

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION

CIVIL APPEAL NO. 19 OF 2010

(Arising out of High Court Civil Appeal No. 09 of 2005)

(And Civil suit No. 109 of 1996)

TOMASI KALLINABIRI ::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

GEORGE WILLIAM KALULE ::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGMENT

This appeal arose from the decision and order of Magistrate Grade I sitting at Mengo in which she dismissed an application brought under **Section 101 of the Civil Procedure Act** seeking an order for stay of Civil Suit No. 109 of 1996 until the final disposal of High Court Civil Suit No. 218 of 2004.

The learned Trial Magistrate dismissed the application on the grounds that the Affidavit in support of the Motion was incompetent and also that the application was devoid of merit.

The Applicant was aggrieved by the above decision and appealed to this court on the following grounds:-

- (1) The learned Trial Magistrate erred in law in that she held that Kallinabiri's Affidavit was defective and of no effect and ignored the fact that it was not totally defective because he swore the Affidavit in his own behalf as the Applicant.*
- (2) That the learned Magistrate erred in law that she held that since the Applicant did not raise the question of jurisdiction at the beginning he could not raise it now.*
- (3) That the learned Magistrate erred in law in that she ignored the conflict that was going to arise between the decision of the High Court and the Magistrate's court.*
- (4) That the learned Magistrate erred in law in that she acted on matters which were not stated in any affidavit or evidence.*
- (5) That the learned Magistrate erred in law in that she contacted the Respondent and received documents from him and acted upon them without giving the Applicant any opportunity to know those documents and say something about them.*

(6) That the learned Trial Magistrate erred in law in that she allowed the case to proceed when it was brought to her attention that the Respondent was trying to get this land fraudulently.

(7) That the learned Magistrate erred in law in that she rejected the provisions of the Constitution of Uganda, 1995, when those provisions were vital in this case.

Learned Counsel for the Appellant abandoned ground 4 and 5 of the appeal and proceeded to argue ground 7 and 1 together and the rest of the grounds separately. Counsel for the Respondent in his reply followed the same pattern.

Ground No. 7: That the learned Magistrate erred in law in that she rejected the provisions of the Constitution of Uganda, 1995, when those provisions were vital in this case. AND

Ground No.1: The learned Trial Magistrate erred in law in that she held that Kallinabiri's Affidavit was defective and of no effect and ignored the fact that it was not totally defective because he swore the Affidavit in his own behalf as the Applicant.

The main contention in ground 7 and 1 was that the Applicant's affidavit was defective for being deposed in a representative capacity without authority or Power of Attorney from the other Defendant. The learned Trial Magistrate relied on **Order 1 Rule 12 (1) of the Civil Procedure Rules** which provides that where there are more Defendants than one, anyone or more of them may be authorized by any of them to appear, plead or act for such other in any proceeding. The order further states that the authority shall be in writing signed by the party giving it and shall be filed in the case. The above provision was

reiterated in the celebrated case of **Kaingana v Dabo Boubon [1986] HCB 59** where Karokora Ag. J. (as he then was) stated that:-

“A person is competent to swear an affidavit on matters or facts he knows about or on information he receives and believes. Whereas the deponent in this application claimed that he was fully acquainted with the facts.... He swore the affidavit in a representative capacity. There was no authority given to him by the Defendant to qualify him to act on his behalf as his advocate or a holder of power of attorney.”

The learned Magistrate concluded that the said affidavit being defective could not be cured under **Article 126 (2) of the Constitution**.

It must be remembered that the law on affidavit has taken a new twist according to the case of **Dr. Kiiza Besigye v Y. K. Museveni** where the Supreme Court held that court can separate a defective part of an affidavit and use the relevant part. But even then the said affidavit cannot be said to be totally defective because the deponent indicated that he swore the affidavit on his behalf and that of Nola Nsoza. Therefore the same could be said to be defective only to the extent that it referred to Nola Nasozi because he did not possess authority to swear on her behalf but as far as the affidavit referred to the Deponent, it was acceptable and not defective. For the above reasons I find that the case of Kaingoma (supra) which the Appellant relied on was cited out of context in view of Dr. Kiiza Besigye's case and the fact that the Deponent swore the affidavit on behalf of Nola Nsoza and also on her own behalf.

In the premises the above two grounds must fail.

Ground 6: The learned Trial Magistrate erred in law in that she allowed the case to proceed when it was brought to her attention that the Respondent was trying to get this land through fraud.

The learned Counsel for the Appellant submitted inter alia, that once fraud is brought to the notice of court the court must not allow the transaction to proceed. The court must investigate it and determine the truth about it. He relied on the case of **SCOTT v Brown Doering MC-NABE Co (1892) 2 Q B 724** where **Lindley L. J.** stated:

“No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the Defendant had pleaded the illegality or whether he has not. If the evidence adduced by the Plaintiff proves the illegality, the court ought not to assist him.”

The learned Counsel for the Respondent submitted that the Trial Magistrate was not in error. He submitted that the Trial Magistrate allowed the proper procedure to be followed so as to establish who was the rightful owner of the land in Plot 35. He submitted that fraud as an element of dishonesty ought to have been specifically pleaded and proved in the body of the plaint.

