

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HCT – 01 – CV – CA No. 025 of 2015
(Arising from FPT – 00 – CV – MA No. 047 of 2013)

JAMES KAMULINDWA.....APPELLANT

VERSUS

ALPHA GAMA ENGINEERING ENT. LTD.....RESPONDENT

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.

JUDGMENT

This is an appeal against the ruling and orders of His Worship Otto M. Gulamali, Chief Magistrate at Fort Portal delivered on 4th September 2013.

Background

The Respondent instituted a Summary suit against the Appellant and the Appellant applied for leave to appear and defend himself. However, the application was dismissed on a preliminary point of law that the affidavit in support of the application was incurably defective for having been sworn in Fort Portal and commissioned by a commissioner of Oaths with a Kampala address.

The Appellant being dissatisfied with the dismissal of the Application for leave to appear lodged the instant appeal whose grounds as per the memorandum of appeal are;

1. That the learned trial Chief Magistrate erred in law and in fact in dismissing the Appellant’s application for leave to appear and defend on the sole ground that the supporting affidavit was incurably defective for having stated to have been sworn at Fort Portal and commissioned by a Commissioner for Oaths with a Kampala address.
2. That the learned trial Chief Magistrate erred in law in not finding and not holding that the Appellant’s application disclosed sufficient facts or triable issues to justify granting him leave to appear and defend the main suit brought under summary procedure.
3. That the learned trial Chief Magistrate erred in law in entering a decree against the Applicant in the circumstances.
4. That the decision of the learned trial Chief Magistrate caused a miscarriage of justice to the Appellant.

Counsel Cosma A. Kateeba appeared for the Appellant and M/S Lubega & Co. Advocates for the Respondent. By consent both parties agreed to file written submissions.

It is now trite law that a first Appellate Court is bound to subject the evidence on record to fresh scrutiny and come to its own conclusions as a way of retrial. (See: **Mujuni Ruhema versus Skansa Jensen (U) Limited, Court of Appeal, Civil Appeal No. 56 of 2000**).

Resolution of the Grounds:

Ground 1: That the learned trial Chief Magistrate erred in law and in fact in dismissing the Appellant's application for leave to appear and defend on the sole ground that the supporting affidavit was incurably defective for having stated to have been sworn at Fort Portal and commissioned by a Commissioner for Oaths with a Kampala address.

Counsel for the Appellant submitted that failure to state the place of commissioning on an affidavit, did not render the Appellant's affidavit fatally defective and the trial Court ought not to have struck it out. That recent judicial precedent has time and again established that a defect in naming the date or place of commissioning is not fatal to the application and may be supplied to read the correct place and date. (See: **Col. (Rtd) Dr. Kiiza Besigye versus Museveni Yoweri Kaguta and Electoral Commission, Supreme Court Election Petition No. 1 of 2001**).

Secondly that there was never proof that the Commissioner for Oaths was not present in the area or that the Appellant never appeared before him to swear the affidavit. That as a judicial Officer the trial Chief Magistrate had powers to order that the affidavit be re-sworn before putting it on record as was stated in the case of **Nabukeera Hussein Hanifa versus Kibuke Ronal & Another, Election Petition No. 17 of 2011**.

Counsel for the Respondent on the other hand submitted that this Ground offends **Order 43 Rule 1(2)** of the Civil Procedure Rules, for being argumentative and should therefore be struck out.

On the contrary I find this ground clear and I do not think there is any other way Counsel for the Appellant would have put it without having it lengthy as it is. In my opinion the Ground does not offend **Order 43 Rule 1(2)** of the Civil Procedure Rules but merely reproduced the holding of the trial Chief Magistrate and shall therefore be maintained.

Counsel for the Respondent went on to submit that the requirement of **Section 5** of the Commissioner for Oaths Act is not a technicality because it is a matter of substantive law. That the affidavit of the Appellant had an incurable illegality and thus the trial Chief Magistrate was justified in dismissing the whole application.

Counsel went on to cite the case of **John Baptist versus Electoral Commission and Another, Supreme Court, Election Appeal No.11 of 2007**, where it was held that the practice of the deponent of an affidavit signing and forwarding an affidavit to a Commissioner for Oaths without being present was a blatant violation of the law and should not be condoned in anyway. It was further emphasized that **Section 6** of the Oaths Act requires the Commissioner for Oaths to state the date and place where the oath is taken. And **Section 5** of the Commissioner for Oaths Act requires that every Commissioner for Oaths

shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.

It is my view that the issue of the affidavit being sworn in one place and the Commissioner for Oaths having a different address was not an incurable defect but rather one that the trial Chief Magistrate could have ordered to be rectified. This was a mere technicality that ought not to have been the basis of the dismissal of the whole application.

Be as it may, and truth be told, on ground the practice is different and it is known that affidavits are sworn in one place and commissioned in another. To me this is not fatal, what matters the most is that fact that the deponent admits and swears by the content of his sworn affidavit. An affidavit being sworn in Gulu and Commissioned with a Fort Portal address does not make it incurable.

On the issue of the cases as cited by Counsel for the Appellant, I believe they were meant to point out that the alleged illegality was one that could be ironed out and not incurable as per the precedents cited.

