THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

MISCELLANEOUS APPLICATION NO. 9 OF 2018

(Arising from Civil Appeal No. 050 of 2016)
(Arising from Civil Suit No. 03 of 2015)

1. VICTORO BYANGIRE
2. JOSEPHAT LUSIBA :: APPLICANTS

VERSUS

BUREGEYA ALOYSIUS :: RESPONDENT

RULING

Before: Hon. Justice Byaruhanga Jesse Rugyema

[1] This Application is brought under **Ss.98 & 80(1)(d) CPA, S.33 of the Judicature Act, O.43 r 22 & O.52 rr 1,2 & 3 CPR** for orders that the Applicants be granted leave to adduce additional evidence at the hearing of **Civil Appeal No. 050 of 2016** and be granted leave to argue new grounds on appeal.

[2] The grounds of the Application are outlined in the supporting Affidavit of the 1st Applicant, **Victoro Byangire** which in brief are:

1. ***The Applicant is an Appellant in a pending appeal with high likelihood of success and the evidence sought to be adduced regards the legality and validity of the sale of land, the subject of the appeal to the Respondent and the lack of locus standi on the part of the respondent to file C.S. No. 03 of 2015.***

2. ***That the person from whom the Plaintiff/Respondent claims to have purchased the suit land from (i.e. a one Andrew Mugisha), did not pass on good title for lack of Letters of Administration to the Estate of the late Kanyankole.***

3. ***That the Respondent is neither a grantee of Letters of Administration nor a beneficiary of the late Kanyonkole and that therefore, he lacked locus standi to institute C.S. No. 03 of 2015.***

4. ***That the grounds sought to be argued touch on matters of illegality as they are matters in law which can be raised at any stage.***

5. ***That at the time of having the Applicant's evidence in Court, the seller of the land to the Respondent was not produced in Court as a witness which disabled the Applicant from cross examining him on whether he had such authority to sell off the land.***

[3] In his Affidavit in reply, the Respondent contended that at the earliest opportunity possible he would bring to the attention of Court the deliberate non service of the instant Application.

[4] Secondly, that the supposed evidence sought to be adduced requires the amendment of the character of the parties' original pleadings in **C.S. No. 03 of 2015**.

[5] Thirdly, that the intended adduction of additional evidence is for purposes of removing lacunae in the Applicant's case and filling gaps in evidence and patch up the weak points in his case.

[6] Fourthly, that the Applicants were availed ample opportunity to question all the matters complained of, but failed to do so in either cross-examination or their defence.

[7] Fifthly, that there is no illegality the Applicants seem to raise or cure by the adduction of additional evidence and amendment of the Memorandum of Appeal because the Respondent lawfully acquired the property in question from a one **Mugisha Andrew** and the 2nd Applicant duly approved his signature and stamped on the purchase agreement.

[8] Lastly that there is no good reason exhibited by the Applicants to allow this honourable Court to exercise its discretion in challenging the instant Application and therefore, if this Application is allowed, he is bound to suffer serious prejudice and injustice.

Counsel Legal Representation

[9] The Applicant was represented by the **Justice Centers Uganda, Hoima** while the Respondent was represented by **P. Wettaka Advocates, Kampala**. Both Counsel filed their respective submissions for consideration in the determination of this application.

Determination of the Application

Preliminary Objection

[10] The Respondent's Counsel raised a preliminary objection that the Application was never and has never been served upon the Respondent. That under **0.49 r. 2 CPR**, Orders, Notices and Documents required to be served in the manner provided for the service of summons. That service of summons is provided for under **O.5 r (1)(2) CPR** and has to be done within the 21

days time frame. Counsel concluded that the instant Application offends the provision of **O.49 r.2 CPR** and the effect of non service is that the suit or application has to be dismissed; **O.5 r 1(2) CPR**, see also **Michael Mulo Mulaggussi vs Peter Katabalo H.C. Misc. Appeal No. 006 of 2016 [2018] UGHCLD 36.**

[11] Counsel for the Respondent on the other hand, submitted that the Application was served upon the Respondent but the Respondent declined to endorse upon the Application. That however, even if the application was not served upon the Respondent, it did not prejudice the Respondent in any way as he has already filed his reply and therefore has not suffered any prejudice as a result of non-service in time.

[12] I have looked and examined the instant Notice of Motion. It was endorsed by the Registrar of the Court on 22nd February, 2018. The record does not however bear an affidavit of service to allude to the exact date of service upon the Respondent.

O.5 r.16 CPR provides that

> *"The serving officer shall, in all cases in which the summons has been served ... make or annex or cause to be annexed to the original summons an affidavit of service ..."*

[13] The Respondent on his part is complaining of non-service. No rebuttal of this averment was made by the Applicant. Under **O.49 r 2 CPR,** it is provided that all orders, notices and documents must be served in a manner provided for service of summons. Such processes include the Motion on Notice. According to **O.5r 1(2) CPR**, summons must be served within

21 days of issuance; **Michael Mulo Mulaggussi vs Peter Katabalo (Supra).**

[14] According to **Kanyabwera v Tumwebaze [2005] 2 E.A 86,** all the provisions under **O.5rr1 & 2 CPR** are of strict application since a penalty accrues upon default. The penalty for default is dismissal of the suit or application **(O.5.r.1(3)(a) CPR).**

[15] This rule for service of summons is mandatory as it gives Courts the root upon which litigation is ordered. It goes to the jurisdiction of the Court. It is not a mere technicality, but is rather the foundation/premise of the right to be heard, for it is through this process that a party is given notice of the suit and called upon to defend himself/herself; **Rashid Abdul Karim & Anor vs Suleiman Adris H.C.M.A. No. 09 of 2017.**

[16] In the instant case therefore, the absence of an affidavit of service on record render the Respondent's claim of non-service valid. The late discovery of this application by the Respondent is demonstrated by the filing of the affidavit in reply on 30th June, 2020, to the Notice of Motion that was filed in February, 2018. This kind of management of pleadings in my view is an abuse of Court process. Statutory timelines must be adhered to. The Applicant in this case filed the Application on 22nd February, 2018, then did not or failed to serve it upon the Respondent but opted to file written submissions in support of the application on 22nd November, 2019, after a span of over a year! It was upon being served with the submissions that the Respondent filed a reply. This is an absurdity.

