REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CV-CA-0033-2009

(Arising out of Misc. Application No. 1008/2008 and Civil Suit No. 2725/2008)

FRANCIS WAZARWAHI BWENGYE ::::::::::::::::::::::::APPELLANT

VERSUS

HAKI W. BONERA ::RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT

The appellant being dissatisfied with the ruling and order of His Worship Daniel Lubowa given on 10/07/2009 at Mengo in Misc. Application No. 1008 of 2008 appealed to this court against the said ruling and order on the following grounds:

1. ***The learned trial Magistrate erred in law when he upheld the respondent's preliminary objection based on technicalities thereby occasioning a miscarriage of justice.***
2. ***The learned trial Magistrate erred in law when he based his ruling on the extraneous facts.***
3. ***The learned trial Magistrate erred in law not to hear the application for leave to appear and defend on its merits.***
4. ***The learned trial Magistrate erred in law when he entered judgment against the appellant.***

It is therefore prayed that:

a). The ruling dismissing the application for leave to appear and defend be set aside.

b). The application for leave to appear and defend be heard on its merits.

Counsel:

Mr. Bernard Tibesigwa for the appellant

Mr. Protase Byarugaba for the respondent.

BRIEF FACTS

The respondent filed Civil Suit No. 2725 of 2008 against the appellant at Mengo Court for recovery of Shs.15,000,000/=. The suit was preferred under O.36 of the Civil Procedure Rules (popularly known as Summary Procedure).

The appellant then filed ***Misc. Application No. 1008 of 2008*** seeking leave to appear and defend the suit. For some un clear reason the appellant proceeded under Section 98 of the Civil Procedure Act and O.41 rr.1, 2 (1) and 9 of the Civil Procedure Rules. When the suit came up for hearing Counsel for the respondent raised a preliminary objection that:

a). The application was filed by Chamber Summons instead of Notice of Motion.

b). That the law quoted by the appellant under which the application was brought was wrong.

The learned trial Magistrate upheld the respondent's preliminary objection, dismissed the application and entered judgment for the respondent for the sum in the claim with costs. Hence this appeal.

Ground 1:

In this ground the appellant complains that the learned trial Magistrate erred in law when he upheld the respondent's preliminary objection based on technicalities thereby occasioning a miscarriage of justice.

Given that the other Grounds revolve around Ground I, I will concentrate on it in the hope that the answer thereto will dispose of the entire appeal.

It is the duty of the first appellate court to review the record of evidence for itself in order to determine whether the decision of the trial court should stand. In so doing I must bear in mind that an appellate court should not interfere with the discretion of a trial court unless it is satisfied that the trial court in exercising its discretion has misdirected itself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of a discretion and that as a result there has been a miscarriage of justice: ***NIC vs Mugenyi [1987] HCB 28.***

In his ruling the learned trial Magistrate found that the appellant filed the application by way of Chamber Summons instead of Notice of Motion. He further found that the appellant had cited O.41 which was wrong. Hence the finding that the application was incompetent and the dismissal of the suit.
It is submitted for the appellant that the Magistrate's reasoning was based on mere technicalities which are prohibited by Article 126 (2) (e) of the Constitution. That applications for leave to defend are provided for under Order 36 rule 4 of the Civil Procedure Rules and that the Order does not provide the procedure for making such an application. I do not think that it is necessary to reproduce the arguments of Counsel on this point verbatim.

Suffice it to say, first of all, that all applications to the court, except where otherwise expressly provided for under the Civil Procedure Rules, are by motion to be heard in open court. O.52 r.1 of the Civil Procedure Rules is very clear on this. Secondly, applications for leave to defend are provided for under O.36 r.4 of the Civil Procedure Rules. The appellant's application was preferred under O.41 rr.1, (2) (1) and 9 which governs applications for temporary injunctions. Clearly therefore the application was defective on account of being preferred under a wrong law. The issue as I see it is whether it was incurably defective to warrant the trial Magistrate's orders therein.

Commenting on the law generally, the learned trial Magistrate did concede that in the interest of justice courts have moved away from strict adherence to technicalities in the spirit of Article 126 (2) (e) of the Constitution. He then observed:

"The purpose of this movement is to assist the poor, illiterate and lay …….

