THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CV-CA-0017-2012
(From Original Mbale Civil Suit No. 61/2011)

1. **WABUDEYA PEACE**
2. **NEUMBE …….…….……APPELLANTS**

VERSUS

MARGARET NAWIRE…….…….…..RESPONDENT

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

RULING

This was a preliminary objection raised to the effect that the appeal is incompetent since no leave was sought before it was lodged.

The preliminary concern of the respondent is that the appeal violates the provisions of O.44 r.1, 2 and 3, and 4 which requires such an appeal to first seek leave of the court that gave the ruling in order to appeal against that order. Counsel said the requirement is mandatory and this appeal is defective and should be struck out.

The appellants submitted that the appeal is not defective and referred to section 220 (1) (a) MCA, the case of ***Ruzinda George v. Edward Waswa HC LD CAppeal 39/2009*** *and* ***Hajji Kassim Dungu v. Nakato N. HC LD Appeal 72/2012***.

Their argument was that this was a final order of the Grade I Magistrate, where the right to appeal is automatic and there is no need to seek leave.

The position of the law, regarding appeals is as pointed out by both counsel governed by the legal provisions on the subject matter. One must carefully, truck down the genesis of the order being appealed from, in order to place it within the context of the legal regime which governs its procedural tenancy.

In the present appeal, the lower court dealt with civil suit 61/2011 between **Wabudeya Peace** & Another (Plaintiffs) versus **Margaret Nawire** (Defendant). When the matter came up for hearing before the trial Magistrate Grade I on 15th December, 2011, counsel moved court under O.7 r.11 of CPR (see page 2 of proceedings) to have the suit struck out because it was incompetent for lack of disclosure of a cause of action. The judgment of court, then found that, "the plaint is frivolous and vexatious and lacking a proper cause of action against the defendant and is thus rejected and struck out with costs."

This preliminary point of law was as a result of counsel moving court under O.7 r.11 (a) which provides that:

> "*The plaint shall be rejected in the following cases.*
> (a) *Where it does not disclose a cause of action*."

Rule 12 further states;

> "*Where a plaint is rejected the Judge shall record an order to the effect with the reasons for the order*."

Rule 13, further provides:

> "*the rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of same cause of action*."

The provisions above when red together, have the effect to mean that the orders given under O.7 r.11 (a) are not final orders. They give a temporary relief whereby a party should go back and under rule 13, if he chooses file a fresh plaint. This type of order therefore in my view is not appealable as of right. It is clearly distinguishable from an order given under O.6 r.30 where;

> *"(1) The court may upon application order any pleadings to be struck out on the ground that it discloses no reasonable cause of action or answer and in any such case, or in case of the suit or defence being shown by the pleadings to be frivolous or vexatious, may order the suit to be stayed or dismissed or judgment to be entered accordingly as may be just.*
>
> *(2) All orders made in pursuance of this rule shall be appealable as of right."*

Clearly O.6 r.30 (2) mandatorily allows the party to appeal because the court would have pronounced a final order or judgment, "to strike out the plaint" yet O.7 r.11 is an intermediary order giving the party the chance to go back to court and file fresh pleadings in place of the ones "rejected" by court.

That being the case, it would logically follow as argued by respondents that a party wishing to appeal a decision of court under O.7 r.11 needs the leave of court so to do. This is because section 76 CPA, O.44 rules 1, 2 and 3, would dictate so.

However, the present case scenario is distinguishable from the above position because, the lower court decision and record, indicate that whereas the proceedings in court arose out of counsel's objection under O.7 r.11 (a), the Ruling of the trial Magistrate, moved out of this Rule and ordered that;

> "*The plaint being frivolous and vexatious and lacking a proper cause of action against the defendant is thus rejected and struck out with costs*."

The judgment does not mention the law followed. However the addition "struck out" moves this order out of O.7 r.11, and placed it under O.6 r.30 (1) and (2). This apparent confusion which the order of the trial Magistrate occasioned in my view, is responsible for the mix up of the procedures by counsel. I have already stated that orders given under O.6 r.30 are appealable as of right.

It is under O.6 r.30, that court may upon application order pleadings to be struck out for disclosing no reasonable cause of action as the Trial Magistrate did find. This makes the finding final as opposed to O.7 r.11 where the court only makes an order "rejecting" the plaint.

The order of the trial court mixed up both the above provisions and therefore I cannot fault appellants for this.

Once the Magistrate pronounced that the “plaint is struck out” then she moved her order from O.7 r.11 to the orders made under O.6 r.30 (1) and (2) for which, appeals therefrom are appealable as of right.

Having found as above, I find that the preliminary objection as raised shall fail and the appeal shall proceed as filed.
I so order.

Henry I. Kawesa

JUDGE

08.11.2013