THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 9 OF 2000

(Arising from Miscellaneous Application No. 223 of 1999 of the Chief Magistrate's Court of Mengo)

1. ITALIAN ASPHALT HAULAGE LTD

2. TITO O. TWIJUKY P/A }:: **APPELLANTS**

3. M/S TRUST MASTERS AGENCIES

VERSUS

ASSIST (U) LTD:: RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE E.S. LUGAYIZI

JUDGEMENT

This judgment is in respect of an appeal which arose out of the ruling of the Chief Magistrate of Mengo (His Worship Mr. Deo Nizeyimana) in Miscellaneous Application No. 233 of 1999. The background to the appeal is briefly as follows. The 1st appellant rented out the suit premise which is on Block 265, Plot 339 Bunamwaya to the respondent. Thereafter, the two - had a misunderstanding as to the outstanding rent for the suit premises. Subsequently, the respondent vacated the suit premises and took all its moveable property to a new site at Nalukolongo. On the instructions of the 1st appellant, the 2- appellant obtained a Special Certificate of Distress from the Chief Magistrate's-court under section 3 of the Distress for Rent (Bailiff's) Act (Cap.68) which empowered him to levy distress upon the respondent's moveable property that was on the suit premises with a view to recovering the outstanding rent. With that certificate in his hands, the 2nd appellant proceeded to seize an assortment of the respondent's moveable property. He then advertised them with the intention of selling them. At that point the respondent applied to the Chief Magistrate of Mengo for an. order canceling the Special Certificate. Court fixed a date to hear the application and both sides were notified of that date. At the time of hearing the application M/S Shonubi & Co. Advocates represented the appellants and M/S Mugisha & Co.

Advocates represented the respondent. At the outset of the hearing the appellants raised four preliminary objections which they lost. Following that event the appellants appealed to this Honourable Court against the Chief Magistrate's ruling dated 19th January 2000. That is the background to this appeal.

The appellant's Memorandum of Appeal initially cited four grounds which Court finds unnecessary to reproduce here. However, with the leave of Court, the appellants subsequently amended the third ground of appeal to read as follows,

> *"3 (a) The learned Chief Magistrate erred, in law and fact in ruling that the annextures to Mr. Laery's affidavits were merely misarranged and therefore the fact of mis-arrangement could not be said to be a falsity when in fact, the objection was levelled against the substance contained in the said annextures in that they were purporting to be receipts of payments expended on the suit premises when in fact they were not.*
>
> **(b)** *The learned Chief Magistrate ought to have ignored completely the affidavit of Mr. Michael A. Laery dated 10/09/1999 supporting the Notice of Motion because it offended the clear provisions of Order 17 rule 3 in that the application itself was not an interlocutory application anticipated by Order 17 rule 3 but an originating one."*

At the time of hearing the appeal Mr. Kibuka Musoke who represented the appellants abandoned the rest of the grounds and argued only the third ground in favour of his clients. In essence he submitted that the Chief Magistrate's decision was based on erroneous premises.

Firstly, he pointed out that the purpose of all the receipts under Annexture "B" series was to show the expenses the respondent incurred in repairing the suit premises. However, quite a number of those receipts had nothing to do with repairs of any building. Instead, they related to repairs of motor vehicles. For that reason, Mr. Kibuuka Musoke argued that Mr. Laery's affidavit was fundamentally defective because it was tainted with untruths and could not lawfully support the Notice of Motion. He cited the case of Bitaitana **vs. Kananura [1971] 11CR** 31 in support of that position. Secondly, Mr. Kibuka Musoke pointed out that the affidavit referred to above also

contained hearsay in paragraphs 14, 19, 21, 22 and 25; and for that reason it was defective because it offended Order 17 rule 3 of the CPR. He elaborated that the matter which was before the learned Chief Magistrate was one where Court was supposed to determine the final rights of the parties. It was not an interlocutory matter in which the respondent could safely rely on Laery's affidavit that contained hearsay. That aside, Mr. Kibuka Musoke further argued that it was not even possible to "sever" the offensive areas of Laery's affidavit from the non offensive areas of it and retain an affidavit that was intelligible. He also pointed out that Article 126(e) of the Constitution would not apply in this case. For those reasons Mr. Kibuka Musoke called upon Court to allow the appeal and set aside the learned Chief Magistrate's ruling which (in his view) did not take into account the above defects.

