THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)

MISCELLANEOUS CAUSE NO. 55 OF 2012
(Arising from Land matter 26 of 2012, Mpigi Magistrates Court)

ASSUMPTA SEBUNYA :::::: APPLICANT

VERSUS

KYOMUKAMA JAMES :::::: RESPONDENT

RULING BY HON. MR. JUSTICE JOSEPH MURANGIRA

1. Introduction

1.1 The applicant through her lawyers Mwandha, Wabwire & Muwanga Advocates & Solicitors brought this application by Notice of Motion under Section 83 of the Civil Procedure Act, Cap. 71 and Order 52 rules 1 and 3 of the Civil Procedure Rules, Statutory Instrument no. 71-1. This application is supported by the affidavit sworn by the applicant. The application also swore an affidavit in rejoinder to the respondent's affidavit in reply.

1.2 The respondent through his lawyers Birungi & Co. Advocates filed an affidavit in reply and opposition of this application and its supportive affidavit. He vehemently opposed this application

1.3 This application is seeking the following orders; that:-

(a) The decision of Her Worship Tusiime Sarah Bashaija (Grade 1 Magistrate Mpigi), in land matter 26 of 2012 be revised.

(b) Costs of this application be provided for.

1.4 Further, this application is based on the following grounds; that:-

(a) The learned trial magistrate failed to exercise a jurisdiction vested in her when she declined to make a ruling on the preliminary points of law raised by the applicant's Counsel.

(b) The trial magistrate exercised her jurisdiction with material irregularity and injustice when she advised the respondent to file a fresh plaint, in order to correct errors that were the subject of the preliminary points of law raised by the applicant's counsel.

(c) The learned trial magistrate acted irregularly when she granted the respondent an adjournment on the basis that the respondent's counsel in court that day had instructions to hold brief for her senior colleague, for purposes of adjourning only, whereas not.

(d) The learned trial magistrate erred in law when she denied the applicant costs following the respondent's withdrawal of miscellaneous applications nos. 026 and 027 of 2011.

(e) The interests of justice require that the orders sought be granted.

1.5 The major law applicable in this matter is section 83 of the Civil procedure Act. It provides that:-

"The High Court may call for the record of any case which has been determined under this Act by any magistrate's court, and if that court appears to have:-

(a) Exercised a jurisdiction not vested in it in law;

(b) Failed to exercise a jurisdiction so vested; or

(c) Acted in the exercise of its jurisdiction illegality or with material irregularity or injustice,

The High Court may revise the case and may make such orders in it as it thinks fit; but no such power of revision shall be exercised

(d) Unless the parties shall first be given the opportunity of being heard; or

(e) Where, from lapse of time or other cause, the exercise of that power would involve serious hardship to any person.

1.6 The main contention by the applicant arises from the way the trial magistrate handled the preliminary objections that were raised by the applicant before the lower Court; they are:-

(a) The plaint was bad in law for failure to comply with the requirements of Order 7 rule 1 (b) in particular, for failure to described the plaintiff's place of residence.

(b) The principle documents on which the plaintiff relied had not been attached, in effect, failing to comply with the mandatory requirement of Order 17 rule 4 of the Civil procedure Rules.

(c) That annexture "A" to the plaint was a document in the Luganda language, which offends Section 88 of the Civil Procedure Act.

2. Issues for determination by the court

(i) Whether the applicant is not entitled to costs following dismissal of Misc. Applications nos. 26 and 027 of 2011.

(ii) Whether the respondent should respond to points of law raised by the applicant.

(iii) Whether the respondent should file an amended plaint to circumvent the points of law raised by the applicant.

2.1 Issue no.1: Whether the applicant is not entitled to costs following dismissal of Misc. Application nos. 026 and 027 of 2011.