Legislators did not, however, intend to protect the reckless litigants. Whereas the protection is for the uninformed, the level of recklessness demonstrated by the applicant is so gross that it indeed boarders (sic) fraud. Concerning an applicant Counsel of such high standing and author of leading legal books, allowing this application would be condoning an illegality."

Whereas the application was indeed preferred under a wrong law which entitled the learned trial Magistrate to have it struck out or treat the defect as curable, allow an amendment and proceed to determine it on merits, very respectfully to him, he exercised his discretion in the matter in a rather injudicious manner.

His suggestion that there should be one law for litigants of high standing in society and another law for everyone else is fallacious and misleading. Under Article 21 (1) of the Constitution, all persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law. It was therefore immaterial that the applicant before him was a lawyer of high standing and an author of leading legal books. He too was entitled to justice like any other litigant.

There are two aspects to learned Counsel's objection to the appellant's application. The first relates to the mode of prefering it, that is, by Chamber Summons instead of Notice Motion and the second to the citing of a wrong law.

I have already indicated that since O.36 does not provide for the mode of prefering the application, then under O.52 it should have been by Notice of Motion.

In the application, the applicant had sought orders that:

a). The defendant/applicant be given leave to appear and defend the case on merit.

b). There are bona fide and triable issues of fact and law in the case.

c). The costs of the application be provided for.

Looking at the orders sought, there is no doubt that the applicant intended to seek leave to defend the case on merit. There is no doubt also that reference to O.41 was a mistake. The general rule is that where an application omits to cite any law at all or cites the wrong law, but the jurisdiction to grant the order sought exists, then the irregularity or omission can be ignored and the correct law inserted.

If any authority were required for this, ***Tarlol Singh Saggu vs Roadmaster cycles (U) Ltd CACA No. 46/2000*** would suffice. The court observed in that case, citing with approval the decision of the former East African Court of Appeal in ***Nanjibhai Prabohusdas & Co. Ltd vs Standard Bank Ltd [1968] EA*** 670 that:

> ***"The court should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity unless the incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature."***

The court also re-emphasized the Supreme Court observation in ***Re Christine Namatovu Tebajjukira [1992 – 93] HCB 85*** that:

> ***"The administration of justice should normally require that the substance of disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights."***

It is therefore clear that if the learned trial Magistrate had directed his mind to the law and authorities on this point, he obviously would not have taken the course he did. He would have found that failure to cite the correct law was an error or lapse which would not necessarily debar the application form proceeding. He would also have found, as regards whether the application should have been by Notice of Motion or Chamber

Summons, that no action may be defeated by use of wrong procedural mode and the judge has the discretion to hear it either in court or in Chambers: ***Kinyanjui & Anor vs Thande & Anor [1995 – 98] EA 159.***

Whether or not to correct the errors in the course of the hearing and proceed to determination of the application on merits was a matter within the trial Magistrate's discretion. As such court would be slow to interfere with that discretion unless it was not exercised judicially. In ***Yahaya Kariisa vs Attorney General & Anor SCCA No.7 of 1994*** court observed that:

> ***"……..Discretion is the faculty of determining in accordance with the circumstances what seems just, fair, right, equitable and reasonable in the given set of circumstances."***

I believe it is.

In the instant case the respondent had brought her claim under O.36 of the Civil Procedure Rules. The applicant filed ***Misc. Application No.1008 of 2008*** seeking leave to appear and defend the suit. The application was accompanied by an affidavit which indicated that the intended defence related to the whole claim. Although the filing was by Chamber Summons instead of Notice of Motion and the application cited a wrong law under which it was being preferred, these were irregularities which, as stated above, were not fatal to the application. What was important was that the learned trial Magistrate had jurisdiction to grant the order sought in the application. He dismissed the application because the applicant was a lawyer of high standing in society and he was an author of many legal books. I have already indicated that this was misleading. On the basis of the irregularities he had the power to reject the application and order it struck out. The rejection of a pleading does not of its own force preclude the pleading party from presenting a fresh one in respect of the same matter. The trial Magistrate instead dismissed the application and proceeded to enter judgment for the respondent in the sum claimed in the plaint.

I have no doubt in my mind that this has occasioned a miscarriage of justice to the appellant who now stands condemned unheard thanks to a procedural error on his part.

