THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA; AT KAMPALA

(EXECUTION DIVISION)

CIVIL APPEAL No. 1670 OF 2013

(Arising from EMA No. 1164 of 2013; arising out Makindye Chief Magistrate's Court C.S. No. 100 of 2010)

BUWEMBO SARAH KAKUMBA..... APPELLANT

VERSUS

1. SAMUEL KIWANUKA
2. CHIMWANI STEPHEN :::::::::::::::::::::::::::::::::::: RESPONDENTS

BEFORE: - THE HON. MR. JUSTICE ALFONSE CHIGAMOY OWINY – DOLLO

JUDGMENT

This appeal traces its origin to Makindye Chief Magistrate's Court, wherein the 1st Respondent herein was the Plaintiff in Civil Suit No. 100 of 2010, and the Appellant herein the Defendant. The parties resolved the suit by a negotiated settlement, by which Court entered a consent judgment in favour of the Plaintiff ordering the Defendant to pay U. shs. 16,071,500/= (Sixteen million seventy one thousand, five hundred only). Following default by the Defendant/Judgment Debtor to satisfy the decree, the Plaintiff/Judgment Creditor moved Court to issue a warrant for the arrest and committal to civil prison of the Defendant/Judgment Debtor. She apparently learnt of this warrant, and promptly paid the outstanding decretal sum to Court. Consequently, the Registrar Execution halted the execution process.

The 2nd Respondent, as the bailiff to whom the warrant had been issued, then filed his bill of costs against the Defendant/Judgment Debtor for taxation. The Defendant/Judgment Debtor objected at the bill directed against her, contending that she was under no duty to pay such bill; but it was, instead, the Plaintiff/Judgment Creditor who should do so. The Taxing Master however overruled her. On the day fixed for the taxation of the bill, the judgment debtor's Counsel sought an adjournment since he had to attend a Board training organized by the Uganda Law Society and scheduled for that day, but the taxing master proceeded and adjourned the matter to another day; and taxed the bill ex parte. It is from this taxed bill of costs that the Defendant/Judgment Debtor is aggrieved, and so this appeal lies.

The grounds preferred for the appeal are that: –

1. The learned Assistant Registrar erred in law and fact when she held that it was not mandatory for a notice to show cause why execution should not issue before issuing a warrant of arrest.

2. The learned Assistant Registrar erred in law and fact when she held that the 2nd Respondent is entitled to his costs, when he did not complete the execution.

3. The learned Assistant Registrar erred in law and fact when she held that the Appellant was required to pay the 2nd Respondent's costs of the execution, when the same had been stayed by Court before the execution could be completed.

4. The learned Assistant Registrar erred in law and fact when she proceeded to tax the 2nd Respondent's bill of costs ex parte despite being notified that the Appellant would not be able to attend the taxation.

5. The learned Assistant Registrar erred in law and fact when she taxed the 2nd Respondent's bill of costs out of scale and not in accordance with the Judicature Court Bailiffs Rules.

The Counsel for the Respondents raised a number of preliminary points of objection to the appeal; two of which, merit consideration. First, is that the appeal does not disclose any cause of action against the 1st Respondent; hence, it should be struck out as against the 1st Respondent. Second, is that there is no extracted order for Court to set aside; and so, the appeal is incompetent and should be struck out. It is now settled law that where a plaint discloses a right the Plaintiff has/had, the violation of the right, and further that the Defendant perpetrated the violation, then it discloses a cause of action. The Appellant challenges the the warrant of arrest, which was issued at the instance of the 1st Respondent. The three ingredients constituting a cause of action are therefore clearly discernible here.

There is indeed a near inexhaustible wealth of authorities on the proposition that an appeal preferred without a formal or extracted decree, or order, accompanying it is incompetent. Such authorities include, ***Kisule vs. Nampewo [1984] H.C.B., Yoana Yakuze vs. Victoria Nakabembe [1988 -1990] H.C.B. 132, Roberto Biiso vs. May Tibamwenda [1991] H.C.B. 92.*** However, in ***Kibuuka Musoke William & Anor. vs. Dr. Apollo Kaggwa Court of Appeal Civ. Appeal No. 46 of 1997***, the Court of Appeal overhauled this long held proposition of law, and, in departing there from, stated in no uncertain terms that: –

> *"… the extraction of a formal decree embodying the decision complained of is no longer a legal requirement in the institution of an appeal. An appeal by its very nature is against the judgment or reasoned order and not the decree extracted from the judgment or the reasoned order."*

