

**IN THE HIGH COURT OF UGANDA AT KAMAPALA  
CIVIL DIVISION**

**CIVIL APPEAL N0.45/2015**

**(ARISING FROM MENGO CHIEF MAGISTRATE COURT  
CONSOLIDATED MISC APPLICATION 755,756/757 AND  
834/2014**

**1. MALE H. MABIRIZI K. KIWANUKA**

**VS**

**M.SHAH & CO. LTD**

**JUDGMENT**

- 1.This appeal relates to procedural issues and concerns on the part of the appellant the substantive matters are still pending in the Court below.
- 2.In his Ruling delivered on 15<sup>th</sup>/11/2014 in Misc. application No. 755 of 2014 arising out of C.M- Civil Suit No, 1557 of 2014 Male H. Mabirrizi K. Kiwanuka Vs. M. Shah Co.Ltd
- 3.The part of the ruling which particularly aggrieved the appellant appears at page 1 of the ruling. I will quote part of the decision by the trial Chief magistrate, it ran's as follows

“The appellant filed four Misc. Applications arising out of the main suit that was brought as a summary suit by the respondent/ plaintiff against the appellant/ defendant. For purposes

of expediency I have decided to combine, consolidate the application to make the decision.

The applications are as follows

1- 'M.A NO. 755/2914 sought that the first defendant in the main suit be struck out as a defendant in the suit

b) The costs be provided for

2. M.C APP 756 OF 2014 sought orders that:-

a) The main suit be dismissed for failure to disclose a cause of action.

b) Costs of the suit

3. M.A NO.757 of 2014 sought for orders that:-

a) The appellants/defendants in the main suit be granted un conditional leave to file a defence in suit.

b) Costs of the application

4. M.A NO. 834 OF 2014 sought for orders that

a) The main suit be dismissed for irregularity and tainted with illegalities

b) Costs of the application”

The trial Chief magistrate consolidated all the four applications. He granted one that is M.A N0.757/2014 seeking, leave to file a defense and the rest were dismissed for want of merit. The Chief Magistrate added that:

**“In fact many of the argument\* raised by 1<sup>st</sup> applicant/defendant would better be sorted out In the main suit...”**

5 The decision of the court below aggrieved the appellant particularly the consolidation of the application reasoning that they were denied the right to be heard as the 3 Misc. applications were consolidated without any hearing. They filed a memorandum of appeal with 9 grounds of appeal namely they are:

*i) The learned chief magistrate erred in law and in fact when he consolidated applications which raised different questions of law to be determined.*

*ii) The learned trial magistrate erred in law and in fact when he consolidated applications with different applicants (but) rather indicated only the first applicant as the applicant thus a rising a miscarriage of justice and the right to be heard by the 2<sup>nd</sup> appellant for the detriment of the 1<sup>st</sup> appellant against whom he erroneously awarded costs.*

*iii) The trial chief magistrate erred in law and in fact when he purported to consolidate Misc. Application NO. 757 of 2014*

*with rest of the application during writing of his ruling yet the same was not part of the consolidated applications on which the party addressed court by way of written submission thus violating the applicant's constitutional right to be heard rendering the outcome null and void.*

*iv) The learned Chief Magistrate erred in law and fact when he did not consider each case independently but instead held that the applications were too complicated for him to determine thus abdicating his statutory duty resulting into a miscarriage of justice*

*v) The learned trial magistrate erred in law and fact when he held that the suit is not burred in law irregular and tainted with illegalities and abuse of court process despite the existence by the same respondent on a counter claim provides facts under Mengo Civil Suit 459/2014*

*vi) - The learned trial chief magistrate erred in law and in fact in holding that the suit against the 1<sup>st</sup> defendant was not bad in law contrary to the substantive law on the legal corporate entity of companies.*

*vii) The learned trial magistrate erred when he held that the tenancy agreement was signed by the 1<sup>st</sup> appellant on his behalf and on behalf of the 2<sup>nd</sup> appellant thus contravening the law on corporate entity.*

*viii).The learned trial chief magistrate erred in law and fact when he instead of ordering the costs to be paid in the cause awarded*

*costs yet the main suit is still pending and without any justification ordered the 1<sup>st</sup> appellant solely to pay the costs to Misc. Application No. 756 of 2014 to which he was a sole applicant causing miscarriage of justice to the I<sup>s</sup> appellant/applicant.*

*ix). The learned trial magistrate erred in law and in fact when he failed to put all the pleadings, evidence and binding authority on court record for clear scrutiny and evaluation and thus made wrong conclusions*

**6. At the trial the appellant represented himself while learned counsel OBIRO EKIRAP ISAAC represented the respondent Company.**

**7. The appellant presented his appeal orally and argued ground 1-4 jointly but others separately**

**THE  
ARGUMENTS**

**8. GROUNDS 1 TO 4**

The appellant referred this court to 0.11 of the Civil Procedure Rules for his submission and emphatically argued that the order requires that before consolidation of suits.

