THE REPUBLIC OF UGANDA

IM THE HIGH COURT OF UGANDA AT

KAMPALA CIVIL APPEAL NO. 13 OF 1989

(FROM MISC. APPLICATION NO. 33/83)

1. STANLEY BEYENDERA APPELLANT
:::::::::::::::::::::: APPLICANTS
2.ARON BISIRU

VERSUS

RUKUNGIRI DISTRICT ADMINISTRATION:::::::::::::::::::: RESPONDENT

BEFORE: THE HOW. MR. JUSTICE G.M.OKELLO

JUDGMENT:

This appeal was cause listed for hearing before me today l6/4/92. When it called for hearing, the appellants and their counsel appeared but no representative from the Attorney General's chambers appeared for the respondent though there was evidence of due service of Hearing notice on the Attorney-General's Chambers. There being no explanation for the absence, I allowed the hearing of the appeal to proceed ex-parte under 039 r 14 (2) of the CPR.

The appellants had applied by Notice of Motion dated 9/6/83 to the Chief Magistrate's COURT of Kigezi under 0.1 r. 10 (2) of the CPR and section 101 of the Civil Procedure Act for leave of that court to amend their plaint. The intended amendment sought to omit the 3rd Plaintiff in the original plaint as he no longer was interested in pursuing the case and to substitute "Rukungiri District Administration" for the defendant instead of the "Administrative Secretary of Rukungiri District" which was improperly included as a defendant. The ground of the application were that THE original plaint was drawn by laymen who were NOT conversant with the art of drafting plaint, and thereby made the above errors which needed to be corrected. That the purpose of the intended Amendment was to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. In his Ruling which was delivered on l6/8/89 the Ag. Chief Magistrate dismissed the Application. It was against this order of dismissal that the appellants now appealed to this court.

Seven grounds were advanced and argued in this appeal. The first ground attacked the trial Ag. Chief Magistrate for holding and implying that a statutory Notice under section 1 of Act 20/69 is required to be filed in court. The second ground challenged the Ag. Chief Magistrate's Ruling in believing the contents of a mere letter dated 30/9/83 from the attorney-General's Chamber in preference

to the affidavit which was sworn by Aron Bisiru as to whether the statutory Notice was served on the intended defendant as required by section 1 of Act 20/69 yet the letter did not form part of the proceedings.

Ground three questioned the understanding of the Ag. Chief Magistrate of section 1 of^ct 20/69 as to who should be served with the statuting Notice of intention to sue where a Local Administration was the intended defendant. Ground four accused the Ag. Chief Magistrate for failure to appreciate the purpose of the intended amendment. Ground five complained against the Chief Magistrate treating the letter dated 30/9/83 from the Attorney-General's chamber as if it was an amendment to the WSD and Ground six attacked the Chief Magistrate for considering the issue of service of statutory Notice which was NOT raised in the W.S.D. Ground seven is merely a summary of grounds 1-6.

The three plaintiffs in the original plaint had jointly instituted the suit against the Administrative Secretary Rukungiri District for some wrongful acts which were committed against them by servants/Agents

of the District administration in the course of their employment.

In the action, the plaintiffs jointly claimed General Damages in trespass to their land, an order for injunction to restrain the defendant From Further committing trespass on the plaintiffs land; Compensation For damages caused to the Plaintiffs property on the land during the trespass, cost of the action and interest on the decretal amount . The plaint was drafted and signed by one of the plaintiffs for them all. The plaintiffs are all laymen without any legal qualification. The defendant was duly served with summons to Enter Appearance with copy of the Plain. These were passed to the Attorney General's chambers. On receipt of the attorney General chamber duly entered the necessary Appearance and filed a WSD for the defendant. Later the 3rd plaintiff who felt unable to proceed with the case dropped out and the rest of the plaintiffs instructed M/S Mwobosa & Co. Advocates to prosecute the suit on their behalf.

On perusing the original plaint, counsel for the Plaintiffs decided that the plaint needed amendment to effectually determine the real questions in dispute between the parties. Hence that application the dismissal of which is the subject of this Appeal. I shall consider the grounds of this Appeal in the order in which they were argued.

The first ground of the appeal was that the learned Ag. Chief Magistrate erred in law in holding and implying that a statutory Notice required under the provision of section 1 of Act 20/69 should have been filed in court for him to see.

Arguing this ground, Mr. Mwebesa pointed out that while considering the question whether the statutory Notice was served on the defendant as required by section 1 of Act 20/69, the trial Chief Magistrate said on page one of his Ruling thus:-

> "It is regrettable that the A.G.'s office has been aware of this date but has not sent a representative.
> Be that it may, according to schedule 1 of Act 20/69, the Administrative Secretary of the District is stated to be delivered or sent in case of a local Administration.
> I appreciate that some Notice could have been given to the administrative Secretary. However, such Notice is not on record before me. Since it was filed by a layman, court is not sure whether the statutory Notice of 6o days was complied with. The plaintiffs words in the affidavit, of 11/1/84 is NOT enough".

