not acceptable under the law. The second ground of the application is therefore devoid of merit and is dismissed.

Ground 3: The trial Magistrate wrongly entered judgment for the Respondent in absence of proof to the required standard.

Counsel for the Applicants submitted that *Rule 21 (2) of the Rules* provides that *"a judicial officer shall request the claimant on oath to state the case clearly and submit any documents and exhibits relevant to the claim".* Counsel submitted that *S. 103 of the Evidence Act* supports that rule by providing that he who asserts must prove. Counsel also relied on the case of **MAYANJA HUSSEIN -Vs- MUBIRU CHRISTOPHER CIVIL SUIT NO. 0129 OF 2019 [2018] UGHCCD 29 (2 May 2018)** where it was held that it is the plaintiff/claimant to bear that burden of proof.

Counsel for the Applicants further submitted that in the small claims case, the Respondent had the burden to prove his case, a fact which he failed to do when he brought witnesses who were not attached to the execution of the hire purchase contract in question and documents not related to the same. The judicial officer instead requested and/or put the burden onto the 1st Applicant to produce the documents thereby shifting the burden in error. Counsel submitted that in the case of **BRITESTONE PTE LTD -Vs- SMITH &**

ASSOCIATES FAR EAT, LTD [2007] SGCA 47, it was held that the burden of proof only shifts when the party entitled to prove it has properly discharged his obligation.

Counsel submitted that in the small claims court, the Respondent failed to discharge his obligation as indicated above and even the police officer's (PW4's) evidence did not speak in his favour when he testified that "*I requested the Respondent to bring documents to support his claim but he did not return"* thereby entering judgement and orders to the detriment of the Applicants which was an illegality in need of setting aside for revision purposes.

By this ground, it was argued by Counsel for the Applicants that by failing to properly place the burden of proof and erroneously shifting it to the defendant in the small claims the case, the trial judicial officer committed an illegality that requires to be set aside by way of revision. My considered view is that an allegation of a failure on the part of the trial court to properly place the burden of proof or wrongly shifting the burden of proof would be an error in law which can only be challenged on appeal where such a right exists. On the matter before the Court, no such right exists and the allegation by the Appellants do not entitle them to raise the said issue by way of a revision application. In effect therefore, such an allegation does not constitute or amount to an illegality within the meaning of *paragraph (c) of Section 83 of the CPA*. I have also found no merit in the third ground of the application and it fails.

Ground 4: The learned trial Magistrate erred in law when she denied the 2nd Applicant an opportunity of defending himself thereby being condemned unheard.

It was submitted by Counsel for the Applicants that as indicated earlier, *rule 25 (a) and (b) of the Rules* is clear on *parties being given an opportunity to be heard and call witnesses.* Counsel submitted that the 2nd Applicant was the 1st Defendant to the small claims case but was not given chance to defend himself even when he stood up as a witness called by the 1st Applicant to defend her case and yet his testimony would be crucial for dismissal of the Respondent's claim against the 1st Applicant.

Counsel submitted that there were other witnesses like a one Nalwoga Hellen who were available to testify for the Applicants but the judicial officer did not give them chance, when they were presented. Counsel submitted that the 2nd Applicant now lives in fear and dilemma because of execution proceedings which might commence against him as result of a judgment which was entered in a case where he was the 1st Defendant but not given a chance to be heard. Counsel submitted that this was also contrary to *Article 28 of the Constitution* on *a right to a fair hearing* and the 2nd Applicant seeks for orders to set aside the judgement and orders in the small claims court for purposes of revision so that he can be able to be heard as a party to the small claim suit if at all it has jurisdiction.

By this ground, Counsel for the Applicants raises two matters; one being that the 2nd Applicant was denied opportunity to appear and defend himself as a defendant in the case; and two, that the 1st Applicant was denied the opportunity to use the 2nd Applicant and other persons she wished to call as witnesses to put across her defence.

On the first aspect involving denial of the opportunity to the 2nd Applicant to defend himself, the Small Claims Procedure Rules are very clear. Where a claimant lodges their claim in accordance with *Rule 11 of the Rules*, and summons are served onto the defendant in accordance with *Rule 12 of the Rules*, the defendant shall, upon receipt of the summons, either satisfy the claim or file a written statement of defence in accordance with *Rule 13 of the Rules*. Under *Rule 17 of the Rules*, where a defendant does not respond to the summons duly served upon him/her, the court shall, upon proof of service, enter judgment for the claimant.

In the instant case, the trial judicial officer was satisfied that service of process was duly effected upon both Applicants/defendants. While the 1st Applicant (then 2nd defendant) had filed a defence to the claim, the 2nd Applicant (then 1st defendant) had not filed any defence. Though the 2nd Applicant was in court on the date of hearing of the case, he had no audience before the Court as a party to the case to present any defence. The trial judicial officer cannot therefore be faulted for not hearing him as a defendant in the matter.

