THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL REVISION NO. 016 OF 2011

(Arising out of MA No. 1299 of 2010)

(Arising out of Mengo Civil Suit No. 1673 of 2008)

1. BWIRE WAFULA
2. SARACEN (U) LTD } ::::::::::::::::::::::::APPLICANTS/DEFENDANTS

VERSUS

JOHN NDYOMUGYENYI::::::::::::::::::::::::RESPONDENT/PLAINTIFF

BEFORE: HON. LADY JUSTICE ELIZABETH MUSOKE

JUDGMENT

This application is by a formal letter brought under Section 83 of the Civil Procedure Act addressed to the Registrar of the High Court of Uganda Civil Division seeking to revise the orders of the Chief Magistrate of Mengo Court in Miscellaneous Application No. 1299 of 2000 wherein the applicant's application to set aside the ex-parte judgement dated 12/10/2010 was dismissed on grounds that the affidavit supporting the application did not distinguish facts based on knowledge and those based on belief.

The background of this case is that the respondent/plaintiff filed a suit against the applicants/defendants for recovery of special and general damages arising out of an injury allegedly inflicted by the applicants/defendants on the plaintiff. When the case was fixed for hearing, Counsel for the applicants/defendants did not appear. He, however, by a formal letter, sought for an adjournment as he was attending a criminal session before the High

Court. The trial Magistrate ruled that this was not the proper way for seeking an adjournment and the matter proceeded ex-parte, eventually leading to an exparte judgement being entered against the applicants/defendants on 12th October 2010. Counsel for the applicants sought to set aside the ex-parte judgment but the application was dismissed on the grounds that the application did not distinguish facts based on knowledge and those based on belief; hence this application for revision.

Counsel for the parties filed written submissions.

Counsel for the applicants submitted that the application to set aside the ex-parte judgment was dismissed on grounds that the affidavit supporting the application did not distinguish facts based on knowledge and those based on belief, without considering the merits of the application at all. He relied on the case of ***Kizza Besigye Vs Y.K Museveni and Anor Election Petition No 1 of 2001*** to argue that the trial Magistrate grossly erred in dismissing the application on grounds of a defective affidavit.

He further relied on the English Court of Appeal case of ***Rossage Vs Rossage 1960 WLR 249,*** where LJ Hudson considered Order 38 Rule 3 of the then Supreme Court Rules of (England which is substantially the same as our Order 19 Rule 3). The Court of Appeal expunged some of the affidavits from the court record because the proportion of the offending materials to the relevant materials was so high that court found it proper to remove the offending affidavit all together. The offending matters were scandalous and would have embarrassed the court as well the opposite party. This was not the case in the applicant's affidavit, where it was a case of only distinguishing between facts based on belief and knowledge.

In reply, Counsel for the respondent submitted that, the application lacked merit as it sought revision of an interlocutory order passed in Miscellaneous Application No. 1299 of 2010, and not Civil Suit No. 1673 of 2008. He stated that the High court has no power to revise interlocutory orders, citing the case of ***Hassan Karim & Co Ltd Vs Africa Import and Export Central Corporation Ltd [1960] EALR 396 at 397.***

He further submitted that the present application for revision did not meet the criteria laid down under Section 83 of the Civil Procedure Act Cap 71. The applicants did not show that the court exercised a jurisdiction not vested in it by law or failed to exercise a jurisdiction so vested. Neither did the applicants show that the trial Magistrate exercised the jurisdiction illegally or with material irregularity or injustice.

It was also Counsel's submission that an affidavit which did not distinguish between matters based on information or belief was defective and as such the trial Magistrate was justified in ruling that the affidavit was defective.

I have considered the application and the submission of learned Counsel on either side.

Section 83 of the Civil Procedure Act Cap 71 states:

> ***"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 illegally or with material irregularity or injustice, the High Court may revise the case and may make such order in it as it thinks fit; …"

Further, in ***Hitila Vs Uganda [1969] 1 E.A. 219***, the Court of Appeal of Uganda held that in exercising its power of revision the High Court could use its wide powers in any proceedings in which it appeared that an error material to ***the merits*** of the case or involving a miscarriage of justice had occurred. It was further held that the Court could do so in any proceedings where it appeared from any record that had been called for by the Court, or which had been reported for orders, or in any proceedings which had otherwise been brought to its notice. Similarly, in ***Fatehali Vs Republic [1972] 1 E.A. 158 (CAD)*** the Court of Appeal sitting at Dar-e-salaam held that a judge of the High Court has power, on his own motion, to call for and revise any proceedings in the Magistrate's court, in whatever manner the proceedings came to his knowledge.

It appears to me that in Uganda, the High Court has very wide powers in as far as revision of the proceedings of the Magistrates' courts are concerned. I, therefore, find that the objection raised by Counsel for the respondent that this court has no power to revise interlocutory matters does not hold any water. The High Court in this case is being asked to revise the orders because the trial Magistrate is alleged to have acted in exercise of his jurisdiction illegally with material irregularity or injustice. The Miscellaneous Application that the applicants seek this court to revise, appears to have disposed of the head suit. In my view, the High Court has powers to review such orders as in the present case, where the orders have the effect of finally disposing on a Civil Suit.

Further, Order 19 rule 3 of the Civil Procedure Rules S.I 71-1 provides:

> ***"(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted provided that the grounds thereof are stated.***
>
> ***(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents shall unless the court otherwise directs, be paid by the party filing the same."***

The issue for determination is what should be the fate of an affidavit filed by a party, which does not strictly comply with the law as stated above; specifically, where the affidavit did not distinguish facts based on knowledge and those based on belief.