Counsel for the applicant submitted that it was erroneous to rule that costs should not be awarded to a respondent when no affidavit in reply has been filed. That the trial magistrate ignored the applicant's lawyer's submissions that he appeared ready to proceed with respondent's said Miscellaneous Applications on 14th October, 2011, 25th October, 2011, 3rd November, 2011 at the Entebbe Magistrate' Court.

Counsel for the applicant further submitted that on all those occasions, the applicant's lawyer travelled to Entebbe Court although the applications were not heard on the first two occasions, the applicant incurred costs because she had to facilitate counsel to attend Court. That besides, the applications were served, perused and preparations made to respond on points of law whilst in Court. It was also brought to the learned trial

magistrate's attention that a respondent need not file an affidavit in reply if only points of law are to be argued. The trial magistrate failed to appreciate the fact that a respondent need only file an affidavit in reply in case they need to adduce evidence since evidence is adduced by way of affidavit in interlocutory applications.

The trial magistrate was of the opinion that the respondent had not incurred any costs. She invoked Section 98 of the Civil procedure Act and declined to grant the same, although she had allowed the withdrawal of the said applications.

Further I do agree with the trial magistrate when she held that the applications had not been heard and that the respondent did not reply to the said applications. Counsel for the applicant in the said applications did not show court any work done by counsel for the application in preparations to argue the said applications.

In reply to the applicant's submissions with reference to paragraph 18 of the application, it is the respondent's submissions that the applicant's lawyer was ready to go on with responding to the Miscellaneous Applications on 4th October, 2011, 25th/10/2011, 3rd/11/2011 at Entebbe, Magistrate's Court is a fact that cannot be proved by mere submissions by Counsel for the applicant. The contents of paragraphs 19, 20, 22, 23 of the reply to this revision applications are very convincing to say the least. I wish to add that the said two applications were written applications that ought to have been responded to in writing from where the trial magistrate would derive an intention of the applicant to respond on the points of law only.

Further, the fact that the applicant's lawyer had travelled to Entebbe Court with facilitation by the applicant cannot be faulted on the respondent as it was due to the fact that the trial magistrate was indisposed and that the applications were not heard. In any case even the respondent must have incurred an expenditure on his lawyer.

Furthermore, the fact that the applicant's lawyer had pursued and made preparations to respond on points of law would presuppose that the applicant's lawyer intended to make submissions from the bar which in fact cannot be premeditated by the trial magistrate without proof of the same in writing. It is also important to note that the affidavits

evidence in support of the said two applications were facts which the applicant ought to have filed affidavits in reply and opposition to those said applications.

It is, therefore, my finding that the trial magistrate did not err in law when she denied the applicant costs following the respondent's withdrawal of Miscellaneous Application nos. 26 and 27 of 2011. The trial magistrate had a discretion to award costs or not to the applicant in those said applications. This proposition is supported by Section 27 (1) of the Civil Procedure Act, which reads:-

> **" subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, the costs of and incidence to all suits shall be in the discretion of the Court or judge, and the Court or Judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary directions for the purposes aforesaid".**

This ground fails and this issue is answered in the negative.

2.2 Whether the respondent should respond to points of law raised by the applicant.

2.3 Whether the respondent should file an amended plaint to circumvent the points of law raised by the applicant.

Counsel for the applicant argued the above issues together. In his submissions on these two issues, counsel for the applicant relied on paragraphs 18 (ii), 19, 20 21, 22, 23 and 24 of the affidavit in support of this application. For emphasis, the said paragraphs are reproduced herebelow:-

> " para 18 (ii) ; allowing the plaintiff to file on " amended plaint"
> **An amended plaint can only be filed;**
> - **Without leave of Court, within 21 days of the summons being signed.**
> - **Without leave of Court, within 14 days of filing a written statement of defence.**
> - **With leave of Court or consent at any stage of proceedings before judgment. (Order 6 rule 19 and 20 of CPR)"**
>
> **Para. 19: That it is with my knowledge that Court can not on its own motion allow a party to file an amended plaint, that an**

amended plaint in the circumstances could only be filed with leave of Court and within the principles laid out elaborately by justice Yorakamu Bamwine in the recent case of Lubowa Gyaviira vs Makerere University, Misc. Application No. 471 of 2009 (unreported). A copy of the decision is attached and marked "K""

Para 20: That it is clear that the magistrate allowed the respondent/plaintiff to amend the plaint to prejudice the applicant/defendant by circumventing the preliminary objections raised, as had been clearly indicated in paragraph 5 of the written statement of defence.

