THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL APPEAL NO. 100 OF 2019

(ARISING FROM M.A NO. 59 OF 2019)

(ARISING FROM MA NO. 800 OF 2018)

(ARISING FROM CIVIL SUIT NO. 1092 of 2018)

NAKAKAAWA AURAH::APPELLANT

VERSUS

ESSUBIRYO ZAMBOGO CO-OPERATIVE SAVINGS

& CREDIT SOCIETY LIMITED::RESPONDENT

BEFORE: HON. JUSTICE ESTA NAMBAYO

JUDGEMENT

The Appellant being aggrieved by the ruling and orders of the learned trial Magistrate Grade 1 sitting at Mengo Chief Magistrate's Court has appealed to this court on grounds that;

1. **The learned trial Magistrate erred in law and in fact when she held that the Appellant deposits UGX. 11,480,000 in cash or provides a land title/agreement of that value to Court before filing her written statement of defense.**

2. **The learned trial Magistrate erred in law and in fact when she issued a warrant of arrest against the Appellant before judgment.**

Background of the Appeal

The brief background to this appeal is that on the 21st /11/2018, the Respondent filed Civil Suit No. 1092 of 2018 under Order 36 Rule 3 of the CPR for recovery of 12,480,000/-[twelve million four hundred eighty thousand shillings only] and MA No. 800 of 2018 arising out of CS No. 1092 of 2018 against the Appellant seeking for the arrest of the Appellant before judgement on grounds that the Appellant borrowed 6,000,000/- from the Respondent and failed to pay, leaving the amounts to accumulate to 12,480,000/-. When court granted MA No. 800 of 2018, the Appellant was arrested and taken to court where she entered into a consent judgement with the Respondent committing herself pay the amount claimed in the plaint and actually made a part payment of 1,000,000/ -. She also gave a schedule on how she was going to pay the balance.

On the 14th /12/2019, the Appellant filed MA No. 59 of 2019 seeking to set aside the consent judgement and the warrant of arrest against her on grounds that the consent judgement was entered into under duress. The trial Magistrate set aside the consent judgement and gave a condition that the Appellant deposits 11,480,000/-or a land title of the same amount in court as security before filing her written statement of defence not later than 30 days from the date of the ruling, hence this appeal.

Representation

Learned Counsel Karooro Francis appeared for the Appellant while Counsel Balyejusa Ivan was for the Respondent.

Duty of this court as a 1st Appellate Court.

In the case of *M/s Fangmin -v- Belex Tours and Travel Limited SCCA No. 06 of 2013 at page 63,* *Kanyeihamba, JSC, (as he then was),* noted that;

"the duty of the first Appellant Court is very well settled. It is to evaluate all the evidence which was adduced before the trial court and to arrive at its own conclusion as to whether the findings of the trial court can be supported."

See also the cases of *Geoffrey Nangumya –v- Emmy Tumwine & Another Civil Appeal No. 93 of 2018 and Kifamunte Henry –v- Uganda Criminal Appeal No. 10 of 1997.* In addressing this appeal, this Court will be guided by the above principle.

Ground 1: The learned trial Magistrate erred in law and in fact when she held that the Appellant deposits UGX. 11,480,000 in cash or provides a land title/agreement of that value to Court before filing her written statement of defense.

Submissions for the Appellant

Counsel for the Appellant submitted that the proceedings conducted by the trial Magistrate violated the Appellants right to a fair hearing as provided under Article 28(1) and 42 of the 1995 Constitution of Uganda**.** He relied on the case of ***Bakaluba Peter Mukasa –v- Nambooze Betty Bakireke, Election Petition No. 04/2009***, where Katureebe, JSC, (as he then was), noted while relying on Black's Law Dictionary that a fair hearing/trial is: -

"A hearing by an impartial and disinterested tribunal; a proceeding which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial, consideration of evidence and facts as a whole….one in which authority is fairly exercised: that is, consistently with the fundamental principles of justice embraced within the conception of due process of law. Contemplated in a fair hearing is the

right to present evidence, to cross-examine, and to have findings supported by evidence."

Counsel submitted that the right to a fair hearing is a non derogable right guaranteed under Article 44(c) & 20(2) of the 1995 Constitution of Uganda. He submitted that a fair hearing includes prior notice, adjournments, cross examination, legal representation, disclosure of information, opportunity to present evidence, impartiality, right to be heard, a decision based on a complete record and finding supported with evidence and referred this court to the cases of ***Amuran Dorothy –v- Law Development Centre, MC No. 42/2016,*** and ***Bwowe Ivan & Others –v- Makerere University, MA No. 252/2013*** and submitted that in this case, by ordering the Appellant to deposit the entire sum that the Respondent sought to recover in the civil suit, the Appellant's right to fair hearing was being violated as this amounted to a judgment before trial. That the Appellant should have been heard first before being ordered to deposit the said sum in Court. That neither the Respondent's nor the Appellant's evidence was heard, no witnesses were called, no party was given an opportunity to cross examine either party's witnesses, which was against the principles of a fair hearing as explained above. Counsel prayed that basing on the above, the orders of the trial Magistrate should be set aside.

