

UGANDA / JUDGMENT

Barugahare v Kenyi & Anor (HCT-01-CS-CA-067 OF 2016) [2017] UGHCLD 238 (31 October 2017) [2017] UGHCLD 238

COURT

HC: Land Division (Uganda)

BEFORE

Ojok, J

CASE / FILE NUMBER

HCT-01-CS-CA-067 OF 2016

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT-01-CS-CA-067 OF 2016

ALOYSIUS BARUGAHARE:.....APPELLANT

VERSUS

1. KENYI MILLA MOSES

2. TUSABE WILLIAM BUKYA:.....RESPONDENT

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK

RULING

Brief background

The Appellant/claimant sued the Respondent on November 5, 2007 in the Chief Magistrate's court at Kasese for a declaration that the suit land belonged to him, an order evicting the first respondent therefrom, a permanent injunction, mesne profits with interest, general damages with interest and costs of the claim. On December 7, 2007, the Appellant filed an amended statement of claim. The Respondent wholly denied the appellant's claim. The learned trial Chief Magistrate Katorogo Moses agreed with the Respondents and entered judgment by which he dismissed the Appellant's claim with costs. The appellant being aggrieved with that decision appealed against the whole judgment, decree and orders on three grounds which are;

1. That the learned Chief Magistrate erred in law and in fact in failing to properly evaluate the evidence on record and therefore came to erroneous decisions;
2. Dismissing the appellant's suit on the ground that it did not disclose the cause of action.
3. Dismissing the Appellant's suit on the ground that the dispute ought to have first gone for arbitration under Section 73 of the Co-Operative Societies Act and could only come to the Chief Magistrate's Court by way of an appeal and not as court of first instance only
4. Holding that the appellant is not the owner of the shares comprised in the suit land with Rugendabara Co-Operative Farming Society.
5. That the learned trial Chief Magistrate erred in law and fact in finding and holding that it is Rugendabara Co-Operative Farming Society Ltd which violated the Appellant's rights and the appellant should accordingly have sought redress against that society and not the Respondents.
6. That the learned trial Chief Magistrate erred in law in holding that the first Respondent bonafidely (sic) acquired the suit land

Representation

Counsel Kateeba Cosma appeared for the Appellant, Komunda A Moses appeared for the 1st Respondent and Rwakatooke Mugisha appeared for the 2nd Respondent

Duty of the first appellate court

Duty of the 1st Appellate Court is to appreciate the evidence adduced in the trial Court and the power to do so is as wide as that of the trial Court. Where the trial Court had resorted to perverse application of the principles of evidence or show lack of appreciation of the principles of evidence, the Appellate Court may re-appreciate the evidence and reach its own conclusion. (See **Fredrick Zaabwe Vs Orient Bank Ltd SCCA No. 4/2006 & ULR Volume I at pp 98 and 130**).).

Before the matter would proceed, counsel for the second Respondent raised 2 preliminary points of law; 1) That the appeal is incompetent for failure to extract a formal decree before filing an appeal. And second that this appeal was filed out of time and should therefore be struck out and in his view would dispose off the case.

Preliminary Objection

That the appeal is not from the decree or orders of the trial Magistrate Grade 1 at Kasese in exercise of his original Jurisdiction wherein he tried the land dispute and gave Judgement in favour of the Respondent but it is an appeal from his decision which is contrary to the law, it is submitted that the decision or order appealed from must be extracted and filed with memorandum of appeal. Counsel submitted that there is no decree, the appeal is incompetent and ought to be struck out with costs.

Counsel quoted the case of **Civil Appeal No. 28/2009 (Arising out of Mpigi Chief Magistrate's Court Civil Suit No. 10/2003) Kampefu Farm Ltd Vs Bunkedekko Livingstone (unreported)**.

The case of **Robert Bwiso Vs Mary Tibamwenda HCCA No. DR. MFP 5/89** before I. Mukanza J and also the case of **Yakuze Vs Nakabembe (1958-1990) HCB 138** before **Byamugisha Ag J** (as then he was).

