

**IN THE REPUBLIC OF UGANDA**  
**IN THE SUPREME COURT OF UGANDA**  
**AT MENGO**

**(CORAM: ODER, TSEKOOKO, KAROKORA, KANYEIHAMBA AND  
MUKASA-KIKONYOGO, JJSC).**

**CIVIL APPLICATION NO. 14 OF 1999.**

**BETWEEN**

**FRANCIS RUTAGARAMA BANTARIZA ::::: APPLICANT AND  
HABRE INTERNATIONAL TRADING CO. LTD ::::: RESPONDENT**

*[Application arising from the judgment and decree of the Court at Mengo ('Oder, Tsekooko, Karokora, Kanyeihamba and Mukasa-Kikonyogo JJ. S.C.) dated 20<sup>th</sup> July, 1999 in Civil Appeal No. 399]*

**RULING OF THE COURT.**

The applicant Francis Rutagarama Bantariza has seeking for orders to the following effect-

- (a) setting aside the judgment of the court dated 30th July, 1999;
- (b) further or in the alternative the respondent be deprived of the benefits, including costs, the said judgments gave to him as appellant;
- (c) the order extracted from the said judgments be set aside,
- (d) the applicant be awarded the costs of the appeals in the Supreme Court and the Court of Appeal; and
- (e) for such further or other order or orders as shall to the court be just.

In the notice of motion, the applicant has set out six grounds in support of the motion as follows:

- (i) When Court of Appeal civil appeal was heard and even decided, the respondent had already sold off the suit property, but did not inform the court of that fact;
- (ii) The respondent, without locus standi and having wilfully disposed of the suit property filed a notice of appeal, filed an appeal and argued the appeal in the Supreme Court without disclosing that fact to the court;
- (iii) The respondent put itself in a position it could not lose by selling the suit property and proceeding with the appeals notwithstanding it could not have delivered the suit property to the applicant if applicant had won then and now

unjustly stands to get costs of appeals;

(iv) The respondent abused the process of the court;

(v) The ends of justice demand that the respondent who put the suit property out of the jurisdiction of the courts as far as the appeals were pending in the Court of Appeal and later itself appealing to the Supreme Court, should not be rewarded by the court with costs and should, instead, reimburse the applicant costs he has incurred by pursuing futile appeals;

(vi) It is just and equitable that the judgments be set aside and/or the order be varied; and for an order that the costs of and incidental to this application be paid by the respondent to the applicant.

The application is made under S.8 of the Judicature Statute, 1996, Section 101 of Civil Procedure Act and Rules 1(3) and 41 of the Rules of the Court. The applicant swore an affidavit in support of his application. To the affidavit are annexed annexure "A" to "I". Mr. Nyanzi Yasin, Advocate, made an affirmation in reply to the applicant's affidavit. The affidavits and the affirmation of Nyanzi are on the record. We see no need to reproduce theirs contents.

Dr. J. Byamugisha, Counsel for the applicant in his submissions, relied upon the contents of the notice of motion and the affidavit of the applicant and referred to the annexure thereto and contended that because of the provisions of Order 21 Rule 9(1) of the Civil Procedure Rules and S.8 of the Judicature Statute 1996 , one Bagalaliwo who had purchased the suit property and acquired the same should have been the respondent in the Court of Appeal instead of the present respondent. He further contended that because the respondent had sold and transferred his interest in the suit land to the said Bagalaliwo at the time the appeal was heard and decided by the Court of Appeal and subsequently in this court, the respondent who had no locus standi therefore was not entitled to judgment in this court and the consequential order for costs and the costs. He submitted that the respondent deceived the Court of Appeal and this court when he did not disclose both in the Court of Appeal and before us that he had disposed of the suit land. Learned Counsel then urged us to exercise our inherent power to prevent abuse of process of court by depriving the respondent of the costs in this court and in the Court of Appeal which we had awarded to the appellant as a successful party.

For the respondent, Mr. Mbabazi contended that the application is based on new evidence and that since our Rule 29(1) forbids us from accepting new evidence, the application should be rejected. Learned Counsel argued that by the 5/11/95 when the trial court gave judgment, the lease of the applicant in the suit land had expired and therefore he had no locus standi. He further argued that since the applicant had preferred an appeal against the respondent to the Court of Appeal, the respondent was bound to contest it and had to file the subsequent appeal to this court to challenge the judgment of the Court of Appeal. Counsel also contended that Order 21 Rule 9(1) of Civil Procedure Rules was not applicable to this case. Counsel further stated that the applicants' contentions about costs should be raised elsewhere but not in this court.