It is trite that courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy. Unless the other party will be greatly prejudiced, and/or cannot be taken care of by way of an order for costs, hearing and determination of disputes should be fostered rather than hindered: ***Banco Araba Espanol vs Bank of Uganda SCCA No. 8 of 1998.***

By saying so I should not be understood to mean that rules of procedure should be ignored. Each case must be decided on the basis of its own circumstances. From the record of the lower court and the written arguments of Counsel on appeal, it would appear to me that the learned trial Magistrate erred in law when he upheld the respondent's preliminary objection based on technicalities which makers of the Constitution in their wisdom meant to remedy in Article 126 (2) (e) of the Constitution.

Consequently the appellant has been shut out from the judgment seat without proper considerations. The trial Magistrate's discretion was in my view not judicially exercised.

During the pendency of this appeal the respondent filed ***Misc. Application No. 509 of 2009*** before this court seeking orders to strike out the appellant's appeal on the grounds that no leave was obtained by the appellant before he filed the appeal. Learned Counsel for the respondent has in his written submissions sought to justify the respondent's application in that regard. He has submitted that the orders granted in ***Misc. Application No. 1008 of 2008*** and the suit from which it arose (***CS No.2725/2008***) were not appealable as of right but with leave of court. According to him, it is not in dispute that the decision of court was an order; that the appeal is against "*the ruling and order"* of the Magistrate's court; that it is only Decrees in law that are appealable as of right and according to Uganda laws orders are either appealable as of right or with leave of court.
With the greatest respect to learned Counsel for the respondent, his argument is unsustainable. I am saying so because when ***Misc. Application No. 1008/2008*** was

dismissed, that dismissal was a decision on the merit which gave rise to a decree. The learned trial Magistrate decided as he did after hearing the parties. A decree is defined under Section 2 of the Civil Procedure Act to mean:

> ***"the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may either be preliminary or final. It shall be deemed to include the rejection of a plaint or writ and the determination of any question within Section 35 or 95 of this Act, but shall not include:***
>
> ***a). any adjudication from which an appeal lies as an appeal from an order; or***
> ***b). any order of dismissal for default.***
>
> ***Explanation:***
> ***A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."***

As far as the lower court was concerned, the dismissal of the application and the entering of judgment for the respondent in the sum claimed in the plaint conclusively determined the rights of the parties with regard to the matters in controversy in the suit. Following that decision, the appellant had only one option: to appeal against both the dismissal of the application for leave to defend and the resultant judgment in favour of the respondent/plaintiff. Under Section 220 (1) (a) of the Magistrates Courts Act, Cap.16, an appeal lies from the decrees or any part of the decrees and from the orders of a Magistrate Grade I to the High Court. In these circumstances, I have not appreciated learned Counsel's argument that no leave was obtained by the appellant before he filed the appeal. None was required.

All in all the interests of justice in this case demand that the appeal be allowed; the ruling dismissing the application for leave to appear and defend and the judgment in HCCS No. 2725 of 2008 be set aside; and, subject to correction of errors in the application by the appellant, the application for leave to appear and defend be heard on its merits. For the avoidance of doubts the Chief Magistrate Mengo shall re-allocate the file to another Magistrate Grade One to hear and determine the controversy as by law established.
As regards costs, the appellant has prayed that the appeal be allowed with costs here and below.

The usual result is that the loser pays the winner's costs. The practice is subject to the court's discretion, so that a winning party may not necessarily be awarded his costs.

In the instant case the appellant was responsible for the irregularities in his pleadings. He failed to seek amendment of the same with a view to correcting the errors before the objection was heard and determined. He even appears unapologetic about it. I am inclined in these circumstances not to interfere with the lower court's order for costs against the applicant/defendant in any event.

As for costs in the appeal, I am inclined to the view that neither party can be blamed for the lower court's improper exercise of its discretion. Accordingly each party shall bear its own costs herein.

Orders accordingly.

Yorokamu Bamwine
JUDGE
19/05/2010

19/05/2010

Mr. Bernard Tiibesigwa for appellant

Mr. Protasa Byarugaba for respondent

Both parties absent.

Court:

Judgment delivered.

Yorokamu Bamwine

JUDGE

19/08/2010