

*Amend  
memo of Appeal*

THE REPUBLIC OF UGANDA

*Mag. G. I. cannot deliver  
judgment for Mag. G. I.*

*Slip Rule*

IN THE HIGH COURT OF UGANDA AT MBALE  
CIVIL APPEAL NO. MM 40/1988

*S.101 & 102 CPA*

*O. 48 R. 3*

ABDUL KADIR MUKASA

.....

APPELLANT

vs

1. JOSEPH BAIFE

0

.....

RESPONDENTS

2. TRUSTEES OF TORORO DIOCESE 0

*Inherent Power*

*102*

*What of Limitation  
on Appeals*

R U L I N G

BEFORE: THE HONOURABLE JUSTICE A.N. KAROKORA, JUDGE

Before the Notice of Motion brought under section 101 and 102 of Civil Procedure Act and Order 48 r 3 for amending Memorandum of Appeal was heard on its merits, Mr. Dagira of M/s Tsekooko & Wekesa & Co. Advocates raised a preliminary objection on the ground that the application was mis- conceived and was not properly before court, because application to amend the Memorandum of Appeal could not properly be brought under sections 101 and 102 of Civil Procedure Act ( CPA ) under Order 48 r 3 for the purpose of adding the 2nd Respondent and two additional grounds of Appeal. It was contended that the two sections do not deal with addition of a party to Memorandum of Appeal. He submitted that the court was not considering judgment or decree or omission in the judgment. The application was brought for Omission in Memorandum of Appeal. The section, he contended, does not cover a situation like this one. He referred to the case of Vallabhdas Karsandas v Marisuklal & others / 1965 7 EA 700 where the court of Appeal for East Africa was considering section 99 of Kenya which is similar to our section 102 of the Civil Procedure Act. There it held inter alia:

" A court will ofcourse only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied beyond doubt, as to the order which it would have made had the matter been brought to its attention."

He however, contended that the court below did not make any omission in its judgment nor did it over look any matter which, if it had been brought to its attention, would have been corrected. The omission was on the part of the counsel who made the memorandum of Appeal who omitted to include Trustee of Tororo Diocese as co-respondent. He therefore submitted that section 102 does not envisage a situation like this case.



As regards section 101 of Civil Procedure Act, he contended that this section was inapplicable arguing that the application should have been made under order 39 r 2 of Civil Procedure Rules. He contended that since the application could have been brought under order 39 r 2, it could not be brought under the inherent powers of court under section 101 of Civil Procedure Act. He cited the case of Re - Nakivubo Chemist / 1979 / 7 HCB 12

where it was held inter alia that Section 101 of Civil Procedure Act should not be invoked unless there is no specific provisions of law covering the matter. In another case of Kasule v Kasujja / 1979 / 9 HCB 99 the case had been brought under section 101 of Civil Procedure Act instead of under Order 42 r 2. It was held that inherent powers of the court could not be invoked if there was a specific provision dealing with the situation in the rules.

In the circumstances of the case before court and applying the same, he invited me to strike out the application with costs.

On the other hand, Mr. Udimbe, Counsel for the applicant/Appellant submitted that the objection was misconceived, because the appeal was lodged against the decree of the lower court. However when the decree was drawn out embodying the judgment of the court it showed the Trustee of Tororo Diocese as being a party to the suit. Unfortunately, however, when the memorandum of appeal was drawn, the counsel omitted to include Trustees of Tororo Diocese as co-Respondent. Section 102 of Civil Procedure Act should not be given a narrow interpretation by confining it to errors made by courts only. The section, he contended, covers errors made by counsels arising from judgments etc. He contended that amendment contemplated by section 102 of Civil Procedure Act should include adding a second Respondent.

He contended that in the interest of justice the court can still invoke its inherent powers under section 102 of Civil Procedure Act because if the appeal is heard and allowed the decision may bind the 2nd Respondent/Applicant who is now not a party to the Appeal. He submitted it was only fair that amendment was granted so that the 2nd Respondent is heard on appeal.

As regards the second ground of the objection, he contended that Order 39 r 2 did cover a situation where the appellant at the hearing of the appeal sought to argue a ground which did not appear in the memorandum of Appeal. The order does not cover a situation of amendment of memorandum of Appeal. He contended the amendment has to be done under section 101 of Civil Procedure Act.

Secondly the provisions of Section 101 of Civil Procedure Act are not limited by provisions of the Rules.



He therefore invited me to disallow the preliminary objection and allow the application to be argued.