Para 21: That my understanding of the law is that no amendment can be allowed if its effect is to prejudice the rights of the opposite party existing at the time of the proposed amendment.

Para22: That such amendment prejudices the applicant/defendant's rights because it defeats the preliminary points of law raised both in her pleadings and orally through instructed counsel before court.

Para 23: That by granting the respondent /plaintiff an adjournment, the learned trial magistrate failed to consider or appreciate Ms. Samalie Nakyejwe's earlier appearance and person conduct of the matter, her spirited fight in opposing misc. application 221 of 2011 on 3rd November, 2011 and her submissions at the bar opposing costs on 16th May, 2012.

Para 24: That I am aware that Section 98 of the CPA and Article 126 (2) (e) of the 1995 Constitution allow Courts of law to exercise their jurisdiction to prevent abuse of Court process and ensure that justice is administered but the same cannot be used to remedy a defective plaint, or one that is frivolous, vexatious and does not disclose a cause of action."

I have a big problem with the applicant's affidavit in support of this application. The said affidavit is argumentative and full of submissions on the matter in dispute. This affidavit in support of this application does not confirm to the rules governing affidavits as per Order 19 rule 3 (1) and (2) of the Civil procedure Rules. In such regard, this affidavit would be struck out in the circumstances.

In his submissions in reply, counsel for the respondent does agree with the arguments of Counsel for the applicant. He, too, relied on a number of authorities to support his client's case.

With regard to this **issue Section 98 of the Civil Procedure Act, Cap. 71** which is to the effect that:

> **"Nothing in this act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or top prevent abuse of the court."**

The above provision gives a wide discretion to any judicial office to make any orders as may be necessary to meet the ends of justice. The trial magistrate noted that all documents in Court reflected Entebbe Court and when the case was transferred to Mpigi no step was taken by the parties to have the documents reflect the court which the case was transferred to.

It was clear from the record that all the times Ms Samalie Kidde appeared in Court she was holding brief for Counsel Wycliffe Birungi who had personal conduct of the case and that her duty was to execute duties as instructed. On the day in issue Ms Samalie Kidde's instructions were to handle the scheduling conference and seek an adjournment for the hearing of the case. The preliminary objections were made out of the scope of instructions and in any case, she had no prior knowledge of the points of law to clothe her with readiness to reply to them immediately. Therefore the requested for adjournment of the matter, and the grant of the adjournment on the trial magistrate would be lawful.

It should however be noted that even to enable counsel Wycliffe Birungi reply appropriately the learned trail magistrates declined to grant the same. The learned trial magistrate in that respect ordered as follows:

> **"Court realises that all documents in court reflect Entebbe Court and when the case was transferred to Mpigi, no step was taken by the parties to have the documents filed in the right Court. I will allow under Section 98 of the CPA filling fresh suit since this is coming up for the first time –waiting for August 2012 to allow counsel Birungi Wycliffe to just respond to the P.O would not be**

in the interest of justice. Counsel for the plaintiff should go ahead and file a fresh suit and translated documents in English so that the matter begins afresh and avoid unnecessary delays".

It is trite law that once preliminary points of law are raised by a party, the Court has to resolve those points of law first in a ruling or judgment. See Order 15 rule 2 of the Civil Procedure Rules. In that respect the trial Court should have directed the respondent to make a reply to the said raised preliminary objections on points of law. And when the objections raised are of mixed law and fact, then the trial court has a discretion to direct the party raising them to frame an issue on them for determination by Court after a full trial of the entire case.