- i) There must be two or more suits pending
- ii) The two suits or more must have similar question of law

9. He faulted the trial chief magistrate for having consolidated the applications for reasons of “expediency” yet expediency as stated at page

1(one) the ruling of court is not one of the reasons court considers before consolidation

He explained that Misc. Application 755/2014, 756/2014 and 834 of 2014 were not similar **or the** same. **He argued** that the parties being similar perse does **not make the two** suits to qualify for consolidation. **He referred me to DEUTSHE BANK AG VS COURT OF APPEAL & STEEL CORP.OF PHILLIPINES G.R NO. 193965 SC of Philippines.** Inter alia in that case it was **held that** Consolidation must serve **“the best interest of the parties”**.

10. He was concerned that in the Misc. Application No. 755 & 757 **of** 2015, the parties' were not heard. The trial chief magistrate added them on the list for consolidation in the time of writing his ruling. That **such** conduct denied the appellant the right to be heard and **breached** the constitutional right; He Cited **CRANE BANK LTD VS BEREX TOURS & TRAVEL SCCA NO.6 OF 2013**, where it was held that **a decision** made without affording the party a hearing is null and void.

11) The learned advocate then explained what each of the application sought from the court. The description of orders he gave conforms to ones I earlier ~~said~~ in this judgment. He concluded that each of application had its own issue meaning therefore they ought not to have been consolidated.

12. GROUHD 5

In this ground the appellant faulted the learned trial chief magistrate for **having** held **that** the suit was not bad in law by reason of irregularities, illegalities and abuse of court process,

13. His main concern was that the contract on which the cause of action was based had expired and the existence of an admitted counter claim as per the affidavit in reply in Misc. Application No. 757/2014.

#### GROUND 6 AND 7

14. The gist in the two grounds above related to how the tenancy agreement was executed. He argued that the contract was signed by Male H. Mabirizi *on* behalf of the tenant. The learned chief magistrate found out that

**“The claim that the applicant was wrongly added as a defendant is not Born out of what is on record. The record shows he entered the alleged agreement on his and on behalf of the 2<sup>nd</sup> defendant”**

15. The appellant maintained *that Male H Mabirizi was not a party that it was the company he acted for and it was wrong to add him as a defendant*

He referred me to SCCA no. 8 of 1998 bank of Uganda vs Baco Arabe espanal

#### 16. GROUND 8

In ground 8 the appellant complained of being ordered to pay costs when he handled a corporate matter on behalf of the company .He reffered me to the decision in MOHAMED B KASASA VS JASPER BUYONGA & SIRAJE BWOGI C.A NO.42/2008 to the reason that when the law gives discretion the same must be exercised judiciously and a decision must be reached based on the right principles, it must not be in contravention of statutory law.

**17. The 1<sup>st</sup> appellant argued that he was successful in the court below as he was given leave to file a defence and costs do follow the event he ought not to have been made to pay costs.**

#### GROUND 9

**The appellant did not make submission on this nor did he indicate to court whether or not he had abandoned it.**



18. In reply to ground (I) to (4) learned counsel for the respondent OBIRO EKIRAP referred court to page 8 of the proceedings where the court consolidated the applications and the appellant replied that he was ready to proceed. That means he had no problem with the consolidated.

19. Secondly that on 17/0et/2017 the 1<sup>st</sup> **appellant Male .H. Mabirizi filed an affidavit in reply and the affidavit was in respect of misc Application.** 755 of 2014, 756/2014 and 757/2014 all arising out of NO. 1557/2014 so that he could *PROCEED IN THE BELOW COURT BELOW*, the parties were in agreement with consolidation and filed submission relating to consolidated application. In the submission the appellant did not fault the consolidation.

#### **ANSWER TO THE GROUNDS**

**20. I am aware of the duty of the court appealed to at first instance. It has the duty to re-approach the case and come to its own conclusion See PADYA VS R [1957] E.A and F.K ZABWE VS CRAHE BANK LTD fc AMOR SC C.A /2005**

#### **Ground 1 to 4**

I have noted with concern the arguments by counsel EKIRAP. The learned advocate answered that the appellant did not oppose the consolidation when it was proposed; He said he was ready to proceed and actually proceeded with filing the written submission.