Counsel further submitted that the learned trial Magistrate also exceeded her jurisdiction by granting orders in an interlocutory application that in effect disposed of the main suit. He relied on the case of ***Desai –v- Warsama (1967) EA 351.***

On application of the law, Counsel submitted that courts only order a party to deposit a sum of money in court before trial where it is provided for under ***Order 22 and Order 43 of the Civil Procedure Rules,*** for stay of execution, ***O36 r. 8 of the Civil Procedure Rules****,* to allow the Applicant leave to appear and defend conditionally and under **Section 64 of the Civil Procedure Act and O40 r.1 of the Civil Procedure**

Rules where a party is required to furnish security for his or her appearance before judgement. That in this case, the application before court was to set aside the consent Judgment and improper issuance of a warrant of arrest and attachment before Judgment. That in the circumstances, the learned Trial Magistrate erred in law and in fact when she ordered the Appellant to deposit Ugx. 11,480,000 in court or provide a land title/agreement of that value to Court before filing her written statement of defence. Counsel prayed that the said orders be set aside so that the Appellant files her defense.

Submissions for the Respondent

In reply, Counsel for the Respondent submitted that the application was filed under *S. 33 of the Judicature Act, S. 98 of the Civil Procedure Act and* Order 9 rule 12 of the Civil Procedure Rules which give court wide discretionary powers and that in this case, Court exercised its discretion to make the orders that it deemed fit and it was justified to do so.

That the Appellant did not advance any evidence challenging the claim by the Respondent in Civil Suit No. 1092 of 2018 or illustrate that she had any defence to the claim and as such she cannot invoke the constitutional provisions now to challenge the exercise of the court's discretion.

Analysis

The main suit in this case was filed under Order 36 rule (2) of the CPR. Under Order 36 rule 3 (1) of the CPR, provides that upon being served with summons in respect of a suit filed under Order 36 rule 2, the defendant applies and obtains from court leave to appear and defend the suit. In this case, there is no evidence on court record to show that the Appellant was served with summons and as such there was no application for leave to appear and defend as required by law.

On the day of filing the suit, the Respondent also filed MA No. 800 of 2018 under Order 40 rule 1 of the CPR for the arrest of the Appellant before judgment. Under Order 40 rule 1 of the CPR the defendant may be called upon at any stage of the trial to furnish security for his/her appearance before judgement is pronounced by court. The court is also mandated to and may issue a warrant of arrest against the defendant to bring him/her before the court to show cause why he or she should not furnish security for his or her appearance. It is important for the court to bear in mind that the order of arrest or attachment before Judgment affects the rights of the defendant before any verdict is pronounced against him/her. This would therefore require that there is congent evidence leading Court to the conclusion that the Applicant's claims calling for the arrest of the defendant or attachment of his/her property are true. There must be evidence that there have been attempts by the defendant to dispose of the property, or like in this case, that the Respondent/Defendant intends to move out of the country, with a view of defeating the decree in the main suit. The court should not rely on mere statements without tangible evidence.

In this case, the Respondent's claim was that the Appellant had sold the property that she pledged as security for the loan from the Respondent and that she was planning to leave the country which would delay or frustrate the trial process. The affidavit that the court relied on did not disclose when the property was sold, to whom it was sold and/or to which country the Appellant intended to travel or when she intended to travel, so as to frustrate the trial process.

It is my view, basing on the above, that there was no congent evidence before court warranting the issuance of a warrant of arrest against the Appellant under Order 40 rule 1 of the CPR. I would find that the learned trial Magistrate erred in law and in fact when she issued a warrant of arrest against the Appellant requiring her to appear

before court to show cause why she should not furnish security for her appearance for the trial in Civil Suit No. 1092 of 2018 and that it was an error to order the Appellant to deposit UGX. 11,480,000 in cash or in the alternative to deposit in court a land title/agreement of that value in Court before filing her written statement of defense.

Therefore, this appeal succeeds on both grounds and it is hereby ordered that: -

1. **The ruling and orders of the learned trial Magistrate in MA No. 059 of 2019 be and are hereby set aside.**
2. **The orders of the learned trial Magistrate directing the Appellant to deposit in court UGX. 11,480,000/- [eleven million four hundred eighty thousand shillings only] as security for appearance be and is hereby set aside.**
3. **It is hereby ordered that the Appellant files her Written Statement of Defence in Civil No. 1092 of 2018 in a period of 15 days from the date of this ruling.**
4. **The Respondent pays costs of this appeal and in MA No. 059 of 2019.**

I so order

Dated, signed and delivered by mail at Kampala, this 4th day of October, 2022.

Esta Nambayo
JUDGE
4th/10/2022.