THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MPIGI

MISCELLANEOUS APPLICATION NO. 02 OF 2022

(Arising from Miscellaneous Application No. 19 of 2021)

(Arising from High Court Civil Suit No. 6 of 2019)

1. KATABARWA FRANCIS SALONGO
2. RWAKADULA
3. MUSINGUZI JANE ……APPELLANTS
4. KASINGUZI GEORGE

VERSUS

1. YOWASI NSUBUGA KAZOOBA
2. NALWONGA BASAMBIZE……RESPONDENTS

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

Ruling

The appellants brought the instant appeal by way of Notice of Motion under **Order 50 Rule 8, Order 52 Rules 1** and **3** of the Civil Procedure Rules, **Section 79** and **98** of the Civil Procedure Act against the respondents seeking the following orders;

1. That the ruling and orders of the Assistant Registrar dated 20th December 2021, in Miscellaneous Application No. 19 of 2021 be set aside.
2. That Miscellaneous Application No. 19 of 2021 be determined on its own merits.
3. Costs of the Application be provided for.

The application is supported by an affidavit sworn by the 1st applicant and the grounds briefly are as follows;

1. That the learned Assistant Registrar erred in law in holding that Miscellaneous Application No. 19 of 2021 was uncontested thereby occasioning a miscarriage of justice.
2. That the learned Assistant Registrar erred in law when she prematurely determined Miscellaneous Application No. 6 of 2019 before the expiry of

time the Appellants were by law entitled to file their Affidavit in reply and submissions in reply thereby occasioning a miscarriage of justice.

3. That the learned Assistant Registrar erred in law in allowing the respondents to proceed *exparte* despite the existence of sufficient cause for non-appearance by the appellants or their counsel thereby occasioning a miscarriage of justice.
4. That the learned Assistant Registrar erred in law when she entertained an application for withdrawal of a suit against the Appellants disguised as an application for amendment.
5. That the learned Assistant Registrar's ruling and orders were a nullity since Civil Suit No. 6 of 2019 had, by operation of law abated.
6. That the learned Assistant Registrar erred in law when she completely misconstrued the law on withdrawal and/or amendment of suits.
7. That the ruling and orders of the learned Assistant Registrar violated the Applicant's right to a fair hearing.
8. That it is in the interest of justice that this application be granted.

The application was opposed by an affidavit in reply sworn by Twesigye Charles and the pertinent paragraphs are as follows;

3. In specific reply to paragraph 6, it is not true that the respondent's application to amend their plaint was based only on the ground that they had sued a wrong party.

4. That there were several grounds such as inclusion of lands i.e plots 2 – 12 which did not form part of the suit land as reflected in paragraph 6 of the affidavit in support of the application.

5. The contents of paragraph 7 are admitted. I have been advised by my said advocates that the applicants were supposed to file a reply at least but they did not.

6. That the matter was fixed for hearing on the 14th December 2021 at 11:00am but court extended time and gave another date which was served again on the 17th day of December 2021, where the matter was fixed again for hearing on the 20th day of December 2021 at 11:00am.

7. The applicants never filed a reply in the matter nor did they appear on the date as stated in the hearing notice and their advocate too did not appear in court or send any representative, in total disobedience of the lawful court order to wit; a hearing notice.

8. In response to paragraph 9, the note alluded to is an appendage on the hearing notice that counsel had another matter was in respect to their advocate but not in respect of the applicants. The applicants did not give any reason for their absence.

9. I have been advised by my advocates which advice I verily believe to be true that the applicants forfeited their right to be heard when they intentionally failed to file a reply before the dates provided in the Chamber Summons or even appear on the date of hearing the matter as stated in the hearing notices served.

11. In specific response to paragraph 19, my advocates have advised me that Civil Suit No. 6 of 2019 had not abated and was validly before court and the orders/ruling of the learned registrar are valid.

12. In further response, my advocates have advised me that the applicants did not even have a right of reply because they filed their defence out of the prescribed time.

The appellants filed an affidavit in rejoinder through the 1st applicant however, I will not rely the grounds.