Learned counsel for the respondent submitted that the law on affidavits is very clear and that the trial Magistrate was justified when he rejected the affidavit for failing to so distinguish. He relied on ***Allen Isingoma Vs Alex Muhairwe Criminal Case No 39 of 1990.***

The affidavit of Eve Nalwanga reads;

> ***"I, Eve Nalwanga of M/S Kasirye , Byaruhanga & Co Advocates P.O. Box 10946 Kampala, being an adult female of sound mind do hereby solemnly make oath and state as follows;***
>
> 1. ***That I am an advocate working with the above firm and I am well versed with the facts surrounding the above case and I swear this affidavit in that capacity.***

2. ***That we duly informed court through a letter dated 6th day of July 2010 of Counsel's indisposition to attend court and further requested that the matter be adjourned to any date after 26th day of July 2010.***
3. ***That the on the said day counsel with personal conduct of the case Mr. Paul Rutisya was appearing before His Lordship J.B Katutsi in Session Case 001/2010 UGANDA VS ISANGA JOSEPH .***
4. ***That four prosecution witnesses were called and the hearing lasted till evening on the said date.***
5. ***That despite the said letter requesting for adjournment , the matter was heard exparte and several further attendances were made in court.***
6. ***That to our surprise we established that judgment had been entered exparte against the defendants on the 12th day of October 2010.***
7. ***That the decree was further extracted by counsel for the respondent on the 12th day of October 2010.***
8. ***That on the 27th day of October 2010 we were served with taxation hearing notice dated 13th day of October 2010.***
9. ***That it is in the interests of justice that this honourable court sets aside the above judgment.***
10. ***That I am well aware that this honourable court can in such circumstances as those in the present application intervene and both stay the execution of the decree and set aside the ex parte judgment.***
11. ***That I swear this affidavit for and on behalf of the defendants and in support of the application to stay the execution of the decree and set aside the exparte judgment entered against the defendants in civil suit no 1673 of 2008.***
12. ***That what I have stated above is true and correct to the best of my knowledge and belief."***

The deponent Nalwanga indicated and attached the documents, that is to say, a copy of the letter and proceedings in the High court where counsel was appearing when the case was heard, and this was enough to show she knew what she was stating. Coupled with the fact that she was an advocate in that firm, she was in a position to know about the case.

In ***Kizza Besigye Vs Y.K Museveni and Anor Election Petition No 1 of 2001*** cited by counsel for the applicant, Justice Tsekoko JSC stated that;

> ***"I think that the inclusion of the words belief or information is in some cases superfluous and does not render each affidavit invalid, at any rate not the whole of each affidavit. In my opinion it would be improper in this petition to strike out wholly affidavits which are found to contain so called hearsay evidence in some parts where the offending parts of the same affidavits can be severed from the rest of the affidavit without rendering the remaining part meaningless".***

Further, in ***Premchard Rainchard Vs Quarry Services Ltd [1969] EA 514***, court held that an omission to state an already implied apparent source of information in an affidavit is a minor discrepancy which did not invalidate it.

In my view the trial Magistrate ought to have considered the justice of the case, and decided the application on its merits. It was an injustice on part of the applicant for the Magistrate to reject the application on grounds that the affidavit in support was defective in light of the above authorities (***Kizza Besigye Vs Y.K Museveni and Premchard Rainchard).***

In conclusion, the applicant satisfied the test in Section 83 of Civil Procedure Act. He proved that the trial Magistrate exercised her jurisdiction with material irregularity and injustice. The application to revise the orders of the trial Magistrate is granted and the said orders in Miscellaneous Application No. 1299 of 2010 are hereby set aside.

Having decided as I have above, I will go on to consider whether the application to set aside the exparte judgment had any merits. The court is basing itself on Section 33 of the Judicature Act which states:

> ***"The High Court shall, in the exercise of the jurisdiction vested in it by the Constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided."***

I note that the main ground for denying the application of the applicants for an adjournment was because it was sought by letter of the applicant's Counsel, who indicated that he was handling a Criminal Session before the High Court. True, there may be authorities to the effect that court could not grant an adjournment at the request letter of the plaintiff (or Counsel for that matter). However, Article 126(2) (e) of the 1995 Constitution was aimed relaxing some rigid provisions of the law that would end up unnecessarily causing injustice to the parties, especially where no prejudice was likely to be occasioned.

Article 126 (2) (e) states as follows:

> ***"In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles:***
> ***(e) substantive justice shall be administered without undue regard to technicalities."***

I am of the view that a genuine application for adjournment by letter of Counsel should not be disregarded just because it is by letter, as long as the

advocate could prove the reasons for being unable to attend, if required to do so by court at an appropriate time.

I find that the trial Magistrate ought to have considered the justice of the case and allowed the adjournment. The failure to allow the adjournment resulted in injustice to the applicant.

I have looked at the pleadings and I find that there are triable issues reflected therein, which need to be addressed by hearing the case on its merits. The last thing a court should do is to deny a party a hearing on merits, where the pleadings reflect triable issues.

In the circumstances, I find that the application to set aside the exparte judgment entered against the applicants on 12th October 2010, and the decree of the same date, in Mengo Civil Suit No. 1673 of 2008, has merit. The application is also hereby granted; the exparte judgment and decree are hereby set aside. It is ordered that the file be sent back to Mengo Chief Magistrate's Court and the matter be heard on its merits, before a different Magistrate.

It is so ordered.

Elizabeth Musoke
JUDGE
14/11/2012