THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CIVIL MISC. APPLICATION NO. DR. MFP 1/89

(Original Civil Appeal No. MFP 33/88)

(Original Kibiito Civil Suit No. MFP 5/88)

PAULO NGUWA ::APPLICANT/APPELLANT

VERSUS

JOBU TUGUME ::RESPONDENTS
CHRISTOPHER FRIDAY

BEFORE: THE HONOURABLE MR. JUSTICE I MUKANZA

RULING

This is an application by notice of motion brought under section 232 (3) and 4 of the Magistrate Courts Act 1970. Seeking for leave to appeal to this court the first application having been refused by the learned Chief Magistrate on 1st June 1989 and the judgment sought to be appealed against was dated 8th December, 1988.

Before the application was heard the learned counsel representing the respondent raised some preliminary objections to the application. He was overruled and the court proceeded to entertain the application on its merits. I now give my reasons Mr. Nyakabwa submitted that there are certain matters which he felt should not have come in at all. He was objecting to the affidavit attached to the motion. It was not an affidavit to the substance. It was a statement of objections or grounds of appeal why the learned counsel representing the applicant/appellant was attacking the judgment or the ruling of the court. An affidavit should be a statement of evidence basically. I saw or heard this. It is some kind of hearsay which is admitted. Points of law are not necessary. He referred me to the case of **Uganda vs. Commission of Prisons Exp Matovu Re. 1966 Ea P.514.**

He concluded that the affidavit should not be accepted since the grounds embedded in the motion was sufficient. He prayed that they follow the grounds as put in the motion.

Mr. Zehulikize the learned counsel representing the applicant submitted that that was not the first time. Mr. Nyakabwa had raised the objection. The learned Chief Magistrate made no mention to that objection in his ruling. The application was made under section 232 (3) (4) of the MCA 1970 and the section did not set up form of motion but as a matter of practice the form of application is by notice of motion accompanied by affidavit. He contended that not every notice of motion must be supported by an affidavit and perhaps that was the objection being raised by the learned counsel representing the applicant. He made the affidavit after perusing the judgment of the Chief Magistrate. It was not true that the affidavit was deposed to facts end evidence alone. having studied the judgment he vas convinced to the best of his knowledge and belief that there was very important point of law which caused miscarriage of justice and that warranted consideration by this court.

Order 17 r. 3 of the Civil Procedure Rules states that affidavit shall be confined to such facts as a deponent is able of his own knowledge to prove except interlocutory applications on which statement of his belief may be admitted provided the grounds thereof are stated

In some of his affidavit he swore in support of the application Mr. Zehulikize averred to matters like:-

> *"That the learned Chief Magistrate erred in failing to find that the plaintiff/respondents had no locus standi as they did not have letters of administration in respect of the alleged estate of Ruhweza and that the learned Chief Magistrate never evaluated the evidence before him and thus caused a miscarriage of justice."*

I am of the view that Mr. Zehukirize was deposing to facts which he was able of his own knowledge to prove after perusal of the records. And even if I might not be correct in so finding the grounds as given in the notice of motion were sufficient in the meselves to enable this court to dispose of the application. I was referred to the case of Uganda v Commissioner of Prisons Exparte Matovu 1966 EA 514 the learned counsel representing the respondent was of the view that the affidavit sworn by Mr. Zehulikize should not be accepted. In the latter case the applicant

and his counsel swore affidavit. The applicant was applying for a writ of Habeas corpus and subjiciendum because he was unconstitutionally and unlawfully being detained. Matovu's case is distinguishable from the instant case. In the former case the two affidavits were riot companied by notice of motion or a motion paper signed by the counsel for the applicant setting out the relief sought. And the grounds entitling the applicant to such relief was said to be a fundamental defect as to the almost incurable. According to Sir Udo Udoma CJ as he then as In effect, it meant there was in f. ct and law no application capable of being entertained properly before the court. In the instant case there were the affidavit sworn to by the applicant and his counsel and the same were accompanied by notice of motion. So Matovu's case is not an authority to the instant case with regards to the affidavits as sworn to by the applicant and Mr. Zehukirize.

With those notes I now proceed to consider the application itself:-

1. Whether the decision of the learned Chief Magistrate involved important points of law namely.

(a) Whether parties who have no letters of administrator could sue and recover land allegedly belonging to the deceased person.