Brief facts:

On the 20th/12/2021, the learned Assistant Registrar, her Worship Atukwasa Justine delivered a ruling in Miscellaneous Application No. 19 of 2021 and held that the application was uncontested. She allowed the respondents' prayer for *exparte* proceedings, upon which she went on to hear submissions by counsel for the respondents and determined the application. She further ordered that the respondents amend their plaint in civil suit No. 6 of 2019 and costs be in the cause.

The appellants being dissatisfied with the above ruling and orders, lodged this appeal seeking orders that the ruling and orders of the Assistant Registrar dated 20th December, 2021 in Miscellaneous Application No. 19 of 2021 be set aside, Miscellaneous Application No. 19 of 2021 be determined on its own merits and costs of the appeal be provided for.

Representation:

Mr. Muhumuza Philip appeared for the appellants while Mr. Byekwaso Godfrey appeared for the respondents. Both parties filed written submissions.

Resolution of the grounds of appeal:

Grounds 4 and 6 are discussed together, ground 5 separately and grounds 1, 2 and 3 are discussed jointly.

Grounds 4 and 6:

4. That the learned Assistant Registrar erred in law when she entertained an application for withdrawal of a suit against the Appellants disguised as an application for amendment.

6. That the learned Assistant Registrar erred in law when she completely misconstrued the law on withdrawal and/or amendment of suits.

Counsel for the appellants submitted that miscellaneous application no. 19 of 2021 sought amendment of the plaint in civil suit no. 6 of 2019 by the respondent on grounds inter alia, that they had wrongly sued the appellants. And cited the case of **Wasswa v. Moulders (U) Ltd, Miscellaneous Application No. 685 of 2017** where it was held that;

> *"In my view since the person is non-existent there is no suit filed and where it is filed the anomaly cannot be cured under Order 1 Rule 10 C.P.R. This position is well stated by Remmy Kasule J in the Trustees of Rubaga Miracle Centre v. Mulangira Ssimbwa Miscellaneous Application No. 576 of 2006 in these words;*
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> *"The law is settled. A suit in the names of a wrong plaintiff or defendant cannot be cured by amendment. The defendant described as the board of Trustees of Rubaga Miracle Centre Cathedral does not exist in law".*

That the plaint in civil suit No. 6 of 2019 was incurably defective and could not be amended as against the appellants who were wrongly sued as this anomaly cannot be cured by amendment.

Counsel further submitted that the right procedure should have been to apply to withdraw their suit under **Order 25 Rule 2** of the Civil Procedure Rules as against the appellants subject to the payment of costs. That a wrong defendant could not be substituted because in reality there was no valid plaint since the appellants had been wrongly sued. Thus, the Assistant Registrar misconstrued the law on amendments of suits.

The respondents on the other hand submitted that **Order 1 rule 10** of the Civil Procedure Rules allows substitution of a wrong party for purposes of determination of the real matter in controversy. Counsel argued that the case of **Wasswa v. Moulders (U) Ltd, (supra)** is not applicable in the instant case and is misconstrued as it is different from the facts at hand.

Further, that **Order 25 Rule 2** Civil Procedure Rules envisages a person who sued a right party and there was no mistake at all but for some reason he/she decides to withdraw the suit. That however, in the instant case the issue was not only

removing the appellants from the plaint, but also several pieces of land had been included that did not form part of the suit land, hence the need to amend the plaint. That the appellants were served and failed to respond and appear in court.

Analysis of court:

The appellants in the instant case argued that they were wrongly sued and thus there was no plaint to begin with and the application as filed by the respondents was disguised as an amendment when actually what it was was a withdraw of the suit against the appellants that attracts costs. Counsel relied on the case **of Wasswa v. Moulders (U) Ltd, (Supra)** to support his argument.

I do agree with the submissions for the respondents that the above case is distinguishable from the instant case where the parties are existent albeit wrongly sued. **Order 1 rule 10** of the Civil Procedure Rules cures anomalies such as these.