On the contrary, Mr. Mugisha submitted that the appeal had no merit in it because Laery's affidavit that accompanied the Notice of Motion was not defective on account of its annextures or its contents. With regard to receipts under Annexture 'B" series which did not relate to repairs of the suit premises, Mr. Mugisha pointed out that their inclusion was only a mis-arrangement and not a pointer to deliberate lies. With regard to the area of Laery's affidavit that contains hearsay evidence, Mr. Mugisha pointed out that the said defect can be cured by the evidence in Laabo's and Mangeni's affidavits which was direct eye witnesses' evidence and went to confirm the reliability of Laery's hearsay's evidence. In addition to the above, Mr. Mugisha pointed out that some of the annextures which did not relate to repairs of the suit premises and the hearsay evidence in Laery's affidavit could safely be severed from the documents in question without rendering them fundamentally defective. He cited the decision in 'Besigye vs. Museveni Presidential Election Petition No.1 of **2001** to back his position and appealed upon Court to dismiss the appeal with costs.

In Court's opinion, it is hot in dispute that the repairs to the suit premises took place. It is also not disputed that some of the receipts under Annexture "B" series to Laery's affidavit dated 10th September 1999 do not relate to repairs of the suit premises. What is clearly in issue in this appeal is the following.

(a) Whether Laery' s affidavit dated 10th September 1999 is fundamentally defective on account of the receipts which do not relate to repairs of the suit premises?

(b) Whether Laery's affidavit offends Order 17 rule 3 of the CPR?

(c) If it does, whether that fact renders the affidavit fundamentally defective?

(d) The available remedies.

Court will now endeavour to resolve the above issues in turn.

With regard to the first issue, the receipts the respondent included under Annexture "B" series which do not relate to repairs of the suit premises are B39, B54, B102, B105,. B 107, B 110, B111, B 112, B 115, B 118, B 120, B 125 and B 144. Clearly, V those receipts are a small portion' of the total receipts Laery annexed to the affidavit in support of the Notice of Motion. In fact they account for only 10% of the total, receipts. The Test of the receipts (i.e. 90% of them) seem to point to the fact of repair of the suit' premises. Indeed, the apparently truthful receipts can easily be separated from the dubious receipts. It seems from the learned Chief Magistrate's ruling that although he did not exactly say so he approached that area of the ruling with a similar outlook. He was mindful of the presence of the dubious receipts and did not mix them with the apparently good ones. That approach was approved by the Supreme Court in Besigye vs. Museveni (Supra). Court will, therefore, not fault the learned Chief Magistrate for not finding that the receipts which did not relate to repairs of the suit premises rendered Laery's affidavit fundamentally defective on account of the fact that they projected lies. In any case, the receipts were not vital in proving the heart of the respondent's case under the Notice of Motion which was that the Special Certificate ought to be cancelled on account of the fact that it was mis-used to attach property that was outside the suit premises and some of which was not even named in the Special Certificate. That means that Laery's affidavit was not fundamentally defective on

account of the receipts which were attached to it and did not relate to repairs of the suit premises. Court has therefore resolved the first issue in favour of the respondent.

With regard to the second issue, it is first of all important for Court to take a close look at Order 17 rule 3(1) of the CPR which provides as follows,

> *"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted, provided that the grounds thereof are stated"*

From the above it is clear that affidavits deponed to in respect of interlocutory applications may include statements that are based on facts which are outside the deponent's personal knowledge e.g., hearsay and matters of belief. All other affidavits are by law supposed to be free of such matters. Blacks Law Dictionary Centennial Edition (1891 - 1991) defines the word interlocutory at page 563 as follows,

> *"Provisional; interim; temporary; not final. Something intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy..."*

Of course, the Notice of Motion that was the subject of the learned Chief Magistrate's ruling dated 19th January 2000 was not an interlocutory application, for, under the respondent sought the final act (in that suit) of canceling the Special Certificate of Distress. Therefore, Laery's affidavit which accompanied the Notice of Motion was as per Order 17 rule 3(1), of the CPR supposed to, be free from hearsay or matters based on Laery' s belief. Did that affidavit conform to the requirements of Order 17 rule 3(1) of the CPR? In answering that question Court will set out below the paragraphs of Laery's affidavit which the appellants seemed to complain about. Those paragraphs read as follows.

"14. THAT lam informed by the PC Oyat of Katwe Police Station and I verily believe the same to be true that the said properties were towed from Nalukolongo in the presence of the following:

(i) Ssematimba Abaasi
(ii) Sentamu Julius
(iii) PC Oyat
(iv) PC Odaga ...
(v) PC Opio ...
(vi) PC Adipa...