In case the 2nd Applicant had reason and could show sufficient cause as to why he was unable to file a written statement of defence, the Rules provide for a remedy in such a situation. Under *Rule 30 (a) of the Rules*, the court may upon application by an aggrieved party review or vary any judgment granted by it in the absence of the defendant *"where the application for set-down for hearing is made on a date within six weeks after the applicant first had knowledge of the judgment"*. Under this provision, a defendant against whom a judgment has been entered in their absence has a right to apply to the court that passed the judgment to review or vary the judgment

provided the applicant does so within six weeks from the date when he/she first had knowledge of the judgment.

In this matter, the 2nd Applicant did not make use of that opportunity bestowed upon him by the law. He cannot by this revision seek what he would have obtained through a process clearly set out under the law. A revision application cannot be used to set aside a judgment entered by the judicial officer in strict compliance with the law. In any case, this complaint by the 2nd Applicant does not fall under any of the conditions under *Section 83 of the CPA* that may occasion a revision of a proceeding or judgment of a trial court.

The second aspect under the 4th ground of the application was that the 1st Applicant was denied the opportunity to use the 2nd Applicant and other persons she wished to call as witnesses to put across her defence. The procedure to be adopted by a trial judicial officer and the duties of the officer when hearing a small claims case is set out under Parts IX and X of the Rules.

Rule 21 provides –

> *Judicial officer's duties at hearing*
>
> *(1) A judicial officer shall ensure that the proceedings at the hearing are in accordance with the provisions of rule 25.*
>
> *(2) The judicial officer shall request the claimant on oath to state the facts of his or her claim clearly and submit any document or exhibit relevant to the claim.*
>
> *(3) The claimant shall answer any questions that may be asked by the judicial officer or any other party to the claim.*
>
> *(4) The judicial officer shall request the defendant on oath to respond to the claim presented … and the defendant shall*

answer any questions asked by the judicial officer or the other party to the claim.

Rule 23 provides as follows:

Witnesses

(1) *A judicial officer may allow a witness to the case to give evidence on oath, which is relevant to the claim, a written statement of defence or counterclaim and the witness shall answer any questions asked by the judicial officer or any other party to the claim.*

(2) *The judicial officer shall permit only one witness to be present in the Courtroom at the time of giving testimony and a witness who has already testified in the case may attend the proceedings.*

(3) *A judicial officer shall have powers to summon a required witness where the circumstances warrant.*

Rule 25 provides as follows:

Proceedings of Small Claims Procedure

The Court shall hear every case before it expeditiously and without undue regard to technical rules of evidence or procedure, but in exercising its jurisdiction, the Court shall be guided by the principle of fairness, impartiality without fear or favour and adhere to the rules of natural justice, and in particular, shall ensure that –

(a) *Each party is given an opportunity to be heard;*

(b) *Each party is accorded ample opportunity to call witnesses and to adduce any other evidence as he or he requires to support his or her case;*

(c) ….

From the above laid out provisions, it is clear that the judicial officer has a duty to conduct the trial of a small claims matter expeditiously and without undue regard to technical rules of evidence or procedure provided he/she adheres to the rules of fairness, impartiality and natural justice. As such, the judicial officer is not duty bound to adopt the strict application of the Civil Procedure Rules or the Evidence Act. Provided the judicial officer has heard, on oath, the facts of the claimant and the defendant as set out under *rule 21 (2) and (4) thereof*, the judicial officer may in his or her discretion determine the matter. The judicial officer is given discretion under *rule 23 thereof* to allow a witness to the case to give evidence which is relevant to the claim or the defence. Clearly, a judicial officer is not duty bound to hear any or all the witnesses presented by the party in a particular case. The decision as to whether to allow a party present a witness and which witness is a matter within the discretion of the judicial officer upon considering the relevance of such a witness' testimony to the fair, just and expeditious disposal of the matter.

As such, where the judicial officer does not deem it necessary to allow or call particular witnesses of any party, he or she is not necessarily in breach of either the Small Claims Procedure Rules or the rules of natural justice. The mere fact that a party was not satisfied in the way the judicial officer exercised her discretion does not make the process or the decision illegal or irregular provided there is evidence that the judicial officer exercised her discretion judicially. The provisions of *Section 83 of the CPA* cannot therefore be invoked under such circumstances.

It was averred by the 1st Applicant in her affidavit in support that when it came to her turn to present her defence in court, the trial judicial officer intimidated the 1st Applicant to admit liability or else she would be put in custody for perjury. This claim was however neither substantiated nor based on by the Applicants' Counsel in his submissions. It is also not borne out by the record since the record indicates that the 1st Applicant gave evidence in response to the Respondent's claim. I have therefore not found this allegation made out.

In all therefore, ground 4 of the application has been found to be devoid of merit and it is dismissed.

<u>Ground 5</u>: The learned trial Magistrate erred in law when she misdirected herself on the law.