21. I have perused the submission of the appellant and one of the applications he

headed it consolidated Misc. Application NO. 755, 756 & 834 arising out of CS. NO. 1557 OF 2014 in the opening statement to his submission the appellant wrote **“The three applications were** consolidated by your direction **in** all the applications the applicant prayed that costs be met by the respondents

22. The submission show that when the trial chief magistrate made the direction to consolidate the applications the applicants are not recorded to have opposed the direction for consolidation. He instead confirmed and went ahead to file submissions of the consolidated applications.

23. It is of interest to note that the applicant asked for costs to be met by the respondents in the consolidated applications. This is further proof that the applicant agreed with the consolidation and he cannot now deviate from that position and pursue an appeal against orders he acted on without any objection.

24. When you study his submission further, he lists all the consolidated applications and stated the orders he wanted from court.

25. Be the above as it may on close look all the applications which were brought for under Mengo C.S 1557/2014 to;

- (a) Dismiss it for illegality
- (b) To Strike out the defendant
- (c) To dismiss it for disclosing no cause of action

To me it appears to be that there were related matters to be decided in applications on similar principles of fact, arising from the same facts Order 11 CPR it provides that;

**“Where two or more suits are pending in the same court in which the same or similar questions of law or fact are involved, the court may, either upon**

**the application of one of the parties or of its own motion, at its discretion, and upon such terms as may seem fit-**

**(a) Order a consolidation of those suits; and**

**(b) Direct that farther proceeding\* in any of the suits be stayed until further order.”**

26. I may have to say that 0.11 of the Civil Procedure Rules has a wide application today than it reads:

I will refer to the East African Decision of **STUMBERG & ANOTHER VS POTGIETER (1970) EA 323** where **KNELLER J** observed at Page 326 that:

**“A broad principle has emerged from English decisions relation to consolidation application. It is this, where there are common question of law or fact in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matter should be disposed at the same time, consolidation should be ordered”**

27. In the present appeal I have noted that the facts of the application arose from the filing of CS NO. 1557/2014 by the respondent. The related questions of law to decide were:-

**1) Whether that suit was irregular and tainted with illegality in Misc. Application 834/2014**

**M) Whether the appellant must be struck out as defendant**

**in that suit as Misc. Application no.755/2014 prayed**

i) Whether the suit discloses a cause of action and if not it be dismissed in Misc. Application No. 756/2014

The above applies to STUMBERG case (supra) and shows that there were more reasons than not to have all those applications consolidated

**28.** I am also of the view that since Order . 11 grants court discretion act on its own motion and states so,

It did not amount to denial of hearing as the appellant argued when court decided to consolidate M.A 757 of 2014 which was seeking leave to file a defence in the same suit and proceeded to grant it. **See PARTICK NKOBA VS RWENZORI HIGHLANDS TEA CO. & ANOR [1999] KALR762**, where Bamwine AG Judge (as he then was held inter alia that;

**“Parties to the various applications may only with leave of court consolidate the various actions into one or only court may in its own volition consolidate the action into one”**

**29.**There is no where In O. 11 civil Procedure Rule or decided case where It is shown that before court consolidates application/ suits on its own motion it has to accord a hearing to the party as the appellant argued. That means if one of the party opposed it and succeeds the court ought not to be able to move itself; In the result I find that the trial court properly consolidated the various applications.

30.It is important to find like the trial chief magistrate did, that all the dismissed

applications were not necessary. It is only Misc. Application 757/2014 for leave to file a defence that had merit. Once leave is granted and the suit is defended then the appellant would be able to raise the issues in the 3 applications.

31. The orders sought actually are some of the reasons the appellants would give to show that there genuine triable issues before court for them to be granted leave to file a defence but it is improper to bring in a suit interim applications before leave is granted. What is proper in my view to use such defects in the case as the reason for applying for leave to file a defence. For those reasons grounds 1-to 4 do fail.

### **32. Ground 5**

I have noted the appellants concern on ground 5 is in their written submission. It is framed as an issue - whether C.S NO. 1557/2014 is irregular and bad in law. The written submissions are numerically paged. It is from page 4 to 11 Section 6 of the Civil Procedure Act is cited and various authorities dealing with it. They include **PEARL OF AFRICA TOURS VS TRAVEL COMM. C.S 89/2011 by Christopher Madrama J.**

**33.** The main argument was that in the presence of HC.C.S NO.859/2014 with a counter claim in the HCC.S 1557/2014 by the respondent was irregular.

