THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

CIVIL APPEAL NO.111 OF 2018

(Arising from Miscellaneous Application NO.35 OF 2017)

(ARISING OUT OF CIVIL SUIT NO.44 OF 2015)

1. **DAMBA PETER**
2. **MATOVU DAVID**
3. **APOLLO NTEGE**
4. **FRED KINOBE::APPELLANT**

VERSUS

NAKIYAGA MAGDALENE:::RESPONDENT

Before: Hon. Lady Justice Alexandra Nkonge Rugadya

Ruling.

This is an appeal from the ruling and orders of ***His Worship Achoka Egesa Freddy, the Magistrate Grade 1 of Kasangati Chief Magistrates Court*** delivered on *13th September. 2017.*

Brief Background.

The respondent instituted ***Civil Suit No.44 of 2015*** in the Chief Magistrates Court of Kasangati, against the appellant and 3 others namely; Damba Peter, Matovu David and Apollo Ntege, jointly and severally for a declaration that she was the rightful owner of the suit *kibanja* comprised Namavundu Village Nangabo Sub County Wakiso District; a further declaration that the defendants acts and omissions amounted to trespass and fraud, an eviction order, general, punitive and exemplary damages as well as costs of the suit.

The defendants however did not file any defence and an interlocutory judgement was entered on *12th June, 2012* and the matter was set down for hearing. Consequently, an *exparte* judgement was entered in favour of the plaintiff.

Subsequent to the said *exparte* judgement and decree, the defendants filed ***Miscellaneous Application No.35 of 2017*** in that court, seeking orders to set aside the judgement entered against them; that the suit be heard inter party; execution of the *exparte* decree be set aside and for the costs of the application. The application was dismissed with costs.

Being dissatisfied with the ruling and orders of the trial magistrate, the appellants filed this appeal challenging the decision on the following grounds:

1. ***That the learned trial magistrate erred in law and fact when he held that there was proper service of court process on all the applicants.***

2. ***The learned trial magistrate failed to properly evaluate the evidence and reached a wrong conclusion.***

3. ***That the learned trail magistrate erred in law and fact when he dismissed the application based on the mistake of the Commissioner for oaths and counsel of not dating the affidavits.***

Representation.

As directed by this court, learned counsel filed written submissions. The 1st and 2nd appellants were represented by ***M/s Muslim Centre for Justice and Law.***

The 4th appellant was represented by ***M/s Byamugisha Lubega Ochieng & Co. Advocates*** while the respondent was represented by ***M/s Gitta & Co. Advocates.***

Preliminary Objections:

In his submissions, learned counsel for the respondent raised two preliminary points of law. The first was that the appeal was incompetent as it had been filed out of time.

Secondly, that the appeal was improperly before this court since an earlier application had been filed in the same court, seeking the same/similar prayers, but had been dismissed by the trial court, with costs.

Objection No. 1: Whether or not the appeal was filed within the period as prescribed by law:

Section 79 (1) (a) of the Civil Procedure Act supports the position that every appeal should be entered within thirty days of the date of the decree or order of court.

Counsel for the respondent contended that while the decision in ***Miscellaneous Application No.35 of 2017*** was made on *13th September, 2017*, the appellants filed the instant appeal on 13th November 2017 after 30 days had elapsed and therefore there was no valid appeal before this court; and prayed therefore that the same be dismissed with costs.

In reply, counsel for the appellants however submitted that the Memorandum of Appeal was filed in this court on 6th October, 2017, within the time as stipulated by law.

The position of the law on this matter which I have carefully considered together with other matters raised while addressing this issue is that appeals are originated by filing a memorandum of appeal ***under O.43 r. 1 of the Civil Procedure Rules.***

As duly submitted, ***section 79 (1) of the Civil Procedure Act, Cap. 71*** provides that except as specifically stipulated in the Act or any other law, every appeal shall be entered within 30 days from the date of the decree or order of the court or within seven days from the date of the order appealed against; and the appellate court may for good cause admit an appeal though the period of limitation prescribed by the section has elapsed.

Indeed as argued by learned counsel for the appellants, the appeal was related to the present application: ***Miscellaneous Application No.35 of 2017,*** not the one filed earlier which the trial court had dismissed.

Within that context, the memorandum of appeal was lodged in this court on *6th October, 2017,* twenty-three (23) days after the trial magistrate had delivered the ruling dismissing ***Miscellaneous Application No.35 of 2017.***

I am therefore inclined to agree with counsel for the appellants that the appeal against ***Miscellaneous Application No.35 of 2017*** was filed within the stipulated period. The respondent's objection on that score therefore lacked merit.

Objection No. 2: Whether or not the appeal was improperly before this court:

It was the respondent's argument that the appeal was premised on a decision of His Worship Achoka Egesa Freddy wherein ***Miscellaneous Application No. 35 of 2017*** was filed on *10th April, 2017* and dismissed on *13th September, 2017.*

That prior to filing ***Miscellaneous Application No. 35 of 2017,*** the appellants/applicants had filed a similar application seeking to have the same judgement set aside; and that the same was dismissed by the trial Magistrate on *29th September, 2016.*

That the instant appeal ought to have been filed against the decision and ruling made on *29th September, 2016.* That the trial Magistrate ought not to have entertained ***Miscellaneous Application No.35 of 2017,*** which is the basis of this appeal.

Accordingly, that this court should dismiss the appeal with costs since it was improperly before this court.

I will deal with the two objections first.

Regarding the second objection the attempt by this court to locate any record of the earlier application after carefully perusing the record of the lower court yielded no efforts and indeed no copy of the said ruling was availed to this court.