However, the above quoted text of the ruling of the trial magistrate in my considered view is not tinted with material irregularity, impropriety or /and injustice to warrant the revision of her ruling. If the applicant felt that the trial magistrate did not follow the law, she would have sought leave from the trial magistrate to appeal against the decision on the matter.

Therefore, the trial magistrate did not in any way fail to exercise a jurisdiction so vested in declining to reply to rule on the preliminary objections as she only declined in the interest of justice under the wide discretion provided for under Section 98 of the Civil Procedure Act.

I do further say that the preliminary objections so raised by the applicant in the paragraph 11 were not fundamental in nature. The first preliminary objection raised by the applicant that the plaint was bad in law for failure to comply with the requirements of Order 7 rule 2 (b) for failure to describe the plaintiff's place of residence. This rule in my view is directive and not mandatory. It is intended to guide Court in the process of effecting service of Court summons to trace the place where the defendant could be found and be served accordingly. Such none disclosure of the residence of the defendant is not fetal to the suit. It is just a technicality emphisaged under Article 126 (2) (e) of the Constitution.

Article 126 (2) (e) of the Constitution of the Republic of Uganda 1995, provides to the effect, that:-

"substantive justice shall be administered without undue regard to the technicalities".

The import of this provision is to enjoin courts to disregard irregularities or errors unless they have caused substantial failure to justice. In the case of **UTEX industries limited vs Attorney General S.C.C. application no. 52 of 1995**. The Supreme Court of Uganda held;

> **"Regarding Article 126 (2) (e) I am not persuaded that the constituent assembly delegates intended to wipe out the rules of procedure of our Courts by enacting articles 126 (2) (e). Paragraph (e) contains a caution against undue regard to technicalities. The article appears to be a reflection of the saying that rules of procedure are handmaids of justice meaning that they should be applied with due regard to the circumstances of each case."** (Underlining is mine for emphasis)

Further in **Bakaluba Peter Mukasa vs Nambooze Betty Bakireke SCEP Appeal NO. 04 of 2009: Justice Katurebe J.S.C, held that:-**

> **"Rules of procedure are very important but they are not an end themselves, they are often referred to as the hand maidens of justice but are not justice themselves. Rules form the procedural frame work within which a fair hearing in conducted".**

Wherefore, the 1st preliminary objection would not have merited any need for the respondent to have replied to it. In that regard I would have dismissed that objection.

The 2nd preliminary objection is that the principal document on which the plaintiff relied had not been attached in effect failing to comply with the mandatory requirement of Order 17 rule 4 Civil Procedure Rules . See paragraph 11 of the affidavit in support of this application. With due respect to Counsel for the applicant and the applicant herself who is a lawyer and an advocate of this High Court, Order 17 rule 4 of the Civil Procedure Rules is not applicable in the circumstances of this case. Order 17 rule 4 (supra) thereof reads:-

> **" where any party to a suit to whom time has been granted fails to produce his or her evidence, or to cause the attendance of his or**

her witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding that default, proceed to decide the suit immediately."

Accordingly, therefore, the facts produced by both parties do not show that the trial magistrate in any way in her disputed ruling offended Order 17 rule 4 (supra)

The principle document was duly annexed to the plaint as annexture "A" which in this case was a sale agreement between the respondent and Mr. Kayongo Muhamudu in respect of the suit property and therefore the respondent did not in any way fail to comply with the mandatory requirements of Order 17 rule 4 of the Civil Procedure rules, as argued by Counsel for the applicant.

With regard to the fact that annexture "A" to the plaint was in Luganda language which offends Section 88 of the Civil Procedure Act, it is my finding that annexture "A" was only an attachment and was yet to be admitted as evidence before the trial Court. Section 88 of the CPA is very clear. That the documents which is not translated into the language of the court which is English cannot be admitted in evidence. Such document in Luganda language other than English is only rejected by Court at the tendering of such documents in evidence through a witness during the trial; but not at a stage of a preliminary objection. The respondent would have, before tendering annexture "A" in evidence translated the same document into English language. And failure by the respondent to attach the translated version of the said sale agreement in Luganda into English was not fetal to the respondent's suit.