It followed this radical departure from the long held requirement that an extracted or formal decree must accompany a memorandum of appeal, by its decision in

Banco Drabe Espanol vs. Bank of Uganda; Court of Appeal Civ. Appeal No. 42 of 1998, where it declared such requirement, albeit it being expressly provided for in its rules of procedure, to be moribund and contravening the provision of Article 126 (2) (e) 1995 Constitution which enjoins Courts of judicature to always render substantive justice without undue regard to rules of technicalities; and further, explained that: –

> *"The extraction of the decree was therefore a mere technicality which the old Municipal law put in the way of intending Appellants, and which at times prevented them from having their cases heard on merits. Such a law cannot coexist in the context of the 1995 Constitution Article 126 (2) (e) where the Courts are enjoined to to administer substantive justice without undue regard to technicalities."*

The High Court has, by its decisions in cases such as ***Mbakana Mumbere vs. Maimuna Mbabazi - H.C. Civ. Appeal No. 3 of 2003 (Per Mukasa J.)***, ***Tumuhairwe Lucy vs. The Electoral Commission & Anor. (Mbarara - H.C. Civ. Appeal No. 2 of 2011(Per Bashaija J.)***, ***John Byekwaso & Anor. vs. Yudaya Ndagire (Per Tuhaise J.),*** taken cue from, and followed, the Court of Appeal's departure from the old proposition of law requiring the extraction of a formal decree to accompany the lodgment of an appeal. Accordingly, I must overrule the objections on all the grounds raised by the Respondents as being without merit.

<u>Ground No. 1:</u> **The learned Assistant Registrar erred in law and fact when she held that it was not mandatory for a notice to show cause why execution should not issue before issuing a warrant of arrest.**

0.22 r.34 (1), of the Civil Procedure Rules, provides for the issuance of warrant of arrest of a judgment debtor, for purposes of committal of such person to civil prison, in execution of a decree. It states as follows: –

"34. Discretionary power topermit judgment debtor to show cause against detention in prison.

1. Notwithstanding anything in these Rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in a civil prison of a judgment debtor who is liable to be arrested in pursuance of the application, the Court may, instead of issuing a warrant for his or her arrest, issue a notice calling upon him or her to appear the Court on a day to be specified in the notice and show cause why he or she should not be committed to a civil prison."

On the face of it, by the use of *'may'* as against *'shall'*, the Rule appears to give Court discretionary powers. However, the Courts have adopted a proactive approach in its interpretation of the word *'may'* as used in this Rule. Thus, in ***Kemigisha Mbabazi vs Jing Cheng International Ltd.; H.C. Misc. Applica. No. 344 of 2012, Federico Sebirumbi vs Joseph Konde (1994) IV KALR 44,*** and ***Hajji Hassan Bin Abudul Azizi vs Ramazani Bin Razabo [1977] HCB 39,*** the Court construed the use of the instructive word *'may'* in the Rule as a mandatory requirement. This is clearly informed by the fundamental rule of natural justice that no one should be condemned unheard. To arrest a judgment debtor, before affording such person the opportunity to state his or her case, would gravely offend that principle of natural law.

In law, it is not permissible for any rule of procedure to contravene, or override, any principle or rule of natural justice. I had occasion to pronounce myself on the issuance of warrant of arrest of a judgment debtor in ***H.C. Execution Civil Appeal No. 1906 of 2013, Comesa Technology (U) Ltd., vs David G. Mushabe***, (unreported), where I quite forcefully warned against causing an arrest of a judgment debtor for committal to civil prison without following the right procedure, in the following unmistakable language: –

"... the order for the warrant of arrest of the directors of the judgment debtors to issue, was both procedurally erroneous and gravely wrong in substance. A warrant of arrest should always be preceded by a notice to a person to show cause why a warrant of arrest should not issue against such person. It is only after default on the notice that such a warrant may issue without the Court having heard the person first. This ensures compliance with the cardinal rule of natural justice that no one is condemned unheard.

Producing a person before Court under arrest, without having afforded such a person the prior opportunity to be heard, is unacceptable. Even if such a person is released for want of proof of any case against such a person, grave damage would have been occasioned already. Similarly, even where it is established that there is indeed a case against such a person brought to Court under arrest, but without prior notice to show cause against an impending arrest, it would not validate or justify that arrest."

Accordingly then, in the instant case before me, the Registrar Execution erred in law in holding that a warrant for the arrest of a judgment debtor for committal to civil prison could be issued without affording such person the opportunity to be heard prior to issuing the warrant. Consequently, she erred in issuing the warrant for the arrest of the Appellant for committal to civil prison. This, she did in clear breach of the cardinal principle or rule of natural justice forbidding such course of action. Such a breach if a fundamental requirement of the law cannot be allowed to stand. I have to quash that order.

