

UGANDA / JUDGMENT

Kassim Dungu v Nakato Nuliat & Anor (Civil Appeal No. 72 of 2002)

[2011] UGHC 168 (1 December 2011)

[2011] UGHC 168

COURT
High Court of Uganda

BEFORE
Tuhaise, J

CASE / FILE NUMBER
Civil Appeal No. 72 of 2002

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL APPEAL NO. 72 OF 2002

[Arising From Miscellaneous application No. 345 of 2010; Chief Magistrate's Court of Nabweru at Nabweru]

HAJI KASSIM DDUNGU.....
APPELLANT

VERSUS

1. NAKATO NULIAT
 2. MUSTAPHA SSEZIBWA.....
- RESPONDENTS

BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE

RULING

When this appeal was called for hearing, Counsel Wadembele Noah, holding brief for Nsamba Abbas for the Appellants informed this court that he had been instructed to humbly request court to permit both Counsel to file a joint memo of scheduling and written submissions accordingly.

In response, Counsel David Tebusweke for the Respondents stated that they were never served with a memorandum of appeal. Secondly, he submitted that the matter before court was by way of appeal and there would be less to schedule about. He contended that Counsel is supposed to raise arguments on what the trial Magistrate erred in law which aggrieved the Appellant. Thirdly, he submitted that the appeal is not properly before this court. He argued that Order 44 rule 1 of the Civil Procedure Rules (CPR) provides for orders which are appealable as of right and that the order appealed against is not among those stipulated under Order 44 rule 1 of the CPR. He contended that this would require the Appellant to seek leave to appeal under Order 44 rule 2 of the CPR which is mandatory. He also submitted that section 220(4) of the Magistrates Courts Act requires an application for leave to appeal in the first instance to be made to the Chief Magistrate within a period of thirty days beginning with the date of the decision sought to be appealed from. If it is refused by the Magistrate, an application can be made to the High Court within a period of fourteen days beginning with the date when the Magistrate refused. Counsel Tebusweke submitted that there has never been a refusal by the Magistrate so that the Appellant could appeal to this court. Fourthly he submitted that the appeal is intended to delay justice as the Appellant has embarked on seeking adjournments without giving proper reasons in addition to transacting business on the suit land. The business includes putting tenants in the house constructed by the Respondent's mother putting the Appellant's education in jeopardy, establishing a welding shop, and constructing a chicken house where they are rearing birds. He contended that this prejudices the Respondent while the Appellants business thrives. He prayed that the appeal be dismissed with costs.

In response, Counsel Wadembele for the Appellant described the Appellant's Counsel's complaint of not being served as surprising, contending that the reason Counsel for the Respondent was present at the hearing must be because he was served. He stated that in fact the Respondent's mother has been following the appeal and she is the one who fixed the hearing. On the request to file written submissions, he submitted that it was Counsel for the Appellant's right to request court to file either written submissions or argue the appeal orally. On the appeal not being properly before court, he argued that the appeal arises from an interlocutory order which has the effect of disposing of the case in its entirety against the Appellant and determining his rights. He argued that it is a final order which is properly appealable before this court. He also denied that the Appellant was seeking unnecessary adjournments to delay justice, contending that the last adjournment was made at the instance of court which had other engagements and the present hearing date was consented to by both parties. He further contended that Counsel for the Respondent had not substantiated his claims that the Appellant was transacting business on the suit premises and there was a temporary order in place restraining the Appellant from alienating the land. He prayed court to dismiss Counsel for the Respondents' prayers.

In rejoinder, Counsel for the Respondent reiterated his prayers and stated that the order appealed against was the Chief Magistrate's rejection of the Appellant's attempts to sneak himself in the proceedings before the said court. He denied that the Chief Magistrate's order had the effect of determining the rights of the Appellant, arguing that it would have had if the Appellant had rightly applied to join under Order 1 rule 10(1) of the CPR but he did not. He stated that though it is true there is an injunction in place, the Appellant was not respecting it.

I have carefully listened to the submissions of both Counsels on the prayers raised by the Respondent's Counsel.