Order 1 rule 10 of the Civil Procedure Rules provides that;

> *"The court may at any stage of proceedings either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."*

And, the case of **Mahmud Bharwani v. Crane Bank Limited (in Receivership), HCMA No. 656 of 2020);** it was held that;

> *"By virtue of Section 98 of the Civil Procedure Act, Section 33 of the Judicature Act and the power vested in this court by Order 1 Rule 10(2) of the Civil Procedure Rules and in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, I will proceed to direct that the words "in receivership" are struck out and the words "in liquidation" are added to the name of the plaintiff in Civil Suit No. 9/2018.*
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> *It is the considered view of this court that the justice of this matter requires that the parties are enabled to pursue their claims to their logical conclusion upon presenting the necessary evidence to support the said claims in order for court to determine all the issues in controversy and in a bid to avoid multiplicity of suits.*

Further, no prejudice will be occasioned to any of the parties by the order of court especially since the hearing of this matter is still in preliminary stages.

The parties are accordingly advised to have the main suit scheduled for hearing on its merits at the earliest."

The anomaly of wrongly sued parties is curable under **Order 1 Rule 10** of the Civil Procedure which allows substitution of the wrong party with the correct party and this is done by amendment of the pleadings so as to enable court to effectually and completely adjudicate upon and settle all questions involved in the main suit.

It is my view that **Order 25 rule 2** of the Civil Procedure Rules as cited by the appellants is misplaced.

I find and hold that the Assistant Registrar did not err in entertaining the application for amendment of the plaint nor did she misconstrue the law there under.

These grounds hereby fail.

Ground 5: That the learned Assistant Registrar's ruling and orders were a nullity since Civil Suit No. 6 of 2019 had, by operation of law abated.

Counsel for the appellants submitted that the Assistant Registrar's ruling and orders were a nullity since Civil Suit No. 6 of 2019 had by operation of law abated as evidenced by Annexture "I" to the affidavit in support of the appeal.

Counsel went ahead to cite the case of **Asaba Charles and Another v. Kafeero Andrew and Another, HCMA No. 2004 of 2021**, where it was held that;

"Order XIA Rule 2 provides that where a suit has been instituted by way of plaint, the plaintiff must take out summons for directions within 28 days from the date of the last reply or rejoinder referred to in Rule 18(5) of Order VIII of the rules."

Sub-rule 6 thereof further stipulates that where summons for directions are not taken out in accordance with sub rule (2) or (6), the suit shall abate…I therefore, uphold the preliminary objection on the ground that a non-existent suit cannot be amended."

That in the instant case by the time the ruling was made the suit had abated and there was no suit to amend, therefore, the ruling and orders were a nullity and the learned registrar erred in law when she entertained and determined miscellaneous application No. 19 of 2021.

Counsel for the respondents on the other hand submitted that the suit had not abated as the case was filed on 17th January 2019, and the last defence was filed on the 14th of February 2019. That at the time the Civil Procedure (Amendment) Rules had not yet come into effect.

Analysis of court:

It is true that at the time the suit was filed the Civil Procedure (Amendment) Rules had not yet come into effect and therefore the arguments for the appellants are misconceived. The suit had not abated and the same was properly handled by the Assistant Registrar and her ruling was not a nullity as no law had been contravened. For clarity, the plaint was filed on the 17th/1/2019 and the joint Written Statement of Defence was filed on the 14th/2/2019. The Civil Procedure (Amendment) Rules came into effect on the 31st of May 2019 and does not operate retrospectively.

This ground also fails.

Grounds 1, 2 and 3:

1.That the learned Assistant Registrar erred in law in holding that Miscellaneous Application No. 19 of 2021 was uncontested thereby occasioning a miscarriage of justice.

2. That the learned Assistant Registrar erred in law when she prematurely determined Miscellaneous Application No. 6 of 2019 before the expiry of time the Appellants were by law entitled to file their Affidavit in reply and submissions in reply thereby occasioning a miscarriage of justice.

3.That the learned Assistant Registrar erred in law in allowing the respondents to proceed exparte despite the existence of sufficient cause for non-appearance by the appellants of their counsel thereby occasioning a miscarriage of justice.

