

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
MISCELLANEOUS APPLICATION NO. 207 OF 2017
ARISING FROM CIVIL APPEAL NO. 060 OF 2017
ARISING FROM MISC CAUSE NO. 008 OF 2017

MUSUKU ABDUL JABAR:..... APPLICANT

VERSUS

- 1. BUGIRI MUNICIPAL COUNCIL**
- 2. MUSUSWA IBRAHIM:..... RESPONDENTS**

RULING

BEFORE: HER LORDSHIP HON. JUSTICE EVA K. LUSWATA

1.0 Introduction and brief facts

1.1 The applicant proceeded by motion under O.44 rr.1 (1)-(4) and O. 52 rr 1 & 3 CPR to seek an order to strike out Civil Appeal No. 060/2017 as incompetent and for the record in respect of Miscellaneous Cause No. 008/2017 (hereinafter referred to as the main cause) to be returned for hearing to the Chief Magistrate’s Court of Iganga, and in addition, for costs of the application.

1.2 The main ground of the application is that at the hearing of the main cause in Iganga, the respondents raised a preliminary objection which was overruled. They then filed an appeal against that order but did not seek leave to appeal which according to the applicant, offends the rules of procedure and renders the appeal incompetent. Those grounds were substantially repeated in the applicant’s affidavit, filed in support of the motion.

1.3 The applicant was represented by Were Associated Advocates and M/S Okalang Law Chambers, Advocates and Legal Consultants represented the respondents.

1.4 Martin Musigire, an advocate with M/s Okalang Law Chambers, Advocates and Legal Consultants filed an affidavit in reply stating that the application was misconceived and bad in law. He agreed that the Learned Magistrate overruled a preliminary objection in the main application which prompted filing of the appeal. He argued that the objection raised for the respondents was in regard to the competence of the pleadings in the main application and that any orders given in respect to such an objection were appealable as of right. That therefore, the respondents were not required to seek leave of court before filing the appeal. He called for this court to dismiss this application for lack of merit and for the appeal to be heard on its merits.

1.5 In addition to his submissions, applicant's counsel argued that Mr. Musigire's affidavit is defective and contravenes Regulation 9 of the Advocates (Professional Conduct) Regulations which bars Advocates from swearing affidavits in regard to contentious matters. In reply, respondent's counsel argued that the affidavit did not offend the law, because although it was sworn by Musigire, one Kevin Amujong had personal conduct of the matter and therefore, there would be no conflict if Musigire were to be called as a witness. He concluded that in fact, the affidavit was purely on points of law, and not on contentious points as envisaged under the regulations.

2.0 The law

2.1 The general principle is that all appeals are a creation of statute and in most cases, a right of appeal is available as a matter of right against any order or decree of a Court. Where exceptions arise, specific provisions are available in the law not to take away the right of appeal but to make specific provisions of how to access that right. It was held in **Incafex Ltd Vrs James Kabaterine CACA No. 16/97** that it is spelt out in O.44 CPR orders that are appealable as of right. That all appeals outside that law would require leave of court and thus be incompetent if it is not first obtained.

3.0 My Decision

3.1 In my view, Order 44 CPR is applicable to this application. In particular, (and there appears to be no contest on that point between counsel,) it is agreed that in that in certain cases, an intending appellant would require leave to appeal to the High Court. Mr. Musigire argued that the present appeal lies, not under Order 44 CRP, but under Order 6

rr 30(1) CPR regarding the competency of the pleadings in the main cause. That particular law allows a party to move Court to strike out any pleadings that do not disclose a cause of action or are presented as frivolous and vexatious. Under Order 6 rr 30(2) CPR, an order made in pursuance to that rule is appealable as of right. In short, an order under that rule would not fall under the general provisions of Order 44 CPR which specify which orders are appealable as of right.

- 3.2 I have confirmed from the record of the lower Court that the gist of the objection against the main cause was wrong procedure adopted and a request for dismissal of the claim. It was stated in particular that “*the application has no legal basis as it does not refer to any law and the purported claim for unconditional release of the motor vehicle is a tortious claim of detinue and prayer for general damages can only be proved by way of an ordinary suit presented by plaint and not a miscellaneous cause supported by affidavit evidence*”. The lower court heard that objection on its merits and overruled it in favour of the present applicant, and thus this appeal.
- 3.3 In his submissions to support the above objection, respondent’s counsel argued that the pleadings in the lower Court, did not state the law followed. His argument was that the facts related in the motion revealed the tort of detinue which raised contentious issues that required strict proof by the applicant. That such proof would involve oral and not affidavit evidence.
- 3.4 I see nothing in the above submissions to suggest that the basis of the objection was that the motion did not raise a cause of action against the current respondent. In fact, by mentioning that the facts revealed the tort of detinue, it was clear that this was the cause of action being raised in the main cause albeit by motion and not plaint. The merits or lack of it of the procedure followed, I am satisfied that the objection was not against absence of an arguable cause of action but of the procedure followed.
- 3.5 A frivolous action has been defined to be one which has no serious purpose or value and carries little weight or importance. It is one which is clearly insufficient on its face and is only designed to delay or embarrass the opposing party. On the other hand, a vexatious suit is one that is filed when a party is not acting *bonafide* and is not calculated to lead to any practical result. See **Blacks Law Dictionary [On Line] 2nd Edition**

3.6 I have held that the bone of contention against the main cause was not its content but the procedure followed to file it. This would not in any way mean that the applicant's claim was frivolous or vexatious as defined above. The decision of the trial Magistrate on that issue would thus not fall under the exceptions to O. 44 CPR and the applicant would be right to argue that the respondent required leave of the trial Magistrate or High Court before lodging their appeal. The issue of wrong procedure would of course remain an issue against which the respondent can appeal once the leave has been obtained. I would accordingly decide the first issue in favour of the applicant.

3.7 The second ground of contention is that Mr. Musigire's affidavit offends the provisions of Regulation 9 of the Advocate's regulations. However, there was nothing shown to indicate that Mr. Musigire would be a witness in this cause. His argument is that it was Ms. Amujong and not him to argue the application, which was also not contested.

3.8 However, it is clear that M. Musigire's affidavit substantially contains matters of law. What may appear as facts in paragraphs 3, 4, 8 and 9 of his affidavit, are mere statements of how the application was filed, the objection raised and then dismissed. These are matters readily available on the record of the lower court and are not in controversy. In my view, nothing should bar an advocate to depose to them. I ideally find no merit in the second objection.

4.0 Conclusion

4.1 In conclusion, I have found in favour of the applicant on the first objection which would settle this application in their favour. Civil Appeal No. 060/2017 having been filed without leave is incompetent. I order that it be struck out forthwith and the case file in respect of Misc. Cause No. 008/2017 be returned to the Iganga Chief Magistrate's Court for hearing on its merits.

4.2 Since the applicant has succeeded on the first but not second objection he is awarded only 50% of the costs of this application.

I so Order

EVA K. LUSWATA

JUDGE

17/9/2018