Be that as it may, the trial magistrate in *page 2* of his ruling in ***Miscellaneous Application No.35 of 2017*** clearly stated:

> ***"…. I want to state that this is the second time this kind of application is being brought to this court to set aside the judgement.***
>
> ***The first was brought to this court through M/s Muslim Centre for Justice and Law and the same were dismissed with costs for (sic!) entered on the 29/9/2016."***

Court however did not state the number of that application or the circumstances under which it was dismissed. The record of proceedings itself does not reflect the circumstances under which that decision had been made.

But what is clear is the fact that the order of court to proceed *exparte* had been made on 6th January, 2016. Neither side to this appeal denied in their pleadings and submissions in relation to this appeal that any such application had been filed and dismissed with costs by that same court.

As a matter of fact, the 1st appellant who was the 1st applicant in ***Miscellaneous Application No.35 of 2017*** in *paragraph 4* of the affidavit in support filed in the trial court on 10th April, 2017 acknowledged receipt of a letter from the respondent's counsel ***M/S Kensiime & Co. Advocates.***

The letter dated 30th March, 2017 requested the applicants therein to explain in detail how they intended to satisfy the judgment passed against them on 29th September, 2016.

A further perusal of the lower court file reveals that indeed there had been two similar applications filed in the lower court, bearing the same application number to wit ***Miscellaneous Application No.35 of 2017*** both seeking orders that the *exparte* judgement and decree entered against the applicants in ***Civil Suit No.44 of 2015*** be set aside among others. The first was filed on *10th April, 2017* and the second was filed on *31st May, 2017*.it is clear that the appellants derived pleasure in filing one application after the other.

In submission, counsel for the appellants' argument in this appeal was as follows:

> *If it is true that the appellant had brought another application before in the lower court, it is my submission that the applicants had a right to bring a fresh application if he so wished. Dismissal of an application is not a bar to bringing a fresh application. Counsel has not cited any provision of law which bars the applicant from bringing another if an application is dismissed. If the respondent thought it was an irregularity to bring a fresh application, she would have raised the issue when the* ***Miscellaneous Application No.35 of 2017*** *was called not smuggling it in an appeal yet there is no cross appeal.*

Above all, the trial magistrate did not dismiss the appellant's ***Miscellaneous Application No.35 of 2017*** *for having filed an earlier application...*

The argument raised above is, just to say the least, totally misconceived, and misconstrued and therefore misguided. It is rather absurd to think that in those circumstances a dismissal of an application was not a bar to bringing a fresh application and that therefore an applicant can file a fresh application any time he/she wished.

If that was to be the case, then the appellants owed court an explanation as to why they did not file yet another fresh application but chose instead to file this appeal against only one, leaving the earlier dismissal order undischarged. It also therefore came as a surprise that counsel for the respondent never objected to that state of affairs which to me was a gross abuse of court process.

With due respect, litigation must come to an end. It therefore goes without saying that the principle of *res judicata* would bar any court from trying any issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties in a court competent to try the subsequent suit in which the issue has been subsequently raised, and has been heard and decided by that court. ***(Section 7 of the CPA, Cap 71).***

Counsel knew or is expected to have known therefore that there was an undischarged order over the same issue between the same parties, which had earlier been made by that same court on 29th September, 2016, as duly acknowledged by that same court vide: ***Miscellaneous Application No.35 of 2017.***

Miscellaneous Application No.35 of 2017 should not therefore have been entertained by the trial court. It was of minor consequence at this point to argue as the appellants did that the matter was never raised in court by the respondent.

The court itself was fully aware of its earlier decision and did in fact acknowledge that fact in its decision which the appellants now seek to challenge.

The essentials for the applicability of the general principles of the *res judicata* doctrine are also well brought out in ***John William Kihuka and others vs Personal Representatives of Rt. Rev Eric Sabiti (1995) KALR 79.***

Based on that authority and a host of others, it is therefore clear that the former judgment must be: *that of a court of competent jurisdiction; directly speaking on a matter in question in the subsequent suit; and between the same parties.* All the above as stated are applicable to the present matter.

It simply means nothing more than that a person shall not be heard to say the same thing twice over in successive litigations. ***(Lt. David Kabareebe vs Maj. Prossy Nalweyiso CACA No. 34 of 2003.)***

The doctrine applies regardless of whether or not the matter is brought to the attention of the court during trial, as it is deeply rooted in the issue of the competence of a court hearing the same matter all over again.

Accordingly the trial court made orders under ***Miscellaneous Application No.35 of 2017***, on issues that it had already competently dealt with, between the same parties and in relation to the same matter, which in totality renders this appeal incompetent.

In passing, the attention of court was also drawn to a record of pleadings which had missing information. This was glaring evidence that the first application which was a crucial part of the record of pleadings was never availed to this court. The reasons are not hard to guess and justify a court's call for investigations to establish what happened to the rest of the record.

An irregularity once brought to court overrides all questions of pleadings. ***(Makula International vs Cardinal Nsubuga & Anor (1982) HCB 11 at page 5).***

In the circumstances, this court finds that the second application although it ended up confirming the earlier orders made by the same court was therefore barred by law and the trial court ought to have dismissed it summarily for offending ***Order 7 rule (d) of the Civil Procedure Rules.***

Since both applications and this appeal were filed by the same firm: ***M/S Muslim Centre for Justice and Law*** the abuse of court process is attributable to that firm.

The appeal is accordingly dismissed with costs to the respondent, to be paid by the counsel from ***M/S Muslim Centre for Justice and Law*** who misled the respondent in filing this appeal.

I so order.

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Alexandra Nkonge Rugadya

Judge.

1st March, 2021.