The case of **Kemirembe Sarah Vs National Housing & Construction Company NO. 83/2010, Y. Gumisiriza Versus Hajji Muhammed Kanjanjire HCCA No. 5 of 2014**.

Failure to extract a formal decree before filing the appeal was a defective going to the jurisdiction of the court and could not be waived. The appeal was therefore incompetent.

Allow me to address/resolve the preliminary objection S. 220 (1) states that subject to any written law and except as provided in this section, an appeal shall lie-

1. From the decrees or any part of the decrees and from the orders of Magistrate's Court presided over by a Chief Magistrate or Magistrate Grade 1 in the exercise of its original civil jurisdiction to the High Court.
 2. From the decision, Judgment and orders of a Magistrate's Court, whether interlocutory or final presided over by a Magistrate Grade II and III to a Court presided over by a Chief Magistrate
 3. From decrees and orders passed or made in appeal by a Chief Magistrate, with the leave of the Chief Magistrate or of the High court, to the High Court.
- (2) Subsection (1) (b) shall have effect notwithstanding anything contained in the Civil Procedure Act or in any rules of Court that a decree be drawn up and extracted before an appeal is filed.

I will not look at any provision of the Civil Procedure Act and the Rules because of S.2 (1) (b) ties my hand. However S.16 (1) of the Judicature Act is very clear that subject to the constitution, this Act and any other law, the High Court shall have jurisdiction to hear and determine appeals which lie to it by virtue of any enactment from decision of Magistrate's Courts and other subordinate courts in the exercise of their original or appellant jurisdiction.

But even still S. 220 (1) (a) of the Magistrate Court Act allows appeals from the decree or any part of the decrees and **from orders of Magistrate's Court presided over by a Chief Magistrate or a magistrate Grade I in the exercise of its original Civil jurisdiction**.

I respectfully disagree with the authority cited by the Respondent's counsel to wit;

1. **Kampefu Farm Ltd Vs Bunkeddeko Livingstone** by Justice Murangira.
2. **Robert Buso Vs Mary Tibamwenda Court of Appeal No. DR. MFP 5/1989**
3. **Yakuze Vs Nakabembe (1988-1990) HCB 138**, before Lady Justice Byamugisha.

4. **Kemirembe Sarah Vs National Housing & Construction Company NO. 83/2010,**
5. **Y. Gumisiriza versus Hajji Muhammed Kanjanjire HCCA No. 5 of 2014.**

That you must first extract a decree before appealing.

All the above cases cited were distinguished by the decision of Lady Justice Percy Night Tuhaise in the case of **John Byekwaso & 2 Ors Vs Yudaya Ndagire Civil Appeal No. 078/2012** which I agree that not extracting decree is just a mere technicality that can be cured by Art 126(2) e of the Constitution that requires that substitute Justice shall be administered without undue regard to technicality. The case of **Standard Chartered Bank (U) Ltd Vs Grand Hotel (U) Ltd Civil Appeal No. 13/1999** extraction of a formal decree embodying the decision being appealed against is no longer a requirement in the institution of an appeal. An appeal by its nature is against the Judgment of a reasoned order and not by the Decree extracted from the Judgment.

This preliminary objection is overruled.

2nd preliminary Objection S. 79 (1) and (2) Civil Procedure Act provides that;

Section 79(1) (a) provides that;

*“*Except as otherwise specifically provided in any other law, every appeal shall be entered within thirty days of the date of the decree or order of the court.....*..”*

Section 79 (2) provides that;

*“*In computing the period of limitation prescribed by this section, the time taken by the court or the registrar in making a copy of the decree or order appealed against and of the proceedings upon which it is founded shall be excluded*.”*

Having carefully perused the record, time Judgment was delivered on the 23rd September 2016, memo of Appeal filed on the 8th/November, 2016, implying that the 30 days to appeal had elapsed. However under minute N0. 1 reminder states that;

Please refer to the above Civil Suit in which Judgment was delivered on 23/09/2016 our letter of that date requesting for certified typed copy of proceedings and Judgment therein to enable us file an appeal against the same and also see a letter dated 8/11/2016 calling for the lower court file and a letter dated the same day forwarding the lower court file.

