

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
CIVIL APPEAL NO .24 OF 2022
ARISING OUT OF CIVIL SUIT NO. 0772 OF 2022**

KENFREIGHT UGANDA LTD::: APPELLANT

VERSUS

MARY KASIRYE::: RESPONDENT

Before Hon. Lady Justice Patricia Kahigi Asimwe

Judgment

Introduction

1. This is an appeal from the order/decision of the Learned Trial Chief Magistrate Her Worship Akullo Elizabeth Ogwal delivered at the Chief Magistrate's Court of Nakawa on 30th May 2020 in Civil Suit No.0722 of 2022.
2. The background to this appeal is that the Respondent sued the Appellant in Civil Suit No. 722 of 2020 at the Chief Magistrate's Court of Nakawa seeking to recover rental arrears in the sum of USD 29000 and Special damages of UGX. 13,518,000 for breach of contract and costs of the suit.
3. The Respondent lodged a Complaint in the Chief Magistrate's Court on the 23rd November 2020, and summons to file a Defence were issued. The Appellant (Defendant) was served with the Complaint and summons on 3rd December 2020. On the 14th of December 2022, the Appellant filed its first Written Statement of Defence in the Magistrate's Court. On 15th December 2022, the Respondent



(Plaintiff) filed an amended Plaintiff dated 11th December 2020, the basis of which summons to file a Defence on the amended plaintiff was issued for service upon the Appellant. The Appellant was served with the summons and an amended Plaintiff on 28th December 2020.

4. On 22nd January 2021, the Trial Magistrate, His Worship Dr. Singiza (as he then was) granted an Interlocutory Judgment on the basis that the Written Statement of Defence was not filed on time. On 28th January 2021, after the Interlocutory judgment was entered by the Court, the Defendant filed an amended Written Statement of Defence.
5. On 14th December 2021, the Appellants filed a Miscellaneous Application at the Chief Magistrates Court at Nakawa seeking to set aside the Interlocutory Judgment that was entered on 22nd January 2021 vide No. 659 of 2022. The application was supported by the affidavit of Hamu Mugenyi an advocate of the High Court. The parties filed submissions on the matter.
6. On 30th May 2022, the learned trial Chief Magistrate delivered a ruling dismissing the application on the grounds that the affidavit in support of the application had falsehoods and hearsay evidence hence being inaccurate and untruthful. The Application was dismissed on the basis of technicalities and not on the merits of the case.
7. The Appellant being dissatisfied with the decision of the learned trial Magistrate appealed to this Court on the following grounds:
 - a) The Trial Magistrate erred in law and fact when she failed to set aside the *ex parte* judgment against the Appellant having found that the Appellant had lodged two written statements of defence lodged on the 14th of December 2020 and 28th of January 2021 on the court record.
 - b) The Trial Magistrate erred in law and fact when she failed to establish that the *ex parte* judgment was entered in error



whereas the Appellant had lodged two defences on 4th December 2020 and 28th January 2021 on the court record.

- c) That the Trial Magistrate erred in law and fact she failed to confirm and establish clearly and confirm that the Appellant had lodged two defences on 14th December 2020 and 28th January 2021.

Representation

8. The Appellant was represented by Yesse Mugenyi of Mugenyi & Company. The Respondent was represented by Patrick Lubango of Kasirye Byaruhanga & Co. Advocates.

Submissions

Appellant's submissions

9. The Appellant submitted that on 14th December 2020, they filed their first written statement of defence. On 15th December 2020, the Respondent filed an amended Plaintiff and served on the Appellant on the 28th day of December 2020, and thereafter the Appellant filed an amended written statement of defence on 28th January 2021. The Appellant submitted that from the record it is apparent that the Respondent had filed an affidavit of service on the 21st day of January 2021 and equally applied for an interlocutory judgment under Orders 5, 8, and 11 (2) of the Civil Procedure Act. On the 22nd day of January 2021, the Chief Magistrate entered judgment on the basis that the Appellants did not file a Written Statement of Defence. The Appellant submitted that at the time the Interlocutory judgment was entered a Written Statement of Defence was already filed on court file on 14th December 2020 and it was duly endorsed by court.
10. On the issue of the decision of the trial magistrate that the affidavit was defective, counsel submitted that the Supreme Court adopted a more liberal approach to dealing with defective affidavits. Counsel cited the case of *Col. (Rtd) Besigye Kizza versus Museveni*

