THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – CV – CA 002 OF 2015

ORIGINAL MISCELLANEOUS APPLICATION 89 OF 2013

ORIGINAL FPT – 00 – CV – CS 246 OF 2013

PRIVATE SECTOR DEVELOPMENT &

CONSULTANCY CENTRE LTD.....APPELLANT

VERSUS

THE OMUKAMA OF TOORO.....RESPONDENT

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

Judgment

This is an appeal against the decision of His Worship Emokor Samuel Chief Magistrate Fort Portal, delivered on 13th January 2015.

Brief facts

The Appellant on 23/07/2009 entered into an agreement with Tooro Kingdom for a lease of Block 73, Plot 20 of the freehold Registration. The Appellant on 19/09/2013 brought Civil Suit no. FPT – CV 246/2013 alleging that Tooro Kingdom, procured *exparte* judgment and it is not disputed that it went ahead to attach a plot of land located on Burahya Block 73, Plot 1 of the Free Hold Register, which was the property of a third party the Omukama of Tooro (By virtue of his office) to which person it was legally registered on 17th/12/1998.

Issues raised were;

1. That the suit of the Plaintiff/Respondent is brought against a non-existent person.
2. That the Defendant in H.C.S.S is not the owner of the property referred to in the Plaint.
3. Whether in the law of contract an agreement must not be made between parties from who consideration does not flow?

Judgment was passed in favour of the Appellant and the Respondent applied for review under **Section 82** of the Civil Procedure Act and **Order 46** of the Civil Procedure Rules and the learned Chief Magistrate passed his ruling in favour of the Respondent and ordered that each party bears its own costs.

The Respondent had brought the Application seeking the following orders;

1. That this Court review its *exparte* judgment in this matter and set aside the same and all the orders there under.
2. That costs of the Application be provided for.

That learned Chief Magistrate found in favour of the Applicant/Respondent, set aside the *exparte* judgment and ordered no costs. The Appellant being dissatisfied with the above decision lodged this appeal whose grounds are;

1. That the learned Chief Magistrate erred in law and fact in holding that there is no institution called the Kingdom of Tooro.
2. That the learned Chief Magistrate erred in setting aside the *exparte* judgment.

The Late Counsel Musana Johnson appeared for the Appellant and Counsel Atuhaire Timothy represented the Respondent. By consent both parties agreed to file written submissions.

First, it is trite law that the duty of a first Appellate Court is to reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor heard the witnesses, to come to its own conclusion on that evidence. Secondly, in so doing it must consider the evidence on any issue in its totality and not any piece in isolation. It is only through such re-evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court. **[See: Pandya versus R (1957) EA 336, Ruwala versus R (1957) EA 570, Bogere Moses versus Uganda Criminal Application No.1/97(SC), and Okethi Okale versus Republic (1965) EA 555].**

Resolution of the Grounds:

Ground 1: That the learned Chief Magistrate erred in law and fact in holding that there is no institution called the Kingdom of Tooro.

Counsel for the Appellant submitted that the learned Chief Magistrate looked at **Article 246 (3) (a)** of the Constitution of the Republic of Uganda, 1995 which provides that;

"The institution of traditional leader or a cultural leader shall be a corporation sole with perpetual succession and with capacity to sue and be sued and to hold assets or properties in trust for itself and the people concerned."

In addressing the issue of whether legal personality was bestowed on the leader of the institution that the learned Chief Magistrate looked at **Section 2** of the Institution of Traditional Leaders Act of 2011which defines Corporate Sole to mean a continuous legal personality that is attributed to successive holders of certain monarchical position such as kings.

And concluded that the above interpretation refers to the ruler such as a king and not a kingdom. That this conclusion was wrong as the Section talks about continuous legal personality that is attributed to successive monarchical positions such as kings.

Counsel for the Appellant further submitted that the legal personality can certainly not be the King but rather the Kingdom that is attributed to successive monarchical positions. The king cannot be a corporation sole nor an institution. That Tooro Kingdom is therefore the Institution responsible for the traditional leader of Tooro was rightly sued in that capacity. The agreements were made by the Kingdom, with the Prime Minister signing for the Kingdom and not the Omukaama of Tooro.

Furthermore, that the king should have filed Objector proceedings but not deny the existence of the Kingdom.

Counsel for the Respondent on the other hand submitted that it is rule of law that a thing or person not having legal personality is technically non-existent, and if and when such a thing or person is made a Defendant to a legal proceeding, then that matter will be dismissed on that ground alone.

Counsel for the Respondent cited the cases of **Vincent Bagamuhunda versus UEB [HCCS KLA-CVL 400/2007], Trustees of Rubaga Centre versus Mulangira Ssimbwa [HCMA 576/2006]** and **Uganda Electricity Generation Company Limited [C.O.A.C.A 96/2004]** where the general principles in respect of non-existent persons were laid down as follows;

i) A non-existent person cannot sue or be sued.
ii) Unlike an existent legal person, a non-existent person cannot be substituted for another party.
iii) The suit of a non-existent person will be dismissed (not struck out, because there is no alteration to the suit by or against that party that can give it merit before Court, unless there is another valid party against who the suit remains).
iv) No costs are usually awarded to or against non-existent persons when suits by or against something that does not exist.
v) When however, an existing person rises to successfully protest action by or against a non-existing person, the existing person is entitled to costs.