(b) Whether a defective plaint was an irregularity.

2. Whether the decision of the learned Chief Magistrate caused a substantial miscourage of Justice namely

(i) that he considered only one ground of appeal

(ii) That he never considered all the other grounds and

(iii) that he never evaluated all the evidence before him.

The learned counsel representing the applicant while submitting in support of the first ground of the application contended that the respondents did not have letters of Administration or probate and could not therefore sue and recover land allegedly belonging to the deceased person in view of section 190 of the Succession Act which states:-

“Except herein provided no right to any part of the property of a person who has died intestate shall be established in any court of justice unless letters of administration have just been granted by a court of competent jurisdiction.”

The learned counsel continued that the learned Chief Magistrate did not make any reference to that matter in his judgment. It only the trial Magistrate who made a reference to the matter that it was governed by customary nature. He concluded that the learned Chief Magistrate could have made a finding on that important point of law and that had he to have done so he would have allowed the appeal.

As to whether defective plaint was an irregularity, Mr. Zehurikize submitted that the learned Chief Magistrate only dealt with this issue which was ground No. 1 in the memorandum of appeal and incidentally that was the only ground which the learned Chief Magistrate dealt with in dismissing the appeal. The defects in the plaint generally were that the second respondent/Plaintiff was a minor and could not sue. He lacked the capacity to sue and should act have been joined as a co-plaintiff. The first respondent/plaintiff who was an adult was not suing en as next friend. Certain important points of law arise in this kind of state of affairs as indicated above. For instance the MCA does not talk of the signing of the plaint by the plaintiff. In the absence of such provision the plaintiff ought not to have signed the plaint. To him that was a matter which warranted consideration by the High Court.

With regard to the suing by the next friend the trial court grade III relied on rules 7 of schedule 2 to the MCA l970 to the effect that the suit should not be defeated on grounds on misjoinder of the parties. And he solved the problem by stating that the plaintiff No. 2 is allowed to sue with the next friend plaintiff No. 1. Unfortunately the learned Chief Magistrate in his judgment did not make clear finding on this important point of law. If he had done so he could have found that rule 8 (2) of schedule 3 to MCA 1970 had not been complied with because the 1st plaintiff the court allowed to sue did not have necessary consent.

On the third ground of the application that the decision of the Chief Magistrate seemed to have occassioned a miscarriage of justice. The learned counsel submitted that despite the fact that there were six grounds of appeal the learned Chief Magistrate dealt with the first ground which

referred to the complainant. The failure to consider the other five grounds of appeal caused a substantial miscourage of justice as the appeal was not disposed on merit. Having found on the first ground that the irregularities against the plaint were not material an did not prejudice the appellant/defendant the learned Chief Magistrate should have gone ahead and consider the other grounds. If he had done so he would have allowed the appeal. The learned counsel submitted that general statement by the Chief Magistrate, "On the evidence as a whole I find that the respondent have proved their case," one could not assume that he dealt with the rest of the grounds of appeal. All the other grounds he never dealt with pointed to the evaluation of evidence as against appellant court. He was entitled to evaluation of the evidence and drew his own conclusion. Had he to have done so he would have found that the disputed Kibanja belonged to the late Ibrahim Rutagura. He referred me to the case of Erinest Mbarira HCCS 8O/1971. He concluded that the failure of the learned Chief Magistrate to evaluate the evidence on record not only caused a substantial miscarriage of justice but also raised an important point of law.

Mr. Nyakabwa the learned counsel representing the respondents submitted that under S. 232 (3) (4) provides that leave could be granted if the intended appeal involved a substantial point of law or a decision that had caused a substantial miscarriage of justice.
In that dispute between the parties whether the and belonged to the brother the appellant and the father of the 2nd respondent that was the issue at the lower court. The appellant walked into the land on the death of the father of the 2nd respondent who found the first respondent was looking after the former and had brewed beer which he then confiscated. There was evidence that the father of the second respondent left a house and land on which the second respondent had lived. The latter lived on a land left by his father and the appellant went and confiscated tl1e property because it belonged to his (the appellants) father.

