

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE**

**HCT-04-CV-CA-0045-2008
(FROM TORORO LAND SUIT NO. 0033/2007)**

YEDIDA PADDE.....APPELLANT

VERSUS

HAMIDALI ALI.....RESPONDENT

BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN

RULING

Yedida Padde through his lawyers M/s Ojambo & Ojambo advocates filed this appeal against the ruling of the Magistrate Grade I Tororo dismissing a preliminary objection by the appellant that the suit before court was barred by limitation.

The respondent Hamidali Ali is represented by M/s Tuyiringire & Co. Advocates.

According to the memorandum of appeal, two grounds are complained of, to wit, that;

1. The learned trial Magistrate erred in law and in fact when he without hearing the defendant's evidence found that the defendant had trespassed on the plaintiff's land.
2. The learned Magistrate erred in law and in fact when he over ruled the defendant's preliminary objection on limitation and ordered the case to proceed and when he held that the Limitation Act did not apply to the plaintiff on grounds that the alleged act of trespass occurred when the plaintiff was out of the country in exile.

Before hearing of the appeal, Mr. Tuyiringire, learned counsel for the respondent raised a preliminary point of law about the competence of the appeal having been filed without leave of court which is a mandatory requirement.

Both learned counsel were allowed to file written submissions respectively.

In his submission, Mr. Tuyiringire contended that;

- The appeal is incompetent because it arises out of an order or decision where there is no automatic right of appeal as per S.76 CPA and O.44 rr (1) and (2) CPR.
- Although a point of law under the Limitation Act is major procedural question which goes to the root of the matter, leave is required before a competent appeal is filed.

In reply learned counsel for the appellant who did not write his names for ease of reference submitted conceding that an order that does not fall under S.76 CPA is appealable with leave. That the dismissal of the appellant's preliminary objection amounted to a decree and not just an order since Limitation was the appellant's major defence. Therefore no leave was required before appealing.

The appellant further submitted that even if the Magistrate's decision was an order, the failure to obtain leave would not in itself make the appeal incompetent because no procedural defect such as to obtain leave could release the appellate court of its duty to give effect to the Statute of Limitation on an appeal from a judgment to a plaintiff in respect of time barred cause of action.

I have considered the respective submission by respective counsel. I have perused the lower court's record. When the issue of limitation was raised for the second time by counsel for the appellant, the trial Magistrate made a ruling on the matter overruling the objection and ordered the suit to "proceed and be heard on merits to its logical conclusion." The trial magistrate indeed fixed the suit for defence hearing on 14 May 2008 at 2:00p.m.

It defeats my understanding wherefrom the first ground of appeal came when the hearing of the suit had not been concluded and judgment pronounced. Indeed no reference to a decree to that effect has been made by the appellant.

I take it that the ruling of the magistrate overruling the preliminary objection was interlocutory and did not amount to a final decree of the suit. For all intents and purposes, it was an order of court.

As rightly pointed out by Mr. Tuyiringire learned counsel for the respondent, the law applicable is S.76 CPA and O.44 rr (1) & (2) CPR.

The appellant ought to have sought for leave before he filed the instant appeal. It is provided for under O.44 r.1(1) CPR that appeals shall lie as of right from the order listed therein from (a) to (u).

Then under O.44 r.(2) CPR any order not listed in r.1 above must be appealed against with leave of court. This rule provides that;

“2. An appeal under these Rules 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 of leave were given.”

Where leave required for a competent appeal to be filed is not obtained, an appellate court has no jurisdiction to entertain the appeal which must be struck out as incompetent ***B.D. BILIMORIA & ANOR. V. T.D. BILIMORIA [1962] EA 198.***

The general purpose of requiring leave to appeal from some orders was to restrict appeals on minor procedural questions not substantially going to the root of the

matter or determining finally the rights of parties. This stage had not been reached by the trial court.

As a general observation, I wish to state that it is usually not necessary to appeal against an interlocutory ruling separate from the final decision. Therefore it was not necessary for the appellant to have appealed moreover irregularly against the magistrate's interim decision overruling a mid trial objection. If parties are allowed to file appeals on interlocutory matters and orders against final decisions, it might lead to a multiplicity of appeals upon incidental orders made in the court of hearing when such matters can more conveniently be considered in an appeal from the final decision. ***SANYU LWANGA MUSOKE V. SAM GALIWANGO SCCA 48/95(1997) V. KALR.47.***

I will uphold the preliminary objection by learned counsel for the respondent. This appeal is struck out with costs.

File is referred back to the trial court for completion.

Musota Stephen

JUDGE

25.8.2010

25.8.2010

Bayingana Mike for Applicant.

Applicant in court.

Respondent in court.

Tuyiringire for Respondent absent.

Kimono Interpreter.

Bayinganga: I am ready to receive the Ruling.

Court: Ruling delivered.

Musota Stephen

JUDGE

25.8.2010