THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CV-CA-0042-2011

MASABA HUSSEIN……..APPELLANT
VERSUS
MONJE LEONARD…..……..RESPONDENT

BEFORE: THE HON. MR. JUSTICE STEPHEN MUSOTA

JUDGMENT

The appellant **Masaba Hussein** represented by M/s Owori & Co. Advocates filed this appeal against the orders of the learned Chief Magistrate Mbale upholding a preliminary objection and dismissing an application seeking to set aside a judgment on admission and the attendant decree entered on 28th September, 2010.

The respondent **Monje Leonard** is represented by M/s Joel Cox Advocates.

The background to this appeal is that **Monje Leonard** filed Civil Suit 13 of 2009 against two defendants to wit **Masaba Hussein** and **Kabuyah Aminah** seeking compensation for the land bought from the defendants which at the time of sale was gazzetted as a sewer line. The plaintiff also sought for general damages and costs of the suit.

The plaintiff averred that the defendants knew that the land they were selling was on a sewerage line and gave one **Michael Masaba** Powers of Attorney to sale on

behalf of the defendants. That the acts of the defendants was intended to defraud the plaintiff.

The defendants filed a joint written statement of defence and in paragraph 9 thereof pleaded thus:

> "*The defendants further aver that they have come to an understanding with counsel for the plaintiff and have even paid shs.3,000,000/= and are willing to pay the balance of 12,000,000/= and take back their plot – See photocopy of payment slip attached*."

The suit land had been sold at 15,000,000/=.

On the basis of the averment in paragraph 9 of the Written statement of defence, **Mr Ojambo** learned counsel for the plaintiff applied for judgment on admission under O.13 r. 6 CPR for 12,000,000/=.

O.13 r.6 CPR provides that;

> "*Any party may at any stage of a suit where an admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon the admission he or she may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon the application make*

such order, or give such judgment as the court may think just."

Accordingly the learned Chief Magistrate entered judgment as prayed for with costs. It is upon this decision that Masaba Hussein the appellant herein filed a Notice of Motion under O.9 r. 27 CPR and O.52 rr 1, 2 and 3 CPR in the following terms:

"*NOTICE OF MOTION*

TAKE NOTICE that on the 11th day of February 2011 at 2:30 O'clock or so soon thereafter as he can be heard the Advocate for the Applicant will move this Honourable Court for Orders

1. *That the exparte judgment and Decree dated 28th September 2010 in Mbale Civil Suit No.13 f 2009 be and is set aside and that Civil Suit No 13 of 2009 be reinstated to be heard on the appointed date.*

   And costs hereof be provided for.

   Dated this 9th day of Dec. 2010

   Advocate for the Applicant/Defendant."

Learned counsel objected to the Notice of Motion for being irregular and incompetent for failure to state the grounds upon which it was based which offended O.52 r. 3 CPR.

Counsel submitted that the grounds of application have to be set out in the Notice of Motion under O.52 r. 3 CPR and that this is mandatory.

Learned counsel further submitted that the Notice of Motion is not supported by affidavit of the applicant himself. The affidavits in support were made by strangers. That the defects cannot be cured by Article 126 (2) (e) of the Constitution because they form the basis of the application.

The learned trial Magistrate upheld the objection on the absence of grounds of the application and failure to refer to any annextures to be relied upon. She further held that O.52 r. 3 CPR is mandatory but overruled the second objection regarding supporting affidavits arguing that the rule does not restrict the applicant to be the one to depone an affidavit in support.

These are the orders appealed against.

In the memorandum of appeal, the appellant raised four grounds of appeal that:-

1. The learned Chief Magistrate erred in law when she relied on a defective affidavit in reply to dismiss the appellant's application without considering the significance of the document before her.
2. The learned Chief Magistrate erred in law when she failed to consider whether it was in the circumstances proper for her to allow an Amendment instead of dismissing the application.
3. The learned Chief Magistrate failed to consider the bearing and weight of the circumstances admitted or proved.

4. The learned Chief Magistrate erred in law when she failed to consider the circumstances surrounding the judgment complained of especially as it had been given on untested statement from the bar by a lawyer other than the lawyer who is alleged by the appellant and his witnesses to have received all the money pleaded in the plaint.

Court allowed respective counsel to file written submissions in support of their respective cases. I will not reproduce the submissions but suffice to say that I have considered the same in relation to the appeal before me. I have considered the law applicable. I will go ahead and decide this appeal generally.