We understood Dr. Byamugisha to have given up the prayer seeking to set aside our judgments. He appears to want us to deprive the respondent of costs and therefore he asks us to vary our judgments only in so far as the award of costs is concerned. We think that Dr. Byamugisha has acted properly in not challenging the validity of our judgments.

The issues raised in this application can then be summarised as follows:

- (i) Was the respondent entitled to oppose the appeal in the Court of Appeal?
- (ii) Was the respondent justified in bringing his appeal to this court after he lost in the Court of Appeal?
- (iii) Has the applicant established a case of abuse of the process of court by the respondent which would justify our interference by depriving him of the costs which we awarded it in our judgments in the substantive appeal? Issues (i) and (ii) in part raise the question whether Rule 9(I) of Order 21 of the Civil Procedure Rules affected the respondent as a respondent in the Court of Appeal and subsequently as an appellant in this court. Assuming that the respondent had sold the land by the time the appeal in the court below was heard and determined, had he a right to be heard there? Order 21 is concerned with the consequence of death, consequence of insolvency and of marriage of a female party to a suit, during the pendency of a suit. Rules 1,2,3,4,5,6,7 and 8 of the Order show in effect that in general, death and insolvency of a party or marriage of a female party to a suit does not abate a cause of action or proceedings. A legal representative in the case of death or an assignee or receiver in the case of an insolvent may continue the suit as a

party. The said Rules 1 to 8 preceding rule 9 concern results on a pending suit/cause where the status of a party changes. Order 21 Rule 9(1) reads:

*“In other cases of an assignment creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved”.*

Our understanding of this rule is that the provisions of this rule are permissive in that, prime facie, the suit may be continued in the name of the original party or assignee or a person upon whom interest has devolved. The rule found its way into our statutory provisions via India where courts have interpreted the rule in a number of cases.

In AIR Commentaries on the Indian Code of Civil Procedure by V.R. Manohar and W.N. Chitaley, 10th Ed, Vol. 4, there are commentaries on the India Order .22 Rule 10 which corresponds exactly with our 0.21 Rule 9. The Indian 0.22, Rule 10 (1) provisions are exactly in the same words as the words of our 0.21 Rule 9(1). It is there observed that the words “other cases etc” in the sub-rule mean cases other than those provided for in the preceding rules. That these words include cases of transfer of property inter vivos. The applicability of the rule appears to be based on the principle that the trial of a suit cannot be arrested merely by reason of a devolution of the interest of a party in the subject matter of the suit, that the person acquiring the interest may continue the suit with the leave of the court but that if he does not choose to do so the suit may be continued with the original party and the person acquiring the interest will be bound by or can have the benefit of the decree as the case may be.

In the Indian case of Sheokumar vs. Central Coop. Bank and Another. A.I.R.34 (1974) Patna 477 a suit by a plaintiff for a declaration of title and possession against the Bank and C. was decreed, the decree directing that the costs of the suit to be borne by the bank alone. The bank had transferred its interest in the suit property to Central Coop Bank before the decree was passed. The bank appealed.

The second appellate court held that the Bank had a right to the appeal independently of whether the bank still had a subsisting interest in the result of the litigation.

The main point which was argued before the second appellate court was that the appeal before the first court was incompetent on the ground that the Bank had parted with its interest in the suit property and was no longer interested in the result of the litigation. The transfer in question was a transaction of sale. From the facts of the case, it was apparent that at the time when the trial court passed the decree and also when the first appeal was filed the Bank had no subsisting interest in the suit property.

We would like to point out that it is a recognized rule that a suit must be tried in all stages in the cause of action as it existed at the date of commencement, and that in appeal the question is whether the decision of the trial court is correct on the facts as they stood when the judgment of the trial court was rendered, and that no subsequent event or devolution of interest can affect that question. Of course an appellate court may take notice of events which have happened since the institution of the suit and afford relief of the altered conditions. This doctrine however is of very exceptional character, and is to be applied in cases where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate, or that it is necessary to base the decision of the court on the altered circumstances in order to shorten litigation or to do justice between the parties: Sheokumar case (supra).

**In Sheokumar case** the court alluded to the application of the Indian Code of Civil Procedure 0.22 rule 10 and then observed that whereas order 22 rule 10 provides means by which a party upon whom an interest has devolved during the pendency of a suit may, by leave of the court, continue the litigation, the legislature has not provided that in the event of the person upon whom the interest devolves not obtaining leave of the court, the suit would stand dismissed. With respect we think that the same reasoning applies to the arguments advanced by Dr. Byamugisha in the present application.