Mr. Nyakabwa submitting on whether there were letters of Administration and whether a defective plaint was an irregularity referred ma to section 10 of the Magistrates courts Act 1970 which empowers the Magistrates to exercise equity where the latter runs concurrent with the law. The procedural point should not stand in the way of substantive justice. That when a man comes and starts grabbing ones land and you go to court to get letters of administration which might take long while one was enjoying ones land. The fact that neither of the respondents had no letters of Administration, that should not be used to defeat the equitable justice. The land had to

be lived on and was being lived on. The question of succession was incidental. The second respondent had to live on that land.

As regards the joinder of parties to the defective plaint, the common ground is that the plaint in Magistrate Grade II and III court other than before legally qualified Magistrates i.e. grade I and Chief Magistrates are not all that complicated and detailed. The Magistrate had addressed himself o the issue of the parties. He refused to rightly too to apply the Civil Procedure Rules. The joinder or non joinder of the parties should not defeat the suit. There was no substantial point of law involved here. Both the trial Magistrate and the learned Chief Magistrate addressed themselves to the procedural defects and as the Chief Magistrate found they did not affect the substantive matter of the dispute.

As regards the accusation that the learned Chief Magistrate dealt with only one ground of the appeal, the learned counsel submitted that as Nr. Zehukirize admitted that the rest of the grounds of appeal were on the evaluation of evidence before the trial court, the learned Chief Magistrate read through the records and also read the judgment and on the evidence as a whole he found that the respondents proved their case and therefore the judgment of trial Magistrate and the learned Chief Magistrate could not be impeached. It was not true that the learned Chief Magistrate did not consider the rest of the five grounds of appeal. He prayed that the application be dismissed.

Section 232 (3) (4) of the Magistrates Court Act 1970 allows a second appeal with leave only, if the appellant satisfied a Chief Magistrate or the High Court that the decision against which an appeal is intended involves a substantial question of law or decision appearing to have caused a substantial miscarriage of justice. This section has already been referred to in my ruling above and it was reproduced here for the sake of emphasis. It would however mean tat the question of law involved or the miscarriage of justice occassioned should be of the nature that would affect the validity of the decision from which the appeal was made. An irregularity was not material to the case and would not suffice. The appellant must show that if the error ad not occurred, the decision of the trial court would have been different See Lulenti Buluma and another vs Erinesti Mbirika Reported 1975 HCB page 42. Also See James Bunwavs Byayeshiyimbaho 1976 HCB P. 22 where it was held that the power to grant leave to appeal is restricted to matters involving a

substantial question of law or where the decision to be appealed against appears to have caused a substantial miscarriage of justice. Thus before leave is granted those two conditions must be fulfilled by the grounds on which leave to appeal is sought. And this leave to appeal could be granted for consideration of a limited Question only.

When submitting on the first ground Mr. Zehukirize representing the applicant submitted that the decision of the learned Chief Magistrate involved important points of law whether the respondent who had no letters of Administration could sue and recover land and whether a defective plaint was an irregularity. Mr. Nyakabwa representing the respondents submitted that there was no point of law involved here. The land had to be lived on and that the respondents could not go for letters of Administration when they had been pushed out of the land. And that the procedure in the Magistrates Grade II and III were simple and not complicated and as such the joinder or misjoinder of the parties was not an irregularity.

In his judgment the trial Magistrate allowed the 1st respondent to sue the applicant on behalf of the 2nd respondent as next friend under Rule *7* of schedule 3 of the Civil Procedure rules for courts presided over by Magistrate Grade III and II and further held that the claim was governed by customary law and dismissed the claim by the learned counsel representing the applicant that the Civil Procedure rules applied before qualified Magistrate & judges was irrelevant and that section 190 of the succession Act was inappropriate and inapplicable in the circumstances.

Rule 7 of the schedule 3 supra simply states that no suit may be defeated by reason of a misjoinder or non joinder of parties.

Mr. Zehurikize while submitted on this ground criticized the learned Chief Magistrate of considering only one ground out of the six grounds listed for appeal. He never considered the rest and *even* never evaluated the evidence. That failure to consider the other five grounds in the memorandum of appeal occassioned a miscarriage of justice.

In reply Mr. Nyakabwa submitted that the learned Chief Magistrate read through the proceedings and judgment of the trial Magistrate and found that on the evidence as a whole found that the judgments of the learned Chief Magistrate and the trial Magistrate should not be impeached.

As indicated above the applicant listed six grounds in hi memorandum of appeal. I am reproducing the same here:-

They were namely:-

(i) The trial Magistrate erred in law in proceedings with the case which was based on a defective plaint.

