

- (c) That the plaint in paragraph 3 does not disclose how the plaintiff inherited the said land from his father Misayiri Mayanja as the letters of administration attached as "A" were granted to the Administrator general and not the plaintiff.
- (d) That it is just and equitable that the plaint/settlement of claim be struck out, the suit be dismissed and /or judgment be entered according.

The abovestated grounds of that application were at the time of the hearing the application stated as preliminary objections. The parties argued out the said objections, and the trial magistrate Grade 1 overruled the said four (4) objections and awarded costs to the respondent. Hence this appeal on six (6) grounds of appeal.

2. The grounds of appeal

The grounds of appeal are well set out in the memorandum of appeal which was filed in this Court on 13th May, 2010. The grounds of appeal are; that:- (see page 3 of the record of appeal).

1. That the learned Trial Magistrate erred in law and fact when she failed to evaluate all the proceedings/documents and as such arrived at a wrong decision.
2. That the learned Trial Magistrate erred in law and fact when she ruled that the respondent had showed that he enjoyed the right of ownership by merely stating so in the plaint/statement of claim
3. That the learned trial Magistrate erred in law and fact when she ruled that the respondent had a cause of action as a registered proprietor/owner of land without a land title.
4. That the learned trial magistrate erred in law and fact when she ruled that the respondent had locus as administrator of his father by relying on letters of administration granted to Administrator General.
5. That the learned Trial Magistrate erred in law and fact when she introduced her own facts by ruling that the respondent had been given the suit land by the late Nuwa Kiwanuka, by this anomalous fact, the magistrate failed to appreciate the facts of the case and as such reached a wrong decision to the detriment of the appellant.
6. That the learned Trial Magistrate erred in law and fact when she introduced her own facts and evidence that were not part of Court proceedings to make a ruling.

And the appellant prayed that:-

- (a) the appeal be allowed
- (b) the ruling and order of the Magistrate Court be set aside.
- (c) The respondents pay the costs of this appeal and costs in the lower Court.
- (d) Any other reliefs the Honourable Court may deem fit.

3. Resolution of the grounds of appeal.

Counsel for the respondent, Mr. Kusiima Peter before arguing the grounds of appeal raised a preliminary objection. That is:-

“the appeal before this Court is incompetent as it contravenes Section 220 of the Magistrate’s Court Act, Cap. 16 which requires any person intending to appeal against an order or decree to first seek leave from the trial Court.”

He referred to the Case of **Teopista Kyebitama vs Damiano Batuma Civil Appeal No. 28 of 1976**; whereby it was held that:-

“it is mandatory under Section 232(4) of the Magistrates’ Court Act, 1970 to apply for leave to the High Court within 30 days from the date of judgment and the Chief magistrate had no power to extend the time and since the time was not extended the appeal was incompetent”.

He prayed for the appeal to be dismissed with costs.

In reply, Counsel for the appellant submitted that the appellant re-states paragraph 2 of page 2 of the main submissions stating Order 6 rule 30 (2) Civil Procedure Rules. That the appeal was of right and no leave was required from the Magistrate’s Court.

Section 220 Magistrate’s Court Act Cap. 16 quoted by the respondent’s Counsel does not state anywhere that leave is mandatory before one appeals against an order or decree of the trial Magistrate. That Section 220 thereof provides that:

“Section 220 (1) subject to any written law and except as provided in this Section, an appeal shall lie-
(a) from the decrees or any part of the decrees and from the orders of a magistrate’s Court presided over by a chief magistrate or a magistrate grade 1 in the exercise of its original civil jurisdiction, to the High Court;”

However, the respondent’s advocate despite citing a wrong law, his preliminary objection to this appeal has merit. I have read the entire record of appeal and the ruling especially, and indeed the appellant required leave of the trial Court before lodging an appeal in this Court.

Yes, miscellaneous application no. 766 of 2009 between the parties was brought by the applicant (now appellant) under Order 6 rules 29 and 30 and Order 52 rules 1 and 3 of the Civil Procedure Rules. The trial Court did not strike out the respondent’s pleadings. In fact the said application was dismissed. And the

dismissal order remains an interlocutory order. It was not a final Order. The objections were not dismissed under Order 6 rule 30 (2) of the CPR. The pleadings by the respondent in Civil Suit No. 731 of 2007 between the parties were not struck out by Court. The application having been found to be without merit, it was simply dismissed with costs to the respondent. Thus such an order falls under Order 44(2) of the Civil Procedure Rules. This order which is the subject of this appeal, the appellant required leave of the lower Court before lodging this appeal. Since the appellant filed this appeal against the said order without first obtaining leave to appeal, this instant appeal is incompetent before this Court. It must fail.