The decision in Sheokuma's case is of persuasive value and appears to cover the facts of the present case. We have not been able to lay our hands on a Ugandan or East African Court decision directly on the issues before us. There is an instructive decision of the High Court of Uganda concerning consideration of our 0.21 rule 4 of CP. Rules. This is the case of **Gajender Pal vs. Ram B. Sirdaw** (1961)EA 344:.

In 1958 the defendant R.B.S. sued one, H.R., who subsequently died. In April 1960, R.B.S. moved the court to join the first plaintiff as a party to the proceedings begun in 1958 as the

son and legal personal representative of the deceased. The application was adjourned as defective since the deceased had appointed two executives namely his son and widow, and by a letter written in June, 1960, to the Registrar and signed by the advocates for R.B.S. and the executors, they requested that a consent order be made substituting the names of the executors in the proceedings for that of the deceased H.R. The Registrar simply recorded the filing of the letter of consent and made no order thereon. In September, 1960, the hearing was resumed and on the basis that the executors had been duly impleaded, judgment was entered for R.B.S. and a decree was later extracted.

The executors then sought to appeal and their advocate having discovered that no order had been made on the letter of consent tried to have the proceedings subsequent to H.R.'s death set aside by consent but R.B.S. would not agree. The executors then sued for declarations that the proceedings, judgment and decree were null and void, that the suit had abated and for the judgment and decree to be set aside. R.B.S. defended claiming that he had done all that was necessary and that the plaintiff executors were not entitled to question the proceedings to which they were active and consenting parties.

Rule 4 relied upon reads as follows:

*“4 (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.*

*“(3) where within the time limited by law no application is made under sub-r (1), the suit shall abate as against the deceased defendant.”*

Sheridan J. held that:

- (i) Since O.21, r.4, places the duty upon the court to implead the legal representatives when application is made, the parties should not be penalised for any shortcomings in carrying out the ministerial function of the court.
- (ii) the claim of the plaintiffs was founded upon an immaterial irregularity and technicality, it would not be just to grant the declarations sought. The Suit was dismissed.

The decision in the above case illustrates the point that proceeding in a suit may continue in the name of the original party. Our understanding of the proceedings giving rise to this

application is this. That it was the applicant who instituted in the High Court the suit against the respondent. That in the eyes of the applicant at the commencement of the suit the respondent was a trespasser. That by the suit the applicant sought to have the respondent evicted from the suit land; that on /1 1/1995 when Mukanza J., dismissed the suit and awarded costs against the applicant as a losing plaintiff, the respondent had not disposed of the suit property. There is nothing to show that after judgment in the High Court either the trial court or the Court of Appeal made an order forbidding the respondent from disposing of the suit property. The record shows clearly that it was the applicant who appealed to the Court of Appeal. We think that at that stage the respondent was entitled, if it chose, to resist the appeal. It has not been disclosed to us when exactly the respondent disposed of the suit property. But whatever the date of the sale, our view is that even though it would have been proper for the respondent to inform the Court of Appeal and subsequently this court, of the disposal of the suit property, 0.21 Rule 9 does not make it mandatory for the respondent to do so or indeed to move any court so that Mr. Bagalaliwo could be substituted for the respondent either in the Court of Appeal or here or in both courts. In these circumstances we are not persuaded by Dr. Byamugisha that the respondent violated the principle against abuse of court process by fighting the appeal in the Court of Appeal or by appealing subsequently to this court against the decision of the Court of Appeal in its own name.

It is not improbable to think that even if Bagalaliwo were substituted he would have insisted that the respondent should bear all the consequences of the litigation.

The award of costs per se cannot be a basis for us to revise our judgments.

In the result this application must fail and it is dismissed with costs to the respondent.

Delivered at Mengo this.....14<sup>th</sup>..... day of . . . .June, 2000.

A.H.O.ODER

JUSTICE OF THE SUPREME COURT .

J.W.N.TSEKOOKO

JUSTICE OF THE SUPREME COURT.

A.N. KAROKORA

JUSTICE OF THE SUPREME COURT.

**G.W. KANYEHAMBA,**  
**JUSTICE OF THE SUPREME COURT.**

**E.L.M.KUKASA KIKONYOGO,**  
**JUSTICE OF THE SUPREME COURT.**