The case of **Godfrey Katunda vs Betty Atuhairwe Bwesharire, High Court misc. Application no . 185 of 2004** unreported in which Court expunged annextures to an affidavit that had not been translated into the English language because of S.88 of CPA is distinguishable from the instant case. In that case His Lordship P.K.Mugamba was of the view that:-

"Needless to say the annextures are part of the affidavit of the applicant which in turn is pivotal to the applications".

My view is that the two cases in point are different and the circumstances leading to the decision of **my senior brotherJudge Lordship P.K. Mugamba** in **Godfrey Katunda vs Betty Atuhairwe Bwesharire (supra)** are different from the points in the instant case in the sense that what was in issue was an annexture to an affidavit which is evidence in itself. While in the case before me what is in issue is an annexture to a plaint which by all means has not yet been admitted in evidence or exhibited on Court record.

Further, the circumstances in the case of **John Sebataana vs Abanenamar Yorokam & Anor Civil Suit No 99 of 2005**, are also different from those in the case before this Court. In the case of **John Sebataana vs Abanemer Yokoram & anor, Civil Suit No. 99 of 2005,** the plaintiff did not annex the power of attorney which gave him the basis to sue the defendant but in the present case, the plaintiff/respondent annexed the sale agreement as proof of ownership which is the basis of his claim.

Wherefore, the aforesaid preliminary objection was not a point of law at the stage it was raised by Counsel for the applicant/defendant. It would have been dismissed in any event.

Regarding the order of the learned trial magistrate that the plaintiff files a fresh plaint correcting all the errors I do agree with the applicant's counsel with regard the fact that an amendment can only be ordered when they do not prejudice the rights of the opposite party, do not disclose a new cause of action and is not brought late in the proceedings and is made for purposes of determining real issues in dispute as per **High Court Misc. Application No. 471 of 2009 Lubowa Gyavira vs Makerere University.** That is the law. There is no question about that.

In granting the amendment the trial magistrate addressed her mind to the said principles of amendment of pleadings, the order of the trial magistrate was as hereunder:

> "**Court realises that all documents in Court reflect Entebbe Court, when the case was transferred to Mpigi no step was taken by the parties to have the documents filed in the right court, I will allow under s. 98 of the CPA filing fresh suit since this matter as coming up for the first time, waiting for August 2012 to allow Counsel Birungi Wycliffe to just respond to the P.O would not be in the interest of justice".**

From that quotation, the matter was only coming for scheduling and was in the early stages of trial the proposed amendment was not going to prejudice the right of the opposite party and the amendment was only intended to allow real questions in controversy between the parties to be determined. Therefore, that the trial magistrate did not act with material irregularity when she allowed an amendment of pleadings as directed. As I have already held hereinabove in this ruling, if the applicant felt aggrieved with the decision of the trial magistrate, she would have sought leave of the trial Court to appeal against such decision.

In the premises all the preliminary objections that were raised by the applicant in the trial Court lacked merit. Accordingly, therefore, there are no valid grounds upon which this court can base on to revise the decision /ruling of the trial magistrate.

3. Conclusion

1.1 In the result and for the reasons given hereinabove in this ruling, this application lacks merit. It is accordingly dismissed with costs to the respondent.

1.2 The applicant is implored to file a written statement of defence in response to the said amended plaint in the lower Court within 10 (ten) days from the date of this ruling.

1.3 Further, the Assistant Registration of this Court is directed to have the original file of the trial Court, delivered at Mpigi Chief Magistrate's Court within 5 (five) days from the date of this ruling.

Dated at Kampala this 15th day of February, 2013.

sgd
JOSEPH MURANGIRA
JUDGE