Mr. Mwebesa contended that by the above passage, t

he trial Chief Magistrate implied that the statutory Notice under section 1 of Act 20/69 was required to be filed in court. Counsel submitted that, that was erroneous interpretation of the provision of section 1 of the Act. That the section merely required that such Notice be served on the

intended defendant but not on the court.

I do not perceived from the above passage the meaning portrayed by the learned counsel that the AG. Chief Magistrate was thereby implying that it was a requirement of the provision of section l of Act 20/69 that the statutory Notice should be filed in court. It seems to me clear that the learned Chief Magistrate was in that passage expressing his doubt as to the form of the Notice which the deponent, claimed to have served on the defendant. He was doubting whether the Appellant a layman could issue the form of statutory Notice required under section 1 of Act 20/69. That he had no way of verifying the deponent's claim in the affidavit that the statutory Notice was served on the defendant since such a Notice was not on the record before him, that the words of the deponent in the affidavit was not enough. He was considering the evidence before him. It was necessary for the copy of what was claimed to be served on the defendant as a statutory notices to have been annexed to the affidavit and place a record before him to verify that the document servant was indeed a statutory Notice as required by section 1 of Act 20/69. For this reason this ground must fail.

The next is ground 2. It was the learned Ag. Chief Magistrate further erred in law by believing the contents of a mere letter dated 30/9/83 from the attorney General's chamber disregarded the affidavit dated 11/1/84 by Aron Basiru which from court proceeding while the letter does not.

Arguing this ground, Mr. Mwebesa referred to a passage in the Ruling of the Chief Magistrate where the trial Magistrate said:-

> "Since it was filed by a layman, court is not sure whether the statutory Notice of 60 days was complied with"

The learned counsel submitted that the above statement was misplaced because there was evidence-by affidavit dated 11/1/84 by Aron Bisiru one of the Appellants showing that the statutory Notice was served on the Administrative Secretary Rukungiri on 20/10/82. That it was erroneous for the trial Magistrate to have ignored that affidavit in preference for the letter dated 30/9/83 from the Attorney-General's chambers. That in any case the defendant did not deny service of such Notice on his WSD.

It is to be noted that an affidavit is evidence in a written form and as such a Magistrate may disbelieve it if he has reason to do so. He is not bound to believe every affidavit placed before him

In the instant case, the Ag. Chief Magistrate looked for a copy of the statutory Notice which the deponent claimed in his affidavit to have served on the defendant to verify the truthfulness of the affidavit.

He was perfectly entitled to do that since he must be sure of the truthfulness of the affidavit before he could act on it. But no copy of the alleged statutory Notice was annexed to the deponent's affidavit CONSEQUENTLY THE Ag. CHIEF Magistrate chose to disbelieve THE affidavit when he said.

"The words of the plaintiff in the affidavit is not enough"

He was entitled to that and I cannot fault him on that.

Counsel further argued that the defendant's WSD did not deny service of the Statutory Notice on it and that it was wrong for the trial Magistrate to have considered that issue which was raised in the letter dated 30/9/83. Which LETTer did not form part of the proceeding.

It is quite true that the WSD of 21/3/83 did not admit or deny service of statutory Notice on the defendant. But I think the trial Chief Magistrate was justified in considering the issue because it was raised in paragraph 4 of Aron Bisiru's affidavit. I think he must have been prompted to be particularly careful about this because the original plaint did not also aver the fact of service of Statutory Notice on the defendant. The defendant in his WSD denied all the Statements of fact that have been alleged in the statement of claim. As the fact, of service of statutory Notice on the defendant was not averred in the plaint, the defendant though careless was justified in making that omission. I do not see merit in this ground and it must fail.

In ground 3, the appellant attacked the **Ag.** Chief Magistrate as having misdirected himself and clearly misunderstood the provision of section 1of Act 20/69 when he held in effect that it was wrong to serve a statutory Notice on an Administrative Secretary when the intended defendant is a local Administration

Arguing this ground, Mr. Mwebesa contended that an Administrative Secretary was the right officer to be served with a statutory Notice of intention to sue when the intended defendant is a Local Administration.

He pointed out that on page 2 of his Ruling the trial Magistrate said.

" The Notice though given to the right party is now

on the Rukungiri District administration which has never boon properly Notified. After all it was Notice to sue a wrong party to wit, Administrative Secretary Rukungiri".

Mr. Mwabesa submitted that by the above passage the Ag. Chief Magistrate moon to say that it was wrong to serve the statutory Notice of intention to sue on the administrative secretary when the intented defendant is the District Administration.