I will not dwell on the issue of service since it would be purely for academic purposes. The Respondent's Counsel, who raised this matter, appeared before this court on the day of hearing this appeal and participated actively in the proceedings. Also, though the respondent was absent, her mother was present. Indeed, the Respondent's Counsel accounted for the Respondent's non attendance by stating that they had returned to the university.

On the issue of holding a scheduling conference in an appeal, Tsekooko JSC, in his lead judgment in **Tororo Cement Co Ltd V Frokina International Civil Appeal No. 2 of 2001** observed that under the new Order XB (now Order XII revised edition) of the Civil Procedure Rules, the holding of a scheduling conference in civil cases is mandatory. He concluded that, "one hopes that the holding of scheduling conference will be a regular feature in the ***trial of civil cases by all trial courts.***" (emphasis mine). I interpret this to mean that holding scheduling conferences under the Civil Procedure Rules are to be conducted by trial courts in trial of civil cases, as opposed to when they are sitting as appellate courts. Thus, with respect to Counsel Wadembele, my opinion is that it is the trial court that should conduct such trials, not the Appellate court which should concentrate on the areas of law or fact that a trial Magistrate or Judge erred on in resolving the dispute. I would therefore agree with learned Counsel for the Respondent that in a matter before court by way of appeal, there would be less to schedule about.

This brings me to the objection by learned Counsel for the Respondent that this appeal is not properly before this court. The order the Appellant appealed from in the instant appeal was made by the Chief Magistrate of Nabweru in miscellaneous application no. 345 of 2010. The brief background is that the Appellant applied to be added as a party in ***Nakato Nuliat & Mustapha* *Ssezibwa V Ida Namugambe & Abbey Kiyingi* *Civil Suit No. 595 of 2008*** pending before the said Chief Magistrate's court. The Chief Magistrate granted the order and the Applicant was added as a third Defendant to the suit. Subsequently the Respondents filed miscellaneous application no. 345 of 2010 seeking to strike out the Appellant off the proceedings on grounds that he had been fraudulently added and that they have no claim against him. The Chief Magistrate allowed the application and struck the Appellant off the pleadings. The Appellant appealed against the decision of the Chief Magistrate.

The orders against which an appeal shall lie as of right are stipulated under section 76 of the Civil Procedure Act, cap 71 and Order 44 rule 1 of the CPR, as well as section 220 of the Magistrates Courts Act, cap 390. The order made by the Chief Magistrate to strike off the Appellant as a

Defendant is not listed among the orders that are appealable as of right under Section 76 of the Civil Procedure Act, and Order 44 rule 1 of the CPR. However, section 220(1)(a) of the Magistrates Courts Act states that an appeal shall lie **“from the decrees or any part of the decrees and from the orders of a Magistrate’s court presided over by a Chief Magistrate and Magistrate grade 1 in the exercise of its original civil jurisdiction, to the High Court.”** Under section 220(1)(c) of the same Act, the orders that are appealable with leave of the Chief Magistrate or of the High Court are those from orders given by such Magistrate **in appeal**. This would, in my opinion, render the order made by the Chief Magistrate of Nabweru appealable to the High Court as of right.

I may mention here that I had ruled on this very issue in **Miscellaneous Application No. 45 of 2001 Hajj Kassim Ddungu V Nakato Nuliat & Anor** where the same Counsel for the Respondent had raised it while hearing the said application. The said application and the current appeal all arise from the same suit, namely **Nakato Nuliat & Mustapha Ssezibwa V Ida Namugambe & Abbey Kiyingi Civil Suit No. 595 of 2008** pending before the said Chief Magistrate’s court. In my opinion, if Counsel for the Respondent was aggrieved by the said decision, he should have challenged it then other than waiting to raise it again as a preliminary objection in the appeal, since both matters arise from the same suit. I find this to be an abuse of court process.

In the premises I find, as I did in the earlier application arising from the same suit, that this appeal is properly before this court. The objection is therefore overruled with costs on the grounds stated above.

Dated at Kampala this 1st day of December 2011.

Percy Night Tuhaise

JUDGE.

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