Counsel for Appellant in rejoinder pointed out the case of **John Baptist's** case (Supra) as cited by Counsel for the Respondent was distinguishable from the instant case. That the cited case was one where the advocate himself in his evidence admitted that he had sworn the affidavit in Kampala but sent it to Masaka for commissioning. However, in the instant case there was no proof that the Appellant swore the affidavit in Fort Portal and sent the same to Kampala for commissioning. The burden of proof was therefore on the Respondent to prove the same. (**See: Sections 101 to 103 of the Evidence Act**).

I find that, the learned trial Chief Magistrate grossly erred in law and in fact in dismissing the Appellant's application for leave to appear and defend on the ground that the supporting affidavit was incurably defective for having stated to have been sworn at Fort Portal and commissioned by a Commissioner for Oaths with a Kampala address. It is true that the postal address of the Commissioner for Oaths was irrelevant in the instant case and could not by any stretch of imagination refer to the place the Commissioner administered the oath as was submitted by Senior Counsel Kateeba.

This ground is therefore allowed.

Ground 2: That the learned trial Chief Magistrate erred in law in not finding and not holding that the Appellant's application disclosed sufficient facts or triable issues to justify granting him leave to appear and defend the main suit brought under summary procedure.

Counsel for the Appellant submitted that the test for the grant of an order for leave to appear and defend is now well settled. That the Applicant had to show by affidavit or otherwise that there was a triable issue of fact or law for Court to inquire into. The defence needed not to be a good one but equally it should not be a sham.

Counsel cited the case of **Mahad Sentongo versus Asia Rizo Nabiseere, High Court Miscellaneous Application No. 843 of 2013**, where it was held that under **Order 33 Rule 4** (current **Order 36 Rule 4**) a Defendant who seeks leave to appear and defend is required to show by affidavit or otherwise that there is a bona fide triable issue of fact or law. The applicant is not bound at this stage to show that he has a good defence on the merits of the case, but ought to satisfy Court that there is a prima facie triable issue in dispute which the Court ought to determine between the parties.

Counsel for the Appellant also stated that trial Chief Magistrate ought to have found out who truly was indebted to the Respondent as the issue that had been raised by the Appellant who was denying being indebted to the Respondent as his defence. Thus, the trial Magistrate should have allowed the application and heard the main matter on its merits.

Counsel for the Respondent argued that at this stage the Appellant was not required to show that he had a good defence or a triable issue and thus the case quoted is also in applicable.

In my opinion the Appellant in lodging his application for leave to defend also attached an affidavit that laid out the fact as to whether he had a defence or not and it is on that basis that the trial Chief Magistrate should have made his decision on whether to grant it or not. I do agree with Counsel for the Appellant that if the trial Chief Magistrate had properly applied the law he would have found disclosed a triable issue in the Appellant's affidavit.

Therefore, in the instant case the trial Chief Magistrate erred in law in not finding that the Appellant's application disclosed sufficient facts or triable issues justifying granting him leave to appear and defend the main suit under summary procedure.

Grounds 3 and 4:

3. That the learned trial Chief Magistrate erred in law in entering a decree against the Applicant in the circumstances.

4. That the decision of the learned trial Chief Magistrate caused a miscarriage of justice to the Appellant.

Counsel for the Appellant submitted that the trial Chief Magistrate in rejecting the Appellant's affidavit and ignoring his defence that raised triable issues that required investigation amounted to a denial of a fair hearing and was prejudicial to the Appellant.

Counsel for the Respondent on the other hand noted that the Appellant came to Court with dirty hands and that the application was dismissed for failure to follow the law and not on technicalities. That granting this appeal will occasion a miscarriage of justice and deny the Respondent of fruits of his litigation. And thus the appeal should be dismissed with costs. Not to mention that the Appellant at all times was represented by Counsel and the appeal is coming 3 years later from the time of the institution of the main suit.

Counsel for the Appellant in rejoinder submitted that the delay to appeal cannot be attributed to the Appellant to deny him his unfettered right of appeal and cited the case of **Uganda**

Telecom Ltd versus Kilembe Investments Ltd, HCT – 01 – CV – MA – 0142 OF 2015,
where it was held that;

“It is axiomatic that when a party instructs counsel, he assumes control over the case to conduct it throughout, the party cannot share the conduct of the case with his counsel. He must elect both to conduct it entirely in person or to entrust it to his Counsel.”

Thus, the omissions of Counsel shall not be visited on the Appellant.

It is my considered opinion that the trial Chief Magistrate did err in granting a decree in favour of the Respondent over a mere a technicality for which he had powers to order otherwise. On the issue of appealing out of time, I do not see the essence of Counsel for the Respondent bringing it up now in his submissions yet he is the same that freely consented to the application for the same to be filed out of time. The trial Chief Magistrate therefore misdirected himself when he entered a decree against the Appellant.

This appeal is allowed and the decision of the lower Court set aside. Costs in the cause.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE.

30/03/2017

Judgment read and delivered in open Court in the presence of;

1. Counsel Kateeba Cosma for the Appellant.
2. Tumwesigye for the Respondent
3. James – Court Clerk

In the absence of both parties.

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OYUKO. ANTHONY OJOK

JUDGE.

30/03/2017