It must be noted that schedule 1 to Act 20/69 tabulates persons to be served with statutory Notice when the intended defendant is one of those Shown in section 1 (l) of the Act. The Administrative Secretary of the administration is the officer to be served with statutory Notice when the Local Administration is the intended defendant.

In the instant case, the learned Ag. Chief Magistrate was surely mixed up in the above passage of his Ruling. If the Statutory Notice was served on the Administrative Secretary Rukungiri District Administration, it was a proper service if the intended defendant was Rukungiri District Administration. It would be service which binds the District Administration. It would be in record with section 1 (l) of Act 20/69.

The above passage is in my view contradictory t0 earlier finding of the Ag. Chief Magistrate in his Ruling. Hehad found that flip defendant was not served .with the statutory Notice of intention to sue. He came to his conclusion when he disbelieved the affidavit of Aron Bisiru of 11/1/84 and held that no statutory Notice was served on the defendant. He did not believe that the Notice which the Plaintiff claimed to have served on the Administrative Secretary Rukungiri conformed to the statutory Notice required by section 1 of Act 20/69.

There is now no basis for saying that the statutory Notice was served on the administrative Secretary. It is. contradictory.

Mr. Mwebesa argued that since the right person was served with the statutory Notice but the wrong person was subsequently included as defendant Administrative Secretary Rukungiri Local Administration, there was no prejudice by substituting Rukungiri District Administration as the defendant under 0.1 r. 10 (2) of the CPR.

I agree with the above argument that where a wrong party is improperly joined in a proceeding, such an error can be corrected by an appropriate amendment. Such amendment is possible under 0. 1 r. 10 (2) and 048 r.1 of CPR. I however hasten to add that this is only possible if the proceedings is in the' first instance properly before court.

In the instant case, this court as a first appellate court is under a duty to subject the entire evidence on record to an exhaustive scrutiny to arrive at its own conclusion. The evidence available on record here is the affidavit of iron Bisiru of 11/1/84. Shows that a Statutory Notice was served on the administrative Secretary Rukungiri on 20/10/82. That after such service the administrative Secretary in his letter.

(Annexure “A” to the affidavit) convened a meeting in the office to which he invited amongst others the chairman General purpose committee to discuss the issue.

It must be pointed out that A statutory Notice which is required under section 1 of Act 20/69 is a document to be drawn in a particular and prescribed form. The imposing question here, was the this the type of document which the deponent served on the administrative Secretary of Rukungiri Local Administration on 20/10/82. The answer is that we are not sure. It was up to the appellant to show that it was the night document which was served on the Administrative secretary. This could have been done by annexing a copy thereof to the affidavit in support of the application leave to

amend. But this was done. He chose to annex only the administrative secretary letter. This casts doubt as to whether the document which was served on the administrative Secretary Rukungiri District Administration on 20/10/82 Was Infact a statutory Notice within the meaning of section 1 of Act 20/69. This was the reason which led the Ag. Chief Magistrate to disbelieve the deponent's affidavit. I agree with him considering the technical form of the Notice and the fact that it was drawn by a layman.

If a statutory Notice was not served on the defendant, then the subsequent suit was not properly instituted in court and therefore no amount of amendment to the plaint can put it right. For this reason this ground must also fail.

Ground is that the learned Ag. Chief Magistrate failed to appreciate that the purpose to amend the plaint was to put right what the laymen should have set out in their original plaint so as to enable the court to effectively dispose off the case. Arguing this ground, Mr. Mwebesa contended that since the statutory Notice was served on the right party the subsequent inclusion of wrong party as the defendant did not prejudice Rukungiri District Administration and that the intended amendment was necessary to correct those errors.

I should like to point out that this point has already been covered in the discussion of ground 3. It is therefore not necessary to repeat it here.

Grounds 5 and 6 are in effect that the learned Ag. Chief Magistrate erred in relying on and treating as an amended WSD. Isabirye's Letter of 30/9/83 in preference to an affidavit which forms part, of the proceedings when the letter does not. That it was wrong for the learned Chief Magistrate to have believed that letter which did not form part of the court proceedings in preference to Aron Bisiru's affidavit which formed part of the court proceeding.

It must be pointed out here that this point has already been discussed when discussing ground 2. It suffices to add here that while it was wrong for the Chief Magistrate to have made reference to the letter of Isabirye of 30/9/83 which did not form part of the proceedings I am of the view that they did NOT occasion any miscarriage of justice because the issue of service of the statutory Notice was raised.

In the appellant's affidavit, In that case the trial Chief Magistrate win bound to consider it. For all the reasons given above, The Appeal must fail, It is accordingly dismissed. I make no order as to cost the Respondent did not appear.

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9.

Q.M. OKELLO

JUDGE.

4/5/92.

Judgment delivered in chamber in the presence of Mr, Stanley Beyendera 1st Appellant and Felix Komakech court clerk.

G.M. OKELLO

JUDGE. 4/5/92.