First of all, I would like to fault the reference to the judgment complaint of as an exparte judgment. This was not an exparte judgment but a judgment on admission entered under O.13 r.9 CPR.

Secondly, I will agree with the submission by learned counsel for the respondent that the appellants erred in their submissions when they dealt with the merits of the dismissed application yet the learned Chief Magistrate disposed of the application on a preliminary objection on a point of law.

The issue of payment of money to Advocate **Wadamba Innocent** on behalf of the respondent was not raised in the memorandum of appeal and therefore it could not be argued without leave of court. Ordinarily the Court of Appeal cannot allow an appeal on a ground not set forth in a memorandum of Appeal or not argued before it. ***CHARLES HARRY TWAGIRA V. A.G. & 2 OTHERS SCCA 4 OF 2007[2008] ULR 97***.

The issue as to whether the money was paid or not was not considered and/or resolved by the trial court.

The appellant ought to recover from his former advocate if he ever paid the money at all.

From the submission by learned counsel for the appellant he appears to admit that the Notice of Motion as presented was incurably defective for failure to comply with O.52 r. 3 CPR. However learned counsel relied on the authority of ***CASTELINO VS RODRIDGES [1972] E.R. 223*** to support his submission that the learned Chief Magistrate ought to have allowed the appellant to amend his Notice of motion instead of dismissing it. The case of ***Castelino*** (supra) is however distinguishable from the circumstances which led to the decision appealed against in this appeal.

In that case it was expressly stated that the grounds of motion were set out in the affidavit annexed to it. However in the instant case, the motion was silent and it did not make any reference to any annexture attached to it to constitute the grounds relied upon.

Whereas in ***Castelino*** case the applicant sought leave to amend the motion which was not granted, in the instant case no such leave to amend was sought by the appellant.

Further, in ***Castelino*** case, the Notice of Motion had the applicant's affidavit attached but in the instant case no affidavit of the applicant/appellant was attached to the Notice of Motion. The affidavits filed were of **Masaba Michael** and

Nandira Godfrey the appellant's business associate who were not parties to the application. There is no way they could validate the Notice of Motion.

I agree with the submission by learned counsel for the respondents that the Notice of Motion outlined above was incurably defective because it did not conform to the mandatory requirement of O.52 r.3 CPR which requires the general grounds to be stated in the motion. This rule provides that;

> "*Every Notice of Motion shall state in general terms the grounds of the application and where any motion is grounded on evidence of affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion.*"

I do not agree with the interpretation of this rule by the learned Chief Magistrate that an applicant may not swear an affidavit in support of the notice of motion. The applicant must depone a supporting affidavit and may file any other affidavits he/she wishes to rely on and serve them together with the notice of motion for the opposite party to answer.

In the circumstances, resort cannot be had to Article 126 (2) (e) of the Constitution to save the appellant because his advocate has been adamant and did not seek leave of court to have his perfunctorily drafted notice of motion amended. The decision of the Supreme Court on this point in ***TORORO CEMENT CO LTD V. FROKINA INTERNATIONAL LTD SCCA NO.2/2001*** is instructive on this matter.

It was held *inter alia* per **Tsekooko JSC** that,

> "*I do not think that Article 126 of the Constitution was meant to encourage sloppy drafting of pleadings. Properly drafted pleadings define issues in contest. That is why we have rules…….. But the party whose pleadings are objected to must be graceful enough to recognize the defect in its pleadings and seek court's leave, if it is possible, to rectify the relevant defect instead of being adamant as the plaintiff has been in these proceedings*."

Amendment of proceedings is allowed under O.6 r. 19 CPR which provides that;

> "*The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such a manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties*."

However before an amendment is allowed or refused court must be moved. Amendment cannot be ordered by court on its own motion otherwise it would have descended into the arena. Without being moved, there is no way I can fault the learned Chief Magistrate of not allowing an amendment instead of dismissing the application. The trial court had no authority to force the appellant to amend his pleadings. He could not therefore be given a remedy he did not ask for as rightly pointed out by the learned Chief Magistrate.

For the reasons I have outlined herein, I will find that all the grounds of appeal have no merit and must fail. The appeal will be dismissed with costs.

Stephen Musota

JUDGE

27.06.2013