

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
MISCELLANEOUS APPLICATION NO. 29 OF 2015
(ARISING OUT OF CIVIL SUIT NO. 396 OF 2012)

KAMPALA DISTRICT UNION OF PEOPLE
WITH DISABILITIES LIMITED ::::::::::::::::::::::::::::::::::: APPLICANT
VERSUS

1. ZIRIYO EDISON
2. NAKANDI KAVUMA ::::::::::::::::::::::::::::::::::: RESPONDENTS
3. KAJUMBA MUGANGA EVA
T/A ST. CATHERINE’S CLINIC

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

R U L I N G:

The Applicant, *M/s. Kampala District Union of People With Disabilities Ltd* brought this application under *Section 98 of the Civil Procedure Act (Cap.71); Order 41 rr.1(I), (3) & (4) Civil Procedure Rules (SI 71 -1)* seeking for orders that;

- (a) *Leave be granted to the Applicant to appeal against the High Court ruling and orders made on the 25th day of November, 2014, in the High Court Civil Suit No. 396 of 2012.*
- (b) *Costs of the application be provided for.*

The grounds of the application are that;

- (a) *The Applicant is dissatisfied with the ruling and orders made in the High Court Civil Suit No. 396 of 2012.*
- (b) *The ruling and orders against which the appeal is intended involved substantial questions of law which ought to be addressed and decided upon by the Court of Appeal.*

- (c) *The intended appeal is meritorious and has high probability of success.*
- (d) *The application for leave to appeal has been made without delay.*
- (e) *It is in interest of justice to allow the application and grant leave to appeal to the Applicant.*

The grounds are supported by the affidavit of Mr. Byrd Ssebuliba, an Advocate with *M/s Shonubi, Musoke & Co. Advocates*. The Respondent filed an affidavit in reply sworn by M/s Kizito Jacqueline, also an Advocate with *M/s Birungi & Co. Advocates*. At the hearing of this application, the Applicant was represented by Ms. Rebecca Nakiranda while the Respondents were represented by Mr. Kabayo Alex. Both Counsel made oral submissions. I need not reproduce the submissions in this ruling. It is, however, necessary to give the background in order to appreciate the application.

On 28/08/2012, the Respondents together with one Namyalo Lyton filed ***High Court Civil Suit No. 396 of 2012*** against the Applicant together with Kampala Capital City Authority. The Applicant filed its defence. On 09/04/2012, the parties filed a joint scheduling memorandum. In the title - head of the joint scheduling memorandum the names of all the four plaintiffs including that of Namyalo Lyton appeared. On 16/04/2014, the Respondents sought and obtained leave of court to amend their plaint. They were given ten days from the date of the order within which to file their amended pleadings. However, the Respondents filed the amended plaint on 05/05/2014, slightly beyond the ten days, and served the Applicant which filed its answer to the amended plaint. In the amended plaint the name of Namyalo Lyton the 3rd plaintiff in the original plaint was omitted by the Respondents.

When the case came up for hearing, Counsel for the Applicant raised preliminary objections. The main ones were firstly; that the amended plaint was filed out of time without seeking leave of

court. The second one was that one of the plaintiffs to the original suit Namyalo Lyton was struck off the plaint without leave of court. Based on these objections Counsel sought to have the suit dismissed. This court, however, overruled and dismissed the objections. Dissatisfied with the ruling and orders of dismissal, the Applicant now seeks leave to appeal hence this application.

The Applicant mainly faults this court for finding that the omission to mention the 3rd plaintiff, Namyalo Lyton, in the plaintiffs' facts in the amended plaint caused no prejudice. This court held that it was not necessary to apply to court for an order to strike out Namyalo Lyton as a plaintiff in *Civil Suit No. 396 of 2012* because, firstly; the parties in their joint scheduling memorandum found that Namyalo Lyton the 3rd plaintiff had no case against the defendants. Secondly, that when the plaintiffs were granted leave to amend their pleadings they were free to omit the 3rd plaintiff from the amended pleadings without having to again to apply to court to do so. According to the Applicant these findings were an error on part of court because the 3rd plaintiff in the original plaint clearly stated her case against the defendants. Secondly, that the scheduling memorandum, though a nut shell of the case the parties intend to present to court for trial as held by court, did substitute pleadings of the parties to the suit.

The Applicant's Counsel also faults this court for what he termed "equating" a court order to court directions, the latter of which the court termed as pre-emptory in nature. Further, that court erred in law and fact in alluding to the fact that by the defendant filing of an amended written statement of defence answering to all issues raised in the amended plaint it had overlooked the procedural lapses of the Plaintiffs.

Consideration:

The grounds for granting an application for leave to appeal are settled. In *Sango Bay Estates Ltd vs. Dresdener Bank & A' nor [1971] EA 17*; it was held that leave to appeal from an order in

civil proceedings will normally be granted where *prima facie* it appears that there are grounds of appeal that merit serious judicial consideration. Secondly, the application must have been brought without undue delay.

I will start with the issue regarding Lyton Namyalo, the 3rd plaintiff in the original plaint, whose name was omitted in the subsequent amended plaint without first applying to court to strike out her name. Court had granted leave to the plaintiffs to amend their pleadings and in their amended plaint omitted the name of 3rd plaintiff. In their scheduling memorandum, there were no any facts made in reference to the 3rd plaintiff. The 3rd plaintiff was omitted from the plaintiffs' case essentially because she had no case against the defendant. It was thus not necessary for the plaintiffs to apply to court again for an order striking out the 3rd plaintiff when they had already been granted leave to amend their plaint. Besides, no prejudice was occasioned to the defendant by the omission of the 3rd plaintiff from the amended plaint. It was not up to the defendant to choose the plaintiff to be sued by because only a plaintiff is *dominus litis*.