**34.** I will not go beyond here on this point; I have already said that arguments of such nature are part and parcel of the main suit in which the appellant was granted leave to file a defence. The existence of such other suits

should be brought to the notice of the trial court for it to decide. Courts cannot encourage the filing of applications on every paragraph of the plaint and WSD. Studies have already established that the Multiplicity of such applications which contribute to the backlog of cases we have. However note that since the trial chief magistrate granted leave, it is an error for him to pre-maturely decide on the matters forming the substance to the applicants defence. See. UGANDA POSTS & TEL.COM VS ABRAHAM KITUMBA SCCA NO. 36/1995) (1997) 230 WHERE THE COURT HELD

*“ The issue of stay of suit should be provided in the written statement of defence or be raised as a preliminary point of law before calling evidence (emphasis added)”*

36. That means if that Supreme Court decision is to be followed as it must be, the appellant had the full option to make the objection before calling evidence. There is no need to file a separate application.

37. I however observe that since the trial chief magistrate granted the appellants leave to file a defence he would not have pre-maturely decided the issue whether to stay or not to stay the proceedings. The same would then be left to be addressed in the main suit.

38. I would for the above reasons set aside the conclusion of the learned trial chief magistrate and orders that the issue be raised at the trial if the trial did not proceed by reason of this appeal, and if it did proceed without awaiting the results of this appeal, then on that finding I would order a re-trial to afford the appellant a chance to raise the objection if they desire, To that extent although the application in the first place was not necessary ground 5 succeeds.

**GROUND 6 & 7**

The gist in grounds 6 and 7 is that the trial chief magistrate failed to apply the principles of corporate personality and its consequences on contracts.

I believe this is only a question of interpretation. The 1st appellant signed the contract in issue, the tenancy agreement as Male H.Mabirizi of Mk Financiers Limited.

39. In my understanding the first appellant signed the contract personally and opted to use the company as his address. He could have used any other address in the same way. I can give an example. Male H.Mabirizi is a lawyer if he had a firm of Advocates where he is a partner he could as well have signed as Male H. Mabirizi of Male H. Mabirizi and Co. Advocates. It does not change anything in identity the truth remains that he is Male H. Mabirizi of that address he has decided to use.

40. The old decision in **Solomon Vs. Solomon [1897] A.C 22 HL** would explain this better per LORD Macnagten Rule

**“The company at law is a different person altogether from the Subscriber... and though it may be that after incorporation the business is precisely the same as if was before.....in law it is not the agent of the subscriber or trustee for them no subscribers or member liable in any shape in form except to the extent provided by the Act.”**

41. If the questioned tenancy agreement were to be a document executed by the company, there was no reason why the first appellant did not sign in his

corporate capacity and seal the document. There would be no need for him to disclose his personal address of preference.

I consequently find that grounds 6 and 7 have no merit and they accordingly fail

#### **43. GROUND 8            COSTS**

The conclusion of the trial Chief Magistrate on this issue was stated as below;

Costs of M.A 757/2014 shall be in the cause while costs of the other three applications shall be paid by the appellant/1<sup>st</sup> defendant”

44. The ground of appeal by the appellant is framed as below;

*"the learned trial Magistrate erred in law and fact when he instead of ordering the costs in the cause, awarded costs yet the main application is still pending and he, without any justification ordered the 1<sup>st</sup> appellant to solely pay costs of Misc. Application 756 & 834 to which he was not a sole applicant thus causing a miscarriage of justice for the 1<sup>st</sup> applicant. "*

45. I must say that the general rule in award of costs is well set in Section 27 CPA. It is also trite law that a successful party is entitled to costs and can only be denied the same for judicial reasons see **KISKALYD VS. DE ANGELS [1969] E.A 6 AND DEVRAMNANJI VS. HARIDAS ADKIDA [1946] 16 EACA 35.**

46. Apart from the brief statement that the 1<sup>st</sup> appellant pays costs personally,



there was no explanation given by the trial court why it was making the orders that the 1<sup>st</sup> appellant pays the costs in respect of those applications.

**47.** Without giving reasons for such a decision the exercise of the discretion would be not judicial. Reasons must be given for such a decision see SC **PRINCE MPUNGA RUKIDI VS. PRINCE SOLOMON GAFABUSA IGURU AND HENRY KAYIMA** particularly the decision of Odoki C. J.

**48.** Secondly in all applications there two parties prosecuting them. The second appellant never distanced itself from the prosecution of these applications from the start to the end. That means the two were party to the starting of the prosecution of cases and the resultant order on costs would have affected both of them. If the trial Court found any reasons to order payments by only one, then the court had to explain by giving reasons why.

For those reasons ground 8 succeeds.

**49.** In the result this appeal succeeds in respect of ground 5 and 8 and fails in all other grounds. Costs in the court below are affected to the extent of the order made in ground 8. Costs for this appeal are awarded for grounds 1 to 4, 6 to 7 to the respondent and 5 and 8 to the appellant.

**NYANZI YASIN**

**JUDGE**

**23/3/2017**