It is trite law that fraud is a very serious matter and once it is brought to the notice of court the court must not allow the transaction to proceed. In **Okwaja v Okello (1985) HCB 84 Oder J** (as he then was) held inter alia, that courts should not be used as a vehicle for fraud. In **Orient Bank & Others v Fredrick Zzabwe** the Supreme Court held inter alia that allegations of fraud

ought to be investigated in entirety. The following were the Appellant's elements of fraud:

- (1) That Nola Nasozi brought to the attention of the court that the Respondent was trying to commit fraud against her.*
- (2) That the Appellant stated in his affidavit that the Respondent was trying to commit a fraud against him.*
- (3) That the Administrator General's letter to the LC I Chairman indicated that the Respondent intended to commit a fraud.*
- (4) That Respondent's prevention of the Appellant and other beneficiaries to survey their shares in Plot 35 was an indicator of fraud on the Respondent.*
- (5) Respondent's failure to establish his claim on Plot 35 indicates intention to defraud those entitled to the Plot.*
- (6) Respondent's suit No. 109/95 against the Administrator General showed fraudulent intention.*

Under the laws of Uganda, all allegations of fraud must be specifically pleaded and proved in the body of the plaint: **Kampala Bottlers v Damnico (U) Ltd. Supreme Court Civil Appeal No. 22 of 1992.**

All the above allegations were not pleaded as required by the law. They were designed and submitted from the bar in contravention to the letter and spirit of our laws. The above allegations of fraud to say the least, were speculative. Even if the allegations of fraud were in issue, the learned Magistrate was not going to investigate them since she was merely requested to stay the

proceedings in favour of a High Court case which has since been dismissed for want of prosecution. Therefore there is no status quo to be maintained since the Appellant abandoned the concurrent hearing which had commenced in the High Court at Nakawa. In the premises I find that granting a stay would be nugatory because there is nothing the stay is going to benefit the parties since there is no pending suit as of now other than Civil Suit No. 109 of 1996.

It is trite law that courts do not make orders that are nugatory. The above ground accordingly fails.

Ground 3: The learned Magistrate erred in law in that she ignored the conflict that would arise between the decisions of the High Court and the Magistrate's court.

Section 6 of the Procedure Act provides that:

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties under whom they or any of them claim litigating under the same title where such suit is pending or proceeding in the same court or any court having jurisdiction in Uganda to grant the relief claimed.”

The Respondent filed Civil Suit No. 109 of 1996 at Mengo Chief Magistrate's Court against the Administrator General in respect of 2 acres of land comprised in **Block 230, Plot 35** situate at Kamuli-Kyadondo which he alleged had been given to him *inter vivos* by his late father Daudi Banalekaki who died intestate in 1978. The Respondent stated that the late Daudi Banalekaki handed to him the Certificate of Title to the suit land and he effectively occupied it and

established his permanent home and developed the land that upon assuming administration of the estate the Administrator General disregarded the Respondent's right in the 2 acres and distributed the same among other children of the deceased. The Respondent prayed for a declaration that he was the rightful equitable owner of the said 2 acres.

On 25/8/1997 an application was argued to allow the Appellants be joined as co-Defendants. The application was opposed and the matter was adjourned to 19th June, 1997, I believe for the purpose of making a ruling. There is no record that the ruling in the above application was delivered. However there is record showing that the Appellants were made joint co-Defendants as proved by the existence of their Joint Written Statement of Defence date 24th June 1997.

Subsequent to the above, on 19/10/2004 the Appellants filed High Court Civil Suit No.218 of 2004 against the Respondent seeking among others, a declaration that the late Daudi Banalekaki did not give the suit land to the Respondent alone as claimed but that the late gave other people including the Appellants.

The Appellants then made an application to the Magistrate to stay the proceedings before her court at Mengo.

In her ruling dismissing the application the learned Magistrate considered the following:

- (a) Dates of institution of the two suits she found that the suit in the Magistrate's court was instituted earlier in 1996, therefore it was pending when the Appellants instituted the High Court suit in 2004. The Trial Magistrate was very right to hold so.

- (b) The matter in issue in the two suits: The Trial Magistrate found that both suits had the issue of declaration that Daudi Banalekaki did not give land in Plot 35 to the Respondent and the Appellants sought an order to survey the land in Plot 35. She found out that the matter in issue were the same in both courts. On that the above point I also agree with the Trial Magistrate.
- (c) The parties to the suits: The parties in both courts are the same except that in the suit before the High Court the Administrator General was left out. However the section covers the situation because the Appellants were parties claiming litigating under the same title like the Administrator General. Therefore the Trial Magistrate was right to find that parties in the both suits were the same.
- (d) Jurisdiction: For section 6 above to apply, the pending suit must be before a court with competent jurisdiction.

In the instant case, the pending suit was for a declaratory orders for ownership and injunction. In case the Appellants thought the matter was before a wrong forum, they should have applied for its dismissal instead of running to the High Court to file another suit over the same subject matter. In running to file another suit the Respondent was guilty of forum shopping which is one of the causes of the backlog in the Judiciary.

In conclusion I find that the Trial Magistrate was right in refusing to grant application for stay of proceedings in favour of the High Court case which was filed later. The Trial Magistrate was right to hold that the Chief Magistrate had jurisdiction to handle the matter. The Appellants belated objection to the jurisdiction after over 8 years was an afterthought assembled in Chambers and served at the bar purely to defeat the course of justice.

I therefore uphold the decision of the Trial Magistrate and dismiss the appeal with costs here and below.

HON. MR. JUSTICE RUBBY AWERI OPIO
JUDGE
6/7/2011

5/7/2011

Anyuru Geoffrey Borris present for Respondent.

Respondent absent (old man) but represented by daughter.

Appellant and Counsel absent.

Judgment read in Chambers.

HON. MR. JUSTICE RUBBY AWERI OPIO
JUDGE
5/7/2011