It was submitted by Counsel for the Applicants that in the proceedings before the trial court, the 1st Applicant had raised a preliminary point of law in her defence to the effect that *"…S.10(5) of the Contract Act provides that all contracts above the value of Shs. 500,000/= shall be in writing…"*. The 1st Applicant had argued that she had no hire purchase contract with the Respondent since there was no written agreement for him to prove his allegation. Counsel for the Applicants submitted that the judicial officer overruled the preliminary objection citing the case of **SITENDA SEBALU V SAM NJUBA,** in which it was held that the word *"shall"* was directory and not mandatory.

Counsel submitted that the above cited decision was distinguishable from the instant small claim situation. Counsel argued that while the word "shall" can be interpreted as either, depending on the

circumstances of the case, the small claims court was dealing with a contention of whether the contracts between the parties was that of hire purchase or for employment, not for election petitions as shown in the **Sebalu case.**

Counsel further submitted that the judicial officer proceeded and concluded that the Applicant had a hire purchase agreement as stated by the Respondent more so to the contravention of **S. 5(1) of the Hire Purchase Act** which provides for *detailed execution of hire arrangements in writing and in a prescribed form*; which the judicial officer did not attempt to make any inquiry into before entering her judgement.

Counsel therefore submitted that the word "shall" was therefore mandatory in contracts as provided for in **S. 91 of the Evidence Act** to the effect that "*where the law provides for a contract to be in writing, in absence of that document, the contract cannot be enforced"*. Counsel concluded that the judicial officer erred in law when she entered judgement for the Respondent in absence of the relevant documents in support of his claim as provided under the law to be presented for court inspection. Counsel prayed that the Court sets aside and revises the said judgement and orders therein for the Applicants to attain justice.

Counsel for the Applicants did not specifically indicate under which leg of *Section 83 of the CPA* he was proceeding in advancing this argument. I will assume that Counsel intended to rely on the ground that the trial judicial officer exercised the jurisdiction vested in her illegally or with material irregularity or injustice.

The complaint by the Applicants under this ground is that the trial judicial officer misdirected herself on the law regarding written and unwritten contracts. To begin with, I must state that a misdirection in law on the part of a judicial officer does not constitute exercise of jurisdiction illegally or with material irregularity. Although it may occasion an injustice, it has to be shown that the misdirection constituted a material injustice that can only be cured by revision within the ambit of *Section 83 (c) of the CPA*.

In the instant case, the trial judicial officer found that although the agreement between the 1st Applicant and the Respondent was not in writing, there was before her evidence of an oral agreement that was corroborated by the conduct of the parties which evidence she believed. The judicial officer further found that the fact that the agreement between the parties was not in writing did not vitiate the contract since the requirement under the Contracts Act for such category of contracts to be in writing could properly be construed as directory and not mandatory.

With due respect to learned Counsel for the Applicants, I do not find the above finding by the judicial officer a misdirection in law. Secondly, even if it was, it does not point to an exercise of jurisdiction illegally or with a material irregularity or injustice. I have therefore found no merit in this ground of the application and it fails as well.

<u>Ground 6</u>: **It is in the interest of justice that the Honorable Court revises the said judgment and orders made therein.**

Counsel for the Applicants submitted that *Article 126(2)(e) of the Constitution* provides that "…*substantive justice shall be administered*

without undue regard to technicalities". Counsel submitted that the small claims court was established to technically prevent case back log by expeditious handling of matters among other good reasons. Counsel submitted that however, this procedure cannot prevail in the presence of an apparent threat to justice of any party to the suit and or the Applicants in this matter. Counsel submitted that *Rule 25 of the Rules* provide that the rules of evidence should be disregarded but while doing so, it should not be to the detriment of the principles of fairness, impartiality and rules of natural justice; as it was done in the contentious small claims judgement.

Counsel also submitted that in her judgement, the judicial officer ordered the Applicants to pay Shs. 6,000,000/= to the Respondent out of proceedings from a wrong jurisdiction, with illegalities and irregularities. Counsel argued that it was in the interest of principles of fairness, in particular to the rules of natural Justice and under *S.98 of the CPA* for purposes of having the ends of justice met and to prevent an abuse of court process, that the judgement and orders of the small claims court be set aside and revised for purposes of determining whether or not the small claims court had jurisdiction to handle the case, among other anomalies. Counsel further prayed that the Respondent be advised by the Court to bring proper documents and genuine witnesses in support of his claim; failure of which the small claims case should be dismissed.

My finding is that this ground of the application is premised on the belief by the Applicants that the proceedings and judgment in the small claims court was based on wrong exercise of jurisdiction or was tainted with illegality or material irregularity or injustice. From my finding herein above on all earlier grounds, none of the complaints

against the proceedings and judgment of the trial court has been made out. It therefore cannot be in the interest of justice for the Court to find any merit in this application. Rather the interest of justice lies in the execution of the judgment and orders of the small claims court since no application for review was filed within time as prescribed under the law. I have also found no merit in the 6th ground of the application.

In all therefore, the application by the Applicants has failed on all the grounds. It is accordingly dismissed. Since the Respondent did not participate in this proceeding, I make no order as to costs.

It is so ordered.

Signed, dated and delivered by email this 30th day of June, 2020.

Boniface Wamala
JUDGE