<u>Ground No. 2</u>: The learned Assistant Registrar erred in law and fact when she held that the 2nd Respondent is entitled to his costs, when he did not complete the execution.

<u>Ground No. 3</u>: The learned Assistant Registrar erred in law and fact when she held that the Appellant was required to pay

the 2nd Respondent's costs of the execution, when the same had been stayed by Court before the execution could be completed.

It is a rule of law that costs follow the event; meaning that a judgment debtor bears the costs of the suit. However, needless to emphasize, this rule applies only where the process is lawful. Since, here, the warrant of arrest was unlawful, the judgment debtor cannot suffer the costs incurred by the bailiff. The expunged warrant was issued at the instance of the 1st Respondent who applied for execution pursuant to the provisions of 0.22 rr.7 and 8(2) of the C.P.R. However, instead of applying for notice to be served on the Appellant to show cause why a warrant of arrest should not issue against her, he applied for the direct issuance of the warrant of arrest of the Appellant. Hence, the 1st Respondent must meet whatever costs the 2nd Respondent incurred in the execution of the unlawful warrant for the arrest of the Appellant.

Where Court orders for stay of execution, a bailiff is nonetheless entitled to payment for work done. Rule 15 (4) of the Bailiffs Rules provides that in such a situation, the bailiff shall be paid by the judgment creditor. However, I think where Court stays the execution, the bailiff should wait and conclude the execution process before making claims for work done. In the event that there is no further execution process after the order staying the execution, the bailiff's claim allowed by Court must reflect the work he or she has actually done. Because the bailiff would have only partially carried out the execution process, the instruction fee allowed by Court should be less than what it would have been, had the execution process gone up to the sale of the items attached, or arrest of the judgment debtor.

Ground No. 4: The learned Assistant Registrar erred in law and fact when she proceeded to tax the 2nd Respondent's bill of costs

ex – parte despite being notified that the Appellant would not be able to attend the taxation.

Ground No. 5: The learned Assistant Registrar erred in law and fact when she taxed the 2nd Respondent's bill of costs out of scale and not in accordance with the Judicature Court Bailiffs Rules.

From the facts of the present case, Counsel for the judgment debtor notified Court that he had to attend a Board training organized by the Law Society on the day of the taxation hearing. I need to point out that such training would add value to the administration of justice, since Counsel is an officer of the Courts of judicature. There would certainly be no harm in adjourning the taxation hearing to another date. It was wrong for the Registrar to proceed ex–parte. Court should not be too quick to conduct a hearing ex–parte when it has information on record, which would form the basis of acting otherwise. As it is, the Court did not proceed that very day, but adjourned the hearing to another date; and yet no notice of the new date was communicated to the Counsel for the judgment debtor.

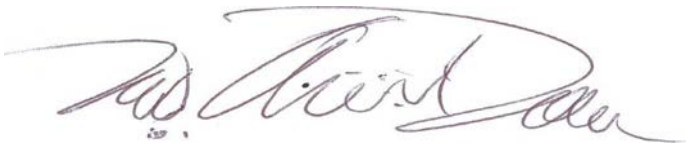
The Judicature Court Bailiffs Rules provides, in rule 17 thereof, that the remuneration of the Court bailiffs shall be in accordance with the scale of fees specified in the Second Schedule to the Rules. It is this Schedule, which governs the taxation of the bailiffs' bills of costs; and must be adhered to by the taxing master. Any taxation of a bailiff's bill of costs, which is done outside the provisions of these Rules is unlawful, and cannot be allowed to stand. In this regard, I find it necessary to set aside the order from the taxation carried out outside of the provisions of the Rules. In the premises, I allow this appeal; and make the following declarations and orders: –

(i) The warrant of arrest herein, issued by the Registrar of Execution, was unlawful for offending against the natural rule of justice. It is hereby set aside.

(ii) The bailiff's bill of costs herein shall be taxed afresh, and in accordance with the Second schedule to the Judicature Court Bailiffs Rules; but shall reflect the measure of partial execution the bailiff actually carried out.

(iii) The judgment creditor (1st Respondent), who caused the issuance of the unlawful and expunged warrant for arrest of the judgment debtor, shall meet the bailiff's taxed bill of costs.

(iv) The 1st Respondent shall pay the Appellant's costs in this appeal.



Alfonse Chigamoy Owiny – Dollo

JUDGE

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