Counsel for the appellants submitted that the Assistant Registrar prematurely determined the application by letting it proceed *ex parte* and before the expiry of the time lines for filing an affidavit in reply. That the 15 days with in which the reply should have been filed was to lapse on the 10th day of January 2022. **(See: The Ramgarhia Sikh Society and 2 others v. The Ramgarhia Sikh Education Society Ltd and 8 Others, HCMA No. 352 of 2015 and Patrick Senyondwa and Another v. Lucy Nakitto HCMA No. 1103 of 2018).**

That the respondents served the appellants with a hearing Notice in Miscellaneous Application No. 19 of 2021 on the 17th day of December 2021 two days to the hearing date. That the impugned ruling was made on the 20th of December 2021 after only 10 days had lapsed since service from the respondents. That it was upon

the appellants filing their reply on the 7th of January that they discovered that the ruling had been made. That in the circumstances, the application would have been deemed uncontested if the 15 days had lapsed without a reply.

Secondly, that the Assistant Registrar erred when she proceeded ex parte yet there was sufficient evidence as to why counsel failed to attend court. That the Assistant Registrar should have used her discretion and granted an adjournment, than her holding that she was satisfied that there was service of the hearing notice and no sufficient cause was shown to justify the absence of the appellant's counsel which was erroneous.

The respondents on the other hand submitted that the appellants in the instant case were served twice on the 9th December 2021, requiring them to appear on the 14th December 2021, then on 17th December 2021 requiring them to appear on the 20th December 2021 which service the appellants do not deny. That their absence in court was deliberate otherwise the advocate would have at least sent the appellants to appear in court and ask for another date.

Analysis of court:

The application in the instant case was filed on the 12th of November 2021, served on the appellants on the 10th of December 2021 for a hearing on the 14th of December 2021. On that hearing date the appellants nor their counsel appeared in court. A hearing notice was extracted and served on the appellants on the 17th of December 2021 for hearing on the 20th of December 2021. On 20th December the appellants nor their counsel appeared and still there was no affidavit in reply filed by the appellants on record. The matter proceeded *exparte* and the application was allowed with costs in the cause.

The appellants argued that the ruling was delivered after only 10 days had lapsed since service from the respondents was effected on them and the appellants upon filing their reply on the 7th of January 2022 is when they made the discovery that the ruling had been made.

I have taken time and computed the days from when service of the application was effected on the appellants by the respondents being on the 10th of December 2021, meaning that the affidavit in reply should have been filed by the 20th of January of 2022 excluding the period of 24th December to 15th January **(See: Order 50 Rule 4 of the Civil Procedure Rules)**. The appellants filed their affidavit in reply on the 7th of January 2022 only to find a ruling that had been made by the Assistant registrar on the 20th of December 2021 against them.

I accordingly find and hold that the Assistant Registrar erred in finding that the application was uncontested as the time line for filing the affidavit in reply had not

yet lapsed much as the appellants had been served twice before the ruling was made. The application was therefore erroneously had *ex parte* and hence determined prematurely. The Assistant Registrar should have used her discretion and granted a last adjournment since the appellants were still with their filing time frame.

The appellants' advocated contended that there was also sufficient reason why he did not appear in court as he was attending to another matter in a different court and the same was intimated to the respondents.

It is my considered view that the matter proceeding *exparte* before the expiry of the 15 days with in which the appellants had to file their affidavit in reply was wrong. The application was therefore, handled and disposed of prematurely.

These grounds of appeal are hereby allowed.

In a nut shell this appeal succeeds in part. Be that as it may I find that no prejudice was occasioned to the appellants in the application being allowed by the Assistant Registrar as the law clearly allows the same as discussed above.

In the interest of justice, fair and expeditious hearing, I find no justification in setting aside the decision of the Assistant Registrar which will only elongate the litigation process creating case back log and unnecessary expenditure for both parties.

I only set aside the orders as to costs before the Assistant Registrar, the appellants shall not be bound in costs in the cause and are hereby discharged in that regard.

The appellants are accordingly warded half of the taxed bill of costs in this appeal. Let the main suit be fixed for hearing on its merits. I so order.

Right of appeal explained.

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OYUKO ANTHONY OJOK

JUDGE

26/10/2022