

UGANDA / JUDGMENT

Haji Ssalongo v Kasese Town Council and Another (Civil Suit 13 of 91) [1994] UGHC 43 (28 July 1994)

[1994] UGHC 43

COURT
High Court of Uganda

BEFORE
Mukanza, J

CASE / FILE NUMBER
Civil Suit 13 of 91

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How he Justice Equida Nacide THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CIVIL SUIT NO. DR. MFP 13/91

HAJI ABDU SSALONGO::::::::::::::::::::PLAILPIFF

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KASESE TOWN COUNCIL ::::::::::::::::::DEFENDANTS M/S KABACO (U) LTD BEFORE: THE HONOURABLE MR. JUSTICE I. MUKANZA. $\$R\$ U L I N G$:-

After a ruling by this court dismissing the suit on the ground that the first defendant was not served with the statutory notice of intention to sue as provided under section 1(1) C of the Civil Procedure and limitation Act 1969 (Act 20 of 1969) the learned counsel appearing for the plaintiff verbally applied for leave to appeal against that ruling to the Supreme Court. The application was vehemently opposed by the counsels representing the defendants and hence this ruling to resolve the matter.

Mr. Rukutano Mwesigwa submitted that he was doing that under order 40 rules (2) and 3 of the Civil Procedure Rules. And rule 39 of court of Appeal for East/Rules 1972 and that he had opted to apply for this leave informally.

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The first ground was that the court erred that notice t_0 the intended defendant ought to be annexed to the plaint whereas the second ground was that the court also erred in law by finding that such failure to annex the notice of intention to sue by the plaintiff nullified the service thereof.

Mr. Mwenekalima who appeared for the second defendant submitted that applications of this nature are governed under 40 of the civil procedure rules. Specifically there is no right of appeal sub rule 2 of rule 4 of order 40 of the civil

\$.../2\$.

procedure Rules and the application for leave shall be by notice of motion. It would appear rule ³⁹ of the court of Appeal for East Africa Rules 1972 comes into play when this court has refused to grant such leave. There should be no contradictions between the two books of law and he had not seen any law which ousts order 40 of the Civil Procedure Rules in the circumstances. •f. •*

J

Mr. Kagaba who had lost a mother was not able to make his submission he was granted an adjournment. Mr. Mwesigwa counsel representing the plaintiff submitted that he will not be present when Mr. Kagaba will be making his submission because of the expenses involved in travelling from Kampala to Fort Portal. He argued further that he wanted to s* record that even if he was not around Mr. Kagaba could make his submission in his absence and should the application proceed in his absence and the application was granted in his favour he would apply for the records of the proceedings; and since both counsels were present they did not require any notice^o

The learned counsel was permitted to make his reply.

Be that as it may Mr. Kagaba submitted that last time counsel for the plaintiff applied verbally and informally against the ruling of the court intimating that he was seeking leave to appeal against the ruling of this court to the supreme court. He based his application on rule ³⁹ of the court of appeal rules. The rules he referred to there were made primarily for the court of Appeal to govern civil proceedings in the court of Appeal. On the other hand the ruling against which he wants to appeal to the Supreme Court

.../3.»

- 2 -

is made by the High by the C. P. A. Therefore the law applicable to his application is not in the rules but it contained in order 40 of the civil procedure rules. His learned friend adopted every interesting approach in his application. On one hand he advanced his application under order 40 of the civil procedure rules. And on the other hand reasoned his application under rule 39 of the Supreme Court rules. He submitted that the application was governed by the provisions of order 40 rules (1) (2) and 3 of civil procedure rules. The notice of motion is contained under order 48. The counsel for the plaintiff applied under wrong law and ignored the proper law. He should have followed the notice of motion is laid down under order 48 of the civil procedure rules. He prayed that the application be dismissed.

Order 40 r 4 (i) gives the circumstances under which an appeal shall lie as of right from orders of this court as provided for under S77 of the civil procedure act: The instances as provided for in the order range from a to k and it is the firm view of this court that the present application is not one of the conditions mentioned in the said order.

Sub rule 2 an appeal under these rules shall not lie from any order save with leave of that/making the order or of the court to which an appeal would lie if leave were not given under sub rule 3 application for leave to appeal shall in the first instance be made to the court making the order sought to be applied from:

Whereas sub rule 4 of order 40 provides that the application to for leave appeal shall be by motion on notice. In the light of what has transpired above, I am not therefore agreeable with Mr. submission that the application should have been brought by Kagaba & notice of motion under 48. That order was not applicable CPR in the circumstances where it was expressly laid down that the application under rule 40 r 4 shall be by motion on notice: .../4 :

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On the other hand rule 39 of the court of appeal for East Africa Rules 1972 statutory instrument 1972 No. 179 provides-

Where an appeal lies with leave of the superior court application for such leave may be made informally at the time when the decision against which it is desired to appeal is given, or by motion or chamber summons according to the practice of the superior court within 14 days of such decision.

Where an appeal lies with the leave of the court application for such leave shall be made in the manner laid down in rules 42 and 43 within 14 days of the decision against which it is desired to appeal or where application for leave to appeal has been made to the superior court and refused within 14 days of such refusal.

> Rule 42 concerns with form of application to court whereas S 43 deals with supporting documents to the formal application.

In the instant case the application for leave to appeal to the Supreme Court was made informally verbally. That offended: order 40 r 4 of the civil procedure rule which is mandatory in that the application shall be by motion on notice. At the sametime Rule 39 of the court/appeal rules in my humble opinion presupposes a situation where leave has been refused by the High Court and the applicant seeks leave from the superior court which in this case is the Supreme Court. This order is peculiar to the proceedings in the superior court and could not be relied upon when seeking leave to appeal to the Supreme court. In case I am wrong non compliance with the provisions of order 40 r 4 of the CPR by Mr. Rukutana Mwesigwa makes the application incompetent and ...5

(b)

misconceived.

There is however authorities to the effect that non compliance with rules of procedure was an irregularity which is generally of a fundamental nature and could be ignored if it was not mandatory" but directory and if it does not occasion a miscarriage of justice to any party. See: F. D Sebamalo vs. The Registered Trustees of Narnirembe Diocese and Another 1988-1990 HOB page 141. I am of the view that order 40 rule 4 of the civil procedure is mandatory and not directory and therefore makes the application by Mr. Rukutano Mwesigw incompetent misconceived and nugatory In the end without going into the merits of the application the same stand dismissed with costs. The applicant ofcourse is not precluded from filing another application in accordance with the civil procedure rules.

I. MUKAN^A ^f * JUDGE 28.7.1994

File sent to the District Delegate Fort Portal with a view to deliver the ruling.

> W'H -v.c-I. MUKANZA JUDGE 28.7.1994.

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Prepared on 14 October 2026 · Esheria