19. That I am advised by the Applicant's lawyers and 1 verily believe the same to be true that it would be a traversity of justice to allow the above distress to subsist in he light of what I have stated herein above.

21. THAT Jam advised by the applicant's said lawyers and I verily believe the same to be true that the exercise of distress is illegal in as much as the Applicant's properties the subject of distress were not located at the demised premises at the time of distress and that the instant situation is distinguishable from that where the Applicant were a judgement debtor whose properties would be liable to attachment from whatever location after a fully fledged hearing.

22. That I am further advised by the Applicant's above said lawyers and I verily believe the same to be true that the whole exercise was unwarranted in so far as the Applicant did not owe any arrears of rent in as much as pursuant to clause 3(C) of the sub-lease Agreement the Applicant had extensively effected repairs to the demised premises as stated herein above which though acknowledged by the 1st Respondent had not yet been re-imbursed by the 1 Respondent.

25. THAT whatever I have slated herein above in paragraphs 1, 2, 3 ... is correct and true to the best of my knowledge and belief and whatever I have stated in correct

and true to the best of my information from the sources disclosed."

While paragraphs 1, 4 and 25 of Laery's affidavit are clearly embroiled with matters which are outside Laery's personal knowledge, paragraphs 19, 21, 22 and again part of 25 contain matters based on Laery' s belief, yet the subject of the Notice of Motion that the affidavit accompanied was not interlocutory but was one where the rights of the parties in that suit were supposed to be. finally determined. Indeed, as earlier on pointed out, the respondent was seeking, under the Notice of Motion, an order for cancellation of the Special Certificate of Distress that the lower court had granted to the 2nd appellant. In those circumstances, Order 17 rule 3(1) of the CPR required that Laery's affidavit ought to have contained only direct evidence that was based on Laery's own personal knowledge. However, because Laery's affidavit is not restricted to such evidence it is obvious that it offends Order 17 rule 3 of the CPR. The second issue is therefore resolved in favour of the appellants.

With regard to the third issue, the contents of Order 17 rule 3(2) reveal quite a lot in this area of controversy. It reads as follows,

> *"The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter ... shall, unless the court otherwise directs, be paid by the party filing the same."*

In Court's opinion the above provision indirectly tells us what the fate of such affidavit that offends Order 17 rule 3(1) should be. The provision seems to suggest that such affidavit should not be thrown out by Court as one that is fundamentally defective. Instead, it should be left to stand, but to the detriment of the party filing it in terms of costs. Mulenga (J.S.C) took that view in the case of Besigye vs. Museveni **(Supra)** and in Court's opinion that view is consistent with Article 126(e) of the Constitution which provides that,

> *"substantive justice shall be administered without undue regard to technicalities"*

The above must apply, in this case, when one particularly takes into consideration the fact that although Laery's affidavit bears hearsay evidence, etc, the rest of the evidence which accompanies the Notice of Motion (i.e. Laabo's and Mangeni's evidence) is direct eye witnesses' evidence which tends to confirm the reliability of Laery' s hearsay evidence. In any case, Laery's hearsay evidence, etc, can safely be severed from the rest of his affidavit without destroying the heart of the case under the Notice of Motion. The foregoing means that Laery's affidavit is not fundamentally defective. Court has therefore resolved the third issue in favour of the respondent.

With regard to the final remedy Court has this to say. Since Court has resolved the first and third issues (which are the heart of this appeal) in favour of the respondent it means that the appeal which is the subject of this judgement has not succeeded. In the circumstances, Court has no choice but to dismiss the appeal with costs; and it is so ordered. In the result, the learned Chief Magistrate's ruling dated 19th January 2000 is hereby upheld.

Be that as it may, before Court takes leave of this matter it wishes to point out that it was imprudent for the appellants' advocates to advise the appellants to appeal to this Honourable Court after merely losing some preliminary objections. After the learned Chief Magistrate's ruling the better course should have been for the parties to proceed with the substance of the Notice of Motion and finally appeal once on all matters if any of the parties was dissatisfied with the outcome of the Notice Motion. In view of the course the appellants took, they will now realise that they have to go back to the lower court to finish what they left unfinished in respect of the Notice of Motion. This is not only going to be very expensive for them financially but they will discover, too, that it is a roundabout way of finally disposing of the Notice of Motion.

(JUDGE)
28/5/2002

Read before: At 9.06 a.m.
Mr. Bagaga for Respondent

(JUDGE)
28/5/2002