

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 4 OF 2014
ARISING FOM MISC. APPLICATION NO. 1067 OF 2012
ARISING FROM CIVIL SUIT NO 330 OF 2012

KIZITO LUTWAMA MOUSSSA :.....: APPELLANT

VERSUS

ISA NTAMBI

T/A YISA AND SONS DEALERS :.....: RESPONDENT

BEFORE: THE HON LADY JUSTICE LYDIA MUGAMBE

JUDGMENT

1. This judgment is in Civil Appeal No. 4 of 2013. The Appellant framed 8 grounds of appeal. These are:
 - i. The learned trial magistrate erred in law and fact when he allowed the Respondent’s application to amend his plaint to strike out the name Hajji Mutini and substitute it with the name Kizito Lutwama Moussa.
 - ii. The learned trial magistrate erred in law and fact when he allowed the Respondent’s application to amend his plaint suing a non-existent person in law as the said Hajji Mutini does not exist and in law a non-existent person is not liable for debts.

- iii. The learned trial magistrate erred in law and fact when he allowed the Respondent's application to amend his plaint to strike out the name Hajji Mutini a non-existent party and substitute it with the names Kizito Lutwama Moussa when he discovered that Kizito Lutwama Moussa is the right person to have been sued as the Defendant in Civil Suit No. 330 of 2012 in the Chief Magistrates Court at Mengo after the Respondent had already filed a written statement of defence stating other names.
- iv. The learned trial magistrate erred in law and fact when he failed to hold that the filing of the suit against Hajji Mutini was not a bonafide mistake as the Respondent all along knew that he dealt with Lweza Clays Ltd a limited liability company and neither Hajji Mutini nor Kizito Lutwama Moussa had a written agreement with the Respondent.
- v. The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence adduced by the Appellant and the Respondent of a sale agreement for a Fuso Fighter lorry white in colour Reg No. UAH 695Y between the Respondent and Lweza Clays Ltd in which Ug. Shs: 12,000,000/= was the fully paid purchase price and that Ug. Shs: 7,500,000/= could not be recovered from one Hajji Mutini a non-existent person who is not liable for debts and therefore came to a wrong conclusion in allowing an amendment of the Respondent's plaint.
- vi. The learned trial magistrate erred in law and fact when he failed to hold that the Respondent had never been properly served with summons to file a defence as the service of the plaint and the summons were effected on one Irene Nakibuuka a secretary who

signed them for and on behalf of Lweza Clays Ltd on 22nd March 2012 and failed to properly evaluate the evidence adduced by the Appellant of a photocopy of the served summons in summary suit which was attached to the plaint and should have dismissed the Respondent's application to amend the plaint in Civil Suit No. 330 of 2012 in the Chief Magistrates Court at Mengo.

vii. The learned trial Magistrate erred in law and fact when he failed to hold that when the Respondent discovered that Kizito Lutwama Moussa was the right person to have been sued as the Defendant, the Respondent's plaint in Civil Suit No. 330 of 2012 in the Chief Magistrates Court of Mengo at Mengo could not be amended in law as the plaint had been drawn in the names of a wrong Defendant but could only be rejected as the names Hajji Mutini could not be substituted with the names Kizito Lutwama Moussa.

viii. The learned trial magistrate erred in law and fact when he failed to dismiss the Respondent's application to amend the plaint in Civil Suit No. 330 of 2012 in the Chief Magistrates Court of Mengo at Mengo with costs.

2. The Appellant prays for orders that the ruling and orders of the trial Magistrate be set aside with costs here and in the lower court, Civil Suit No. 330 of 2012 be dismissed and any other relief deemed fit by court.
3. The Appellant is represented by Mr. Justine Semuyaba of M/s. Lex Semuyaba, Iga & Co. Advocates and the Respondent is represented by Mr. Kenneth Kajeke of M/s. Kajeke, Maguru & Co. Advocates.
4. Briefly the Respondent herein filed Civil Suit No. 330 of 2012 in the Chief Magistrates Court at Mengo against a one Hajji Mutini for recovery of Ug. Shs:

7,500,000/= being the balance of the purchase price of a Fuso Fighter lorry white in colour Reg No. UAH 695Y and costs of the suit. After the Appellant had filed his written statement of defence in the name of Kizito Lutwama Moussa, on 4th December 2012 the Respondent filed Misc. Application No. 106 of 2012 seeking to amend the plaint and substitute Hajji Mutini with Kizito Lutwama Moussa on the ground that Kizito Lutwama Moussa was the right person to be sued and suing Hajji Mutini was a bonafide mistake. On 28th January, 2014, His Worship Kagoda Samuel Moses Ntende allowed the application to amend the plaint and substitute the parties. It is this ruling that is being appealed. The Appellant contends that Hajji Mutini is a nonexistent person in law that could not be sued and as such the plaint could not be amended by substituting a nonexistent person. The Respondent contends that there is no proper appeal before this court as no decree/ order was extracted as required by the law.

5. The Supreme Court in **Father Nanensio Begumisa and 3 Ors v. Eric Tiberaga SCCA No. 17 of 2004**, observed that the legal obligation of the first appellate Court is to re - appraise evidence and is founded in common law, rather than rules of procedure. On a first appeal, the parties are entitled to obtain from the Appeal Court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence, the Appeal Court has to make due allowance for the fact that it has never seen or heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions. Also see **FK Zabwe v. Orient bank and others SCCA No. 4 of 2006**. I will adopt this standard and re - evaluate the evidence in my determination of the grounds of appeal which I will resolve jointly.
6. Although the Appellant raises eight grounds of appeal, they are all connected and will be addressed jointly. From a reading of the pleadings, clearly the Appellant and Respondent dealt together in regard to purchase of the suit lorry. Due to some disagreement regarding payment for the same, the Respondent sued the Appellant in the Chief Magistrates' court at Mengo.

7. The Respondent sued the Appellant as Hajji Mutini the name by which he knew him. On filing his reply in court, the Appellant filed as Kizito Lutwama Moussa but competently defended himself in respect of the transaction in issue. On noticing the difference in names, the Respondent applied in court to amend the names accordingly. The application was allowed. The Appellant disgruntled by this appealed to this court.
8. From the pleadings on record, it is not disputed that the Appellant and Respondent had transactions regarding the suit vehicle. It would appear that the Respondent in dealing with the Appellant knew him by different names from the ones he calls himself at least in court. Since the person is one and the same the trial Magistrate committed no error in law and fact in allowing the application to amend the names of the Appellant in circumstances where the substantive claim remained the same and the alleged transaction between the two is not denied.
9. What the Appellant seems to deny is that in the suit transaction, the Respondent was dealing with the company Lweza Clays Ltd and not him as an individual and therefore he cannot bring an action against him individually. This should be the substance of the Appellant's defence at the trial.
10. In the circumstances of this case by allowing the change in the names, there was no miscarriage of justice or prejudice to the Appellant. Moreover, it was well within the trial Magistrate's discretionary powers so to do. I therefore see no error of fact or law in the actions of the trial Magistrate. All the eight grounds of appeal are dismissed, the appeal is dismissed with costs for the Respondent.

11. The file should be sent back to the trial court for the suit to be heard on the merits.

I so order

LYDIA MUGAMBE
JUDGE
16TH AUGUST, 2017.