This would signify that there was an earlier letter written to court. I must point out that this is our mistake of not probably filing letters and documents systematically to enable us proof whether it is true or not true and in light of the above I will painfully say may be the letter was written within the 30 days. Much as I have not seen anywhere under any law that the other party (Respondent) must be served with the letter requesting for certified copies of proceedings and Judgment, it is a matter of good practice or courtesy that a copy be also served on the other party. This Preliminary Objection is also overruled.

Resolution of grounds of appeal

It is evident that the land which forms the shares of the members belong to the society as it is the registered proprietor of the entire block of land by virtue of having title in its names.

The Appellant and the 1st Defendant are all members of the cooperative society on which their shares are based and or derived. I therefore see no reason why this matter was not first taken by the Arbitrator in accordance with S. 73 of the Cooperative Act which states that matters of co-operative society come to court by way of appeal not as a court of 1st instance.

Indeed S. 75 of the Co-Operative Society Act is very clear that you appeal from the decision of the board

Appellant/plaintiff owner of ... 12 acres of land being his shares within the Co-Operative Society Ltd which he purchased from Mr. John Karani who later sold his shares to the 1st Defendant who authorised the 2nd Defendant to sell the same and declared the 2nd defendant as his agent.

Judgment dated 23/04/2016

S.73 (1) (a) if any dispute ... the business of a registered Society arises

- (a) among the members, past members and persons claiming through the members, past members and deceased members, the dispute shall be referred to an Arbitrator or arbitration for decision.

S.75 states of Appeal to the Court from the decision of the board.

I agree with the argument of the learned Chief Magistrate that this matter would have been best handled by the Co-Operative not this court.

Much as High Court has unlimited jurisdiction, it is clogged with serious backlog and not any case should be brought to court before exhausting the internal mechanisms put in place. High Court should only handle such cases when the internal mechanism is exhausted and failed to handle the matter.

I therefore refer this matter back to the Arbitration to handle it, if it fails to the board and Court shall be the last resort. See the case of **Ibanda Co-Operative Savings & Credit Society Ltd Vs Sarah Kyarikunda & Anor (unreported) HCT-05-CV-MA-0060 of 2011 arising from IBD-00-CV-CS-110 of 2010**

Under S. 73 (10) (c) (supra), only the arbitrator(s) can refer a matter on a point of law to the High Court. Even here, the parties have no right to file the matter in the High Court. A party can only appeal against the decision of the Board under S. 75 (1) (supra) on a point of law such an appeal lies to the Magistrate Grade 1 or Chief Magistrate; depending on the value of the subject matter and geographical location of the parties. Under S.1 (i) (supra) "court" mean a Chief Magistrate or Magistrate Grade 1 in case of a registered Society; and High Court in case of a union of two or more registered societies. Therefore, the court cannot determine disputes as between a registered society and its members or as between members of a registered society when

exercising its original civil jurisdiction. Similarly such disputes cannot be commenced in the High Court even with its unlimited Jurisdiction under Article 139(1) of the Constitution and Section 14 of the Judicature Act (Cap 13). All such cases must come to court by way of appeal, and each of the defined courts is an appellate court and not a court of first instance as regards disputes envisaged under the Act.

I therefore refer this matter back to the Arbitrator to handle it, if it fails then appeal to the board and court shall be the last resort. See the case of **Ibanda Co-Operative Savings and Credit Society Ltd Vs Sarah Kyarikunda & Anor (unreported) HCT-05-CV-MA-0060 of 2011 arising from IBD-00-CV-CS-110 of 2010.**

This appeal is therefore dismissed with costs for being incompetent and premature.

Right of appeal explained.

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OYUKO ANTHONY OJOK

JUDGE

31/10/2017

Judgment delivered in the presence of

1. Counsel Claude A Counsel for the Appellant.
2. Counsel Komunda for the 1st Respondent.
3. Counsel Rwakatooke Mugisha Counsel for the 2nd Respondent.
4. The Appellant.

.....

Oyuko. Anthony Ojok

Judge

31/10/2017

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