[17] In this case therefore, the Applicants having defaulted on service of the Application for over a period of 2 years when the application was lying on record, I find this application an

absurdity and illegal and as a result, it ought to be dismissed and I accordingly uphold the preliminary objection.

Issues for Determination

Whether the Application is Supported by Valid Grounds

[18] It is trite that the legal principle for allowing additional evidence by an Appellate Court is now well settled as follows:

Additional evidence is taken on appeal in exceptional circumstances and usually where such evidence was not available at the time of trial and could not have been obtained using reasonable diligence. The evidence was to be credible and would be likely to influence the result of the case; *Hon. Anifa Bangirana Kawooya vs National Council for Higher Education; S.C.M.A. No. 8 of 2013.*

[19] In the instant case, the additional evidence sought to be adduced on appeal is as follows:

1. **The legality and validity of the sale of land, the subject of the appeal to the Respondent and the lack of locus standi on the part of the Respondent to file Civil Suit No. 0003 of 2015.**

2. **That the person from whom the complaint claims to have purchased the suit land from did not pass a good faith for lack of Letters of Administration to the Estate of the late Kanyankole.**

[20] As clearly found by the trial Magistrate in the lower Court's record, the undisputed facts included the following:

> *"1. Plaintiff bought approximately 100 acres of land at Nakasagazi from Andrew Mugisha in 2008 (P Ex 1).*

2. *...*

3. *The 2nd Defendant is the LC 1 Chairperson of Nakasagazi village.*

4. *The 2nd Defendant signed P. Ex 1, the agreement by which the Plaintiff bought land from Andrew Mugisha".*

The 2nd Defendant/Applicant **Mr. Joseph Lusiba** was not able to deny the above or challenge them during cross examination of the Respondent/Plaintiff during the trial. The Respondent/Plaintiff's purchase agreement of the suit land which was endorsed by the 2nd Applicant as a witness or Chairman was admitted without any objection.

[21] It follows therefore in my view, as to whether or not the vendor **Andrew Mugisha** had capacity to sell, cannot be new evidence which after the exercise of due diligence, was not within the knowledge of, or could not have been produced at the time of the suit by the party i.e. the Applicants now seeking to adduce the additional evidence. This is so because the 2nd Applicant is or was an LC 1 Chairperson of the village where the parties and the subject matter of sale were located. **Secondly**, if it were so, that the Applicants have discovered such new evidence, they ought to have attached it to the 1st Applicant's affidavit in support for verification by the opposite party and Court. For example, the claimed new evidence, regarding the rightful person with the grant for the Estate of the late **Kanyankole** or that the Kibanja sold by **Mugisha Andrew** was part of the Estate of **Kanyankole** and probably not his share, have not been brought to the attention of Court through the 1st Applicant's affidavit in support of the application.

[22] In the premises, I find that the alleged illegalities are not supported by any evidence for this Court to consider in the determination of the Appeal.

[23] The Respondent on his part filed **C.S. No. 03 of 2015** to pursue his interest in the suit land he purchased from **Andrew Mugisha** as per the Purchase Agreement on record (P. Ex 1). He in the premises had locus to file the suit.

[24] As to whether or not stamp duty was paid for the locally executed sale land agreement (P.Exh. 1), is not *"new or discovery of new and important matter of evidence"* which after the exercise of due diligence, was not within knowledge of, or could not have been produced at the time of the suit by the Applicants seeking to adduce additional evidence, because the 2nd Applicant had full knowledge of the local Sale Agreement by virtue of his own endorsement and sealing with the Nakasagazi L.C. 1 Official stamp.

[25] Besides, whereas I agree that the local sale agreement of land attracts stamp duty as provided under **Schedule 2 (Section 2) Stamp Duty Instruments,** this issue of non payment of stamp duty, was not pleaded by the 1st Applicant in his Application. As observed by their Justices in **Adetoun Oladeji (Nig) ltd vs Nigerian Breweries plc S.C. 91 of 2002** cited with approval in **Mujasi Masaba Bernard Elly v Magombe Vincent & Anor E.P.A. No. 27 of 2017.**

> *"...It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with*

the averments of the pleadings goes to no issue and must be disregarded".

[26] In fact, the parties are not allowed to depart from their pleadings as Counsel of the Applicant is attempting to do by raising in his submission the issue of whether there was no need to pay stamp duty for a locally executed sale of land agreement. It was never pleaded in the Application.

[27] All in all, in conclusion, I find that the Application does not fulfill the condition on which additional evidence could be admitted. I find that the proposed additional evidence could have been discovered after due diligence. It is apparent that the unsuccessful Applicants at the trial are now seeking to adduce additional evidence to make a fresh case on appeal, fill up omissions or patch up the weak points in their case thus to allow this Application shall seriously prejudice the Respondent.

[28] For the foregoing reasons, I decline to exercise my discretion to grant leave to adduce additional evidence at the hearing of **Civil Appeal No. 050 of 2016** and dismiss the Application for being devoid of merit, with costs to the Respondent. Court is to proceed and hear **Civil Appeal No. 050 of 2016** on its merits.

Signed, Dated and Delivered at Masindi this **22nd day** of **September, 2022.**

Byaruhanga Jesse Rugyema
JUDGE