I have carefully considered the preliminary objection raised and the submissions of both counsel on that application and my view on the objection is that our concern here is to ensure that justice is done and therefore, pursuant to that objective, I would interpret Section 102 of Civil Procedure Act which provides as follows:-

Clerical or arithmetical mistakes in Judgments, Decrees or Orders or errors arising therein from any accidental slip or omission may at any time be corrected by the court either of its own Motion or on the application of any of the parties.

To include errors or mistakes or accidental slips and omissions committed by Counsels in drawing out Decrees or Orders or preparing Memorandum of Appeal. I do not see any injustice that would be caused to the 1st Respondent if the 2nd Respondent which was omitted through an oversight of the Advocate who prepared Memorandum of Appeal was added on to the memorandum of Appeal and especially since the 2nd Respondent was a party to the suit <sup>right</sup> from its inception.

Furthermore, and without prejudice to the foregoing reason, it is my considered view that in the interest of justice, which is paramount, I would not see injustice that would be caused if 2nd Respondent was added as the 2nd Respondent on the memorandum of Appeal. Section 101 of Civil Procedure Act would cater for such a situation.

Finally as regards the second ground of objection where the applicant sought to add two more grounds of Appeal I see no merit in this objection. In the 1st instance, Order 39 rule 2 does not deal with or cover a situation where the Applicant/Appellant seeks to amend the Memorandum of Appeal.

Rule 2 of Order 39 of Civil Procedure Rules ( CPR ) states as follows:

The appellant shall not, except by leave of the court argue or be heard in support of objection not set forth in the Memorandum of Appeal, but the High Court in deciding the Appeal shall not be confined to the ground of objection set forth in the Memorandum of Appeal or taken by leave of the court under this rule."

Although in effect one could say the application before court is seeking to enable the appellant/Applicant to argue the grounds which had not been spelt out in Memorandum of Appeal, the application is distinguishable from what Order 39 r 2 envisages, because the applicant here is seeking not only to be permitted to argue the grounds not originally spelt out in the Memorandum of Appeal, but he is also seeking to entirely amend the Memorandum of Appeal so that the amended Memorandum of Appeal is filed in Court containing the additional grounds. In my view there is no alternative remedy provided under Order 39 r 2. I would therefore say that the Applicant/Appellant has a right to invoke the inherent powers vested in the court.



Section 101 of Civil Procedure Act ( CPA ) to meet the ends of justice. In my considered opinion therefore the cases of Kasule v Kasujja /1979/7 HCB 99, In Re Nakivubo Chemist Co. Ltd. /1979/7 HCB 12 and Vallabhadas Karsandas v Manskhalal & others /1965/7 EA 700 are distinguishable from the present application, because order 39 r 2 does not envisage a situation where the appellant deems it necessary to amend his Memorandum of appeal by adding more grounds of appeal before the appeal is argued. The appellant, I think, would be in order to invoke section 101 of Civil Procedure Act by applying for leave to amend his memorandum of appeal and adding more grounds of appeal since order 39 r 2 is not exhaustive nor does not purport to be exclusive or provide alternative remedy. 5 10

In any case considering the decisions of the then court of Appeal for East Africa in Mukisa Buscuit Co. Ltd. v West End Distributors Ltd. /1969/7 EA 696 and Re ... while dealing with inherent powers of court had this to say:- 15

It is, I think, important to consider carefully the obvious intention that nothing in this Act should prevent a court from exercising its inherent powers in such manner as would be necessary to prevent injustice. What it is sought to do in this case is to say that a provision in this case is to say that a provision in the Rules precluded the court from taking action which may result in preventing injustice; and it is sought to say that this position arises by reason of Rules made under the same Act in which Section 97 ( similar to our Section 101 CPA ) appears. Section 81 ( similar to our section 85 of CPA ) which is the section giving power to make the rules, says that these rules shall not be inconsistent with the provisions of the act. Surely if one were satisfied that the effect of of rules construed in particular way would be to result in injustice, then the provisions of section 97 of Civil Procedure Act ( S. 101 ) and section 81 ( 85 ) clearly show that the rules should not be construed in such a manner."

My understanding of the above authorities is that the provisions of the Civil Procedure Rules cannot override the provisions of the Act under which the Rules were made. In effect the Rules cannot preclude the inherent jurisdiction conferred upon the courts by the parent Act and especially when the specific Rules does not provide an alternative remedy to the aggrieved party. In any case, the application does not fall within any of the specific provisions of the Civil Procedure Rules which do not purport to be exclusive. 20

Bearing the above in mind, therefore, I find no merit in the preliminary objection. It is accordingly disallowed with costs to the appellant. 25

A.N. KAROKORA,  
JUDGE.

8/5/90

Ruling read in presence of both counsel i.e.  
M/s Odimbe & Dagira and both parties.

A.N. KAROKORA,  
JUDGE.