Second, **this appeal was filed out of time.**

According to the Memorandum of appeal at page 3 of the record of appeal, the ruling was delivered by the trial Court on 18th September, 2009. The said memorandum of appeal was filed in Court on 13th May, 2010. **These are eight months (over two hundred and forty days) from the date of ruling.** Appeals from the Magistrate Grade I and chief Magistrate shall be lodged in the High Court of Uganda with thirty (30) days from the date of the decree or order. This is provided under Section 79 (1) of the Civil Procedure Act, 71 which provides that:

“ Section 79 (1) thereof:

(1) Except as otherwise specifically provided in other law, every appeal shall be entered:-

(a) Within thirty days of the date of the decree or order of the Court.”

This was not done by the appellant.

May be, the appellant and his lawyers would want to argue that they filed a Notice of Appeal on 11th November, 2009. The said Notice of Appeal at page 6 of the record of appeal states that the decision the appellant is appealing against was delivered on **30th/10/2009**. That Notice of Appeal contradicts the date stated in the Memorandum of appeal, which is 18th/09/2009. Still such argument if it was to be raised by the appellant could not be of any help to him. Appeals in the High Court are instituted by lodging a memorandum of appeal; and not a notice of appeal, within thirty (30) days from the date of the decree/order of the Court. Pursuant to **Order 43 (1) of the Civil Procedure Rules:**

“Every appeal to the High Court shall be preferred in the form of a memorandum signed by the appellant or his or her advocate and presented to the Court or to such officer as it shall appoint for that purpose.”

From the above analysis, this instant appeal was filed out of time. There is, therefore, no appeal before this Court. This appeal no. 39 of 2009 between the parties is hence a nullity.

Third, according to Section 220 (1) (a) of the Magistrate's Courts Act, cap. 16, appeal lies from a decree or order of the judgment or ruling. Then Order 21 rule 7 of the Civil Procedure Rules provides for preparation of decrees and orders. Under rule 7 (1) of Order 21, a decree (which includes order) shall bear the date of the day on which the judgment/ruling was delivered. In this instant appeal, at page 9 of the record of appeal it is alleged that the ruling was delivered on 24th/08/2009. Then it was given under the hand and seal of the trial Court on 9th April, 2010. Certainly from the perusal of the memorandum of appeal, which gave a different date on when the ruling was delivered; that is on 18/09/2009; then this order of the trial court being appealed from is incurably defective. Hence, therefore, an appeal arising from a defective order is a nullity.

Consequent to the above findings, I have perused the entire record and the submissions by Counsel for the parties, even if the appeal was to be settled on the alleged merit, I would agree with the findings of the trial magistrate Grade 1. The statements pleaded in paragraphs 3 and 4 of the statements of claim that was filed in the lower Court clearly show that the respondent has issues to be settled between himself and the appellant. Paragraph 3 and of the respondent's statement of claim clearly brings out the respondent's cause of action against the appellant in the main suit.

Further, filing a plaint without a certificate of title does not nullify a plaint or make the plaint not to disclose a cause of action. A document can be produced with leave of Court at any given stage during the hearing of the suit. Order 7 rule 18 of CPR states that:-

“(1) A document which ought to be produced in court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not without the leave of the Court, be received in evidence on his or her behalf at the hearing of the suit. “Underling is mine for emphasis”

(2) Nothing in this rule applies to documents produce for cross examination of the defendant's witness, or in answer to any cases setup by the defendant or handed to a witness merely to refresh his or her memory.”

It is not, therefore, fatal if a party does not produce a statement of a document at the time of filing. On the basis of the aforesaid hereinabove, I would make a finding that this appeal has no merit. There is no way how this Court could fault the trial magistrate on her findings in her ruling in Miscellaneous Application No. 766 of 2009.

It is also important to consider the grounds of appeal as framed by the appellant in the memorandum of appeal at page 3 of the record of appeal. The grounds of appeal appear to be from the facts and evidence adduced. The grounds talk about the trial magistrate failed to evaluate the documentary evidence and to appreciate the facts of the case. I hold, therefore, that the trial magistrate Grade I was right to make findings that the objections raised by the applicant (now appellant) were of issues of fact and not of law. She was right to disallow all the preliminary objections with the costs to the respondent.

4. Conclusion

In the result and for the reasons given in this judgment hereinabove; I hold that:-

- (a) This appeal has no merit. It is accordingly dismissed.
- (b) The original file of the civil suit no. 731 of 2007 is sent back to the lower Court for hearing on merit interparties within 30 (thirty) days from this judgment. This is an old case; I thus order that a special session be held by the trial within the month of June, 2013. Justice should not be seen being delayed by the lower Court.
- (c) The costs in this appeal and those arising from the dismissal of Miscellaneous Application No. 766 of 2009 are granted to the respondent.
- (d) The taxed costs in (e) above shall be paid to the respondent before the commencement of the hearing of Civil Suit No. 731 of 2007. If by the commencement of the said hearing of the said suit, the costs are not yet paid, execution process shall be carried out against the appellant immediately.

Dated at Kampala this 14th day of May, 2013.

sgd
Murangira Joseph
Judge