Also in the case of **Amos versus NRM Secretariat & Another, 1988 -1990 KALR 94** it was held that;

"The National Resistance Movement Secretariat being headed by Government Minister who is also a Political Commissar is, as rightly submitted by Mr. Sekandi, an arm of the Government. It cannot sue in its own right, and has no liability to be sued. It can only be represented by the Attorney General who appears for the Government in all legal matters and who is neither a party to the present suit nor the proceedings in the lower Court. The National Resistance Movement Secretariat was, therefore, improperly joined as a party to the present suit. It is without any further ado struck out..."

"... The Applicant/Plaintiff is condemned to pay costs to the 1st Respondent/Defendant. No costs are awarded to the 2nd Respondent/Defendant as it has no legal existence."

Counsel for the Respondent noted that according to the Constitution of the Republic of Uganda and the Traditional Leader's Act, the institution of the traditional leaders was vested

in a person as corporation sole and not in the old general understanding of the traditional institution as a body corporate or as a geographical area.

Counsel for the Respondent also cited **Section 2** of the Traditional Leaders Act that states;

"Institution of traditional leader means the throne, status, or other position held by traditional leaders and Institution shall be construed accordingly."

The same interpretation Section further states that;

"Traditional Leader means a king or similar traditional leader by whatever name called who derives allegiance from the fact of birth or descent in accordance with customs, traditions, usage or consent of the people led by that traditional or cultural leader."

I concur with the submission of Counsel of the Respondent that it is true that all legal transactions and proceedings in Court are executed against the leaders of the Kingdom. Thus, a traditional leader in nature is a corporation sole which refers to a legal personality and this case is a king. Kingdoms are created by virtue of their customs and successive holders in the absence of the kings/successive holders there would be no kingdoms. The Tradition Leaders Act makes it clear that kings are the legal personnel for their kingdoms as kingdoms in themselves are non-existent and thus lack legal capacity. That is why in Buganda, the Kabaka of Buganda has given Powers of Attorney to the Land Board, Katikiro e.t.c to act on its behalf but is not the Kingdom because it's nonexistent.

Corporation sole has also been defined in Obsorn's Concise Law Dictionary (10th Edition) to mean;

"A corporation consisting of a certain office (e.g a bishop) which continues as a legal entity regardless of the human holder of that office."

While Business Dictionary. Com provides that;

"A public office (created usually by an Act of Parliament) that has a separate and continuing legal existence and only one member (the sole office holder.)"

The Chief Magistrate correctly found that the definition of Corporation sole refers more to a sole office holder as opposed to "Corporation" in general terms.

I also concur with the interpretation of the learned Chief Magistrate where he stated that the framers of the Tradition Leaders Act to avoid any confusion also provided a separate interpretation for traditional or cultural leader from that of traditional institution.

Thus, the learned Chief Magistrate did not err in law and fact in holding that there is no institution called the Kingdom of Tooro. He was very much alive to the provisions of the Constitution of the Republic of Uganda and the Traditional Leaders Act.

This ground fails.

Ground 2: That the learned Chief Magistrate erred in setting aside the *exparte* judgment.

Counsel for the Appellant submitted that it was wrong to set aside the judgment and it should therefore be restored and executed.

Counsel for the Respondent submitted on both grounds jointly, however, I find no justification to set aside the decision of the lower Court because I find not fault and the decision of the Chief Magistrate was right.

This ground fails.

Costs:

Counsel for the Respondent prayed for costs and submitted that in the lower Court it was ordered that each party bears its own costs which was unfair since the Appellant acted not just in ignorance of the law, which is not a defence, but also in disregard of the facts and the ordinary duty of reasonable diligence to be exercised by a contracting party.

Costs are awarded to successful party after the event and these are at the discretion of the Judicial Officer and in case they are not granted then reason should be added for not doing so. The discretion should also be exercised judiciously.

In the case of **Mungecha Vs Attorney General [1981] HCB 55**, it was held that;

"Under section 27(1) of the Civil Procedure Act costs should follow the event unless court orders otherwise. This provision gave the judge discretion, but that discretion must be exercised judicially. That a successful party can only be denied costs if it is proved that for his conduct the action would not have been brought. The costs should follow the event even where the party succeeds only in the main purpose of the suit."

In the instant case the Chief Magistrate gave justification for not awarding costs and I respect his reasoning. I will uphold the same.

This appeal is however dismissed with costs for lack of merit and failure on all grounds. The decision of the lower Court is accordingly upheld.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE

12/04/2017

Judgment read and delivered in the presence of;

1. Counsel Luleti Robert for the Appellant.
2. Counsel Atuhaire Timothy for the Respondent.
3. James – Court Clerk
4. In the absence of both parties.

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OYUKO. ANTHONY OJOK

JUDGE

12/04/2017