Yoweri Kaguta & Electoral Commission (Election Petition No. 1 of 2001) [2001] UGSC 3, where their Lordships held that the offending paragraphs in affidavits could be safely severed and the rest admitted. Counsel submitted that while paragraphs 5, and 6, of the affidavit in support, contain falsehoods and are at variance with the documents attached, Court should have severed those paragraphs.

11. Counsel addressed the court on the issue of whether the Written Statement of Defence filed on 28th January 2021 was filed out of time. Counsel cited Order 51 Rule 4 of the Civil Procedure Rule which provides that the period between the 24th day of December and the 15th day of January in the year following both dates inclusive, shall not be reckoned in the computation of the time appointed or allowed by the rules for amending, delivering or filing any pleading.
12. The Appellant submitted that they were served on the 28th day of December 2020 and they filed their second Written Statement of Defence on the 28th day of January 2021. The appellants had up to 31st January 2021 to file their defence. It was further submitted that in any case there was already a Written Statement of Defence lodged on the 14th of December 2019 and the practice is that once a written statement of Defence is lodged on file, it is deemed to be a defence regardless of whether the Plaintiff is subsequently amended a number of times

Respondent's submissions

13. The Respondent raised a preliminary objection on a point of law that the Appeal arises from a dismissal order of the Application made under Order 9 Rule 12 Civil Procedure Rules. The respondent submitted that Order 44 of the Civil Procedure Rules provides for orders that are appealable as of right and those that require leave of court. They submitted that an appeal arising from Order 9 Rule 12 has no right of Appeal and the Appellant was

required to proceed under Order 44 Rule 2 to apply for leave to appeal. Since no leave to appeal was obtained the court has no jurisdiction to entertain the appeal.

14. Counsel for the Respondent submitted that the learned Trial Magistrate was right to dismiss the Application on points of law since the evidence contained in the supporting affidavit to the application which had been sworn by an advocate Hamu Mugenyi was hearsay, and did not disclose the source of information, and thus rejected his evidence.

Appellant's submissions in Rejoinder

15. The Appellant submitted that Order 44 rule 1 (c) of the Civil Procedure Rules SI 71-1 provides that an appeal shall lie as of right from an order under Rule 27 of Order 9 rejecting an order to set aside a decree passed ex parte.

Resolution

Preliminary objection

16. The Respondent's submissions raised a preliminary objection on a point of law that the appeal is incompetent before the court because the Appellant did not obtain leave to appeal.
17. The ex parte judgment in the main suit was entered under *Order 9 Rule 5 of the Civil Procedure Rules* for failure by the Appellant to file a written statement of defence. The Application to set aside the ex parte judgment before the learned chief magistrate was made under Order 9 Rule 12 of the Civil Procedure Rules. The Application was dismissed. This appeal is against the decision of the Chief Magistrate.
18. *Order 44 Rule 1 of the Civil Procedure Rules SI 71-1* lists the orders from which an appeal shall lie as of right. The list does not include Order 9 Rule 12. Order 44(2) of the Civil Procedure Rules SI 71-1

provides that “an appeal shall not lie from any other order except with leave of court making the order or of the court to which an appeal would lie if leave were given”.

19. In the case of **Attorney General Vs Shah [1971] E.A.**, It was held that appellate jurisdiction springs only from statute and there is no inherent right of appeal. In the case of **Kilama and Ano. Vs. Otim Civil Appeal No. 31 of 2019 Mubiru J** held that the right of appeal is a creature of statute and must be given expressly by statute.
20. Therefore, in this case since there is no legal provision providing for the right of appeal with respect to orders under Order 9 Rule 12 of the Civil Procedure Rules, this court does not have jurisdiction over this matter. The Appeal is therefore dismissed with costs to the Respondent.

Dated this 24th day of October 2023

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Patricia Kahigi Asiimwe

Judge

Delivered on ECCMIS