(ii) The trial Magistrate erred in law and fact in holding that the disputed Kibanja belonged to Ruhweza while the evidence clearly showed that it belonged to the late Ibrahim Rutugura and the appellant was the Administrator of the Estate of the said late Ibrahim Rutagira.

(iii) That the trial Magistrate erred in law and fact in believing the evidence of the plaintiff and the witnesses when such evidence was full of material discrepancies and contradictions as opposed to the defence evidence which was straight forward corroborative and truthful.

(iv) That the trial Magistrate erred in law in entering judgment for the plaintiff who purported to be suing for the recovery of the late Ruhweza's estate.

And the court may in every suit deal with the matter in dispute so far as regards the rights and interest of the parties actually before it. I am of the opinion that the trial Magistrate rightly allowed the first respondent to sue as next friend of the 2nd respondent and rightly held that was an irregularity which could be ignored because all that was required was to settle the dispute between the parties. Rules of Civil Procedure are a guide to the orderly disposal of suits and a means of achieving justice between the parties. They should however never be used to deny justice to a party entitled to a remedy (See Allen Nasanga vs M. Nanyonga 1977 HCB 3 (Civil App. No. 13 of 1977) so my finding was that the defective was an irregularity Also see Iron v Steelwares Ltd vs C. W. Maxty & Co. 1958 23 EACA P. 175.

However the appellant had in his possession letters of Administration to the estate of one Ruhingira the brother of Ruhweza the deceased father of the 2nd respondent. The letters of

Administration were exhibited in the lower court as Ex P. 2. The learned Chief Magistrate did not consider at all this important aspect of the case. True the trial court treated the land as governed by customary law but he learned Chief Magistrate could not have overlooked the possession of letters of Administration by the applicant. He ought to have considered that issue. The question of law involved here was of the nature that it would affect the validity of the decision from which the appeal was made. The first ground of the application therefore succeeds.

The second ground was whether the decision of the learned Chief Magistrate caused a substantial miscourage of justice.

> (v) That the trial magistrate erred in law and fact in taking the 1st Plaintiff as the guardian of Christopher Friday the 2nd Plaintiff when such claim was based on a false and forged document and it was clear that the said first plaintiff was only interested in acquiring the land for the personal benefit.
>
> (vi) And that the decision of the trial Magistrate was bad in law and against the weight of evidence and such caused a miscarriage of justice.

As already explained above the learned Chief Magistrate considered only the first ground of appeal and rightly found that some of the defects in the plaint were not material since they did not take the plaint out of the provisions of the u1e in schedule III of the MCA 1970 and also rightly held that the Civil Procedure Rules and Civil Procedure Act relied on by the counsel for the respondent *were* not applicable to the trial Court. Then the learned Chief Magistrate held that on the evidence as a whole the respondents proved their case and thereafter proceeded and dismissed the appeal considering grounds 2 to 6 of the memorandum of appeal.

Well be that as it may the Chief Magistrate's court being the court of first appeal it was the duty of that Court to submit the the evidence to fresh and exhaustive examination and evaluation and to make its own findings as well as draw its own conclusions in order to determine whether the findings and judgment of the trial court be supported See Management Training Advisory Centre vs Patrick Ikanza CAU at Mengo Civil Appeal No. *6* of 1985 (unreported) See also peters v Sunday Post 1958 EAU 24.

In the instant case the learned Chief Magistrate never submitted the evidence of the trial court to fresh and exhaustive scrutiny evaluation and to make his own finding as well as draw his own conclusion in order to determine whether the judgment of the Magistrate Grade III.

The trial court was supported by the evidence on record. Merely to say that the evidence on the whole the learned Chief Magistrate was satisfied with the judgment of the trial court was not enough. He ought to have evaluated the evidence on record and drew his own findings and conclusion. In the result the applicant had shown that if the learned Chief Magistrate had evaluated the evidence as explained above. The decision might have been different.

In conclusion I am satisfied that the decision against which an appeal is intended involved a substantial point of law and is a decision appearing to have caused a substantial miscarriage of justice. Leave to appeal to this court is granted with costs, to the applicant. The Applicant/intending appellant to lodge in his appeal within 21 days from today.

I.MUKANZA

JUDGE

21/2/91