Apart from the above, it is important to note that when a party is allowed to amend his or her pleadings, it implies that the pleadings are not yet closed. This brings into play provisions of **O6 rr.20 and 21 CPR** that a party is at liberty to amend his or her pleadings without leave of court any time before the pleadings are closed. In my view, the Applicant's complaint with regard to the omission of the 3rd plaintiff's name in the amended plaint does not raise an important question of law that merits serious judicial consideration on appeal.

The other issue the Applicant raised is that court "equated" a court order to a court direction and termed the latter as pre-emptory in nature. Firstly, I note that this was misapprehension of the ruling of court by Counsel for the Applicant. At no time did court "equate" the two. Secondly, the Applicant argues, and rightly so, that court orders must be complied with and that any party

who disobeys them does so at his/her peril. To back this position, Counsel cited the case of ***Amrit Goyal vs. Harichand Goyal & 3 Others, CACA No. 109/2004.***

Without belaboring the point, in stating that court directives are directory and pre-emptory in nature, this court was acutely alive of the need for parties to comply with court orders. Court did not say that parties are free to disobey court orders without attracting consequences. That was the reason the court cited in its ruling the case of ***Hadkinson vs. Hadkison [1952] ALLER 567,*** which was relied on in ***Stanbic Bank (U) Ltd & Jacobensen Power Plant Ltd vs. URA, HCMA 42*** about the importance of complying with court orders and that disregarding of an order of court is a matter of sufficient gravity whatever the order may be.

The distinction between a court order and a directive, in the context of this case, ought to be understood. When court granted the plaintiffs leave to amend their plaint, that constituted an order of court, and it was granted pursuant to the relevant provisions of the ***Civil Procedure Rules.*** The time frame of ten days set by the court within which the plaintiffs were to comply with the order were directory in nature in that they were meant for expeditious case management by court. The directive was therefore pre-emptory in nature, in that the plaintiffs were required to comply with the court order, which was the leave to amend pleadings, within the time frame set by court; not by the rules.

Time frames set by courts are intended to regulate the proper and expeditious management of cases that come before courts. They are not intended to be additional procedural hurdles to litigants. Where litigants commit procedural lapses that are not fatal, and the opposite parties are not prejudiced, such lapses would not ordinarily carry with them severe sanctions meriting dismissal of the parties' cases. It would be the same where a litigant who, for some excusable reasons, fails to strictly adhere to specific timelines set by court for doing a certain act or taking a

certain particular step to ensure the timely progress of the case. In the instant case the slightly late filing of the amended plaint did not occasion any prejudice to the defendant, who in any case filed an answer to the amended plaint.

This court was acutely alive to provisions of **Order 6 r.25 CPR** that where a party has obtained leave to amend does not amend within the time set for that purpose by the order he/she shall not be allowed to amend after the expiration of the limited time. Indeed in its ruling this court not only stated the purpose of the order for the amendment, but went on to find that the defendant was not prejudiced by the failure of plaintiff to comply with time lines set by court. This position was buttressed in that regard by the case of **Mohan Musisi Kawanuka vs. Aisha Chand, SCCA No. 14 of 2003** that no prejudice is suffered by a party if it can be compensated by costs. It was up to the Applicant to show what prejudice it had suffered as a result of the slightly late filing of the amended of the plaint before meriting the award of costs. Instead of doing that, Counsel for the Applicant went on a fault - finding exercise of how the plaintiff had not strictly adhered to the time limits set by court; even though the defendant filed an amended defence answering to all issues raised in the amended plaint.

In my view, once all pleadings of the parties were fully on court record and there was nothing substantively fatal with them, it signaled a clear indication that the parties were desirous of being heard on the merits of the case, notwithstanding the lapses in complying with time limits earlier set by court. Such lapses did not operate as a bar to the subsequent proceedings. This is what court considered most in line with the spirit and letter of **Article.126 (2)(e) of the constitution**.

Owing to the above findings this court holds the view that no reasonable appellate court would fault a trial court that overrules objections, by parties and or their Counsel, that do not go to the substance of the case, and insists on hearing the merits of the case. This would be particularly so

where land rights of parties are in question, such as the instant case. This court in deciding as it was, as much as possible, avoiding the absurdity of paying undue regard to procedural lapses that did not go to the substance of the case. Such lapses did not constitute important questions of law that would merits serious judicial consideration on appeal. Leave to appeal is therefore denied. The application is dismissed with costs.

It is noted that this ruling comes against the background of all the plaintiffs unilaterally withdrawing their respective claims against the defendant in the main suit. This essentially determines the suit, unless the defendant still feels, for academic reasons that they need to pursue the appeal against the ruling.

BASHAIJA K. ANDREW
JDUGE
08/07/2015

Mr. Kabayo Alex Counsel for the Respondents/ Defendants – present.

Mr. Sebuliba Counsel for the Applicant/defendant – present.

Parties – all absent.

Mr. Godfrey Tumwikirize - Court Clerk - present.

Ms. Nanseera Hasipher – transcriber – present.

Ruling read in open court.

BASHAIJA K. ANDREW
JDUGE
08/07/2015