**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDAHOLDEN AT KAMPALA**

**(COMMERCIAL DIVISION)**

**CIVIL APPEAL NO. 13 OF 2014**

**MK FINANCIERS LIMITED APPELLANT**

**VERSUS**

**N. SHAH & CO. LIMITED RESPONDENT**

BEFORE HON. JUSTICE RUGADYA ATWOKI

JUDGMENT

This is an appeal from the ruling and orders of the Chief Magistrate of Mengo, in which the suit of the appellant against the respondent was dismissed with costs, and the counterclaim of the defendant was ordered to proceed before the Grade I Magistrate.

The appellant filed a suit in the Commercial Division of this court against the defendant seeking to recover US $ 14,800 for what he called economic duress and illegal rent. He also sought general damages, interest and costs. The defendant filed a reply and also a counter claim for unpaid rent.

The matter was referred to the Chief Magistrate at Mengo, as it fell within the jurisdiction of that court. The appellant filed two applications Nos. 414 and 415 of 2014, for temporary injunction, and interim orders of injunction respectively. Court issued hearing notice for the MA No. 415 of 2014, and on hearing day 5/6/2014, all parties were in court for that purpose. The learned Chief Magistrate, according to the record of proceedings, ‘held lengthy discussions’ with the parties. She thereafter dismissed the main suit for the reason that the plaint did not disclose a cause of action. Consequently the two applications were also dismissed. The learned Chief Magistrate directed that the defendants counter claim be sent to the Grade I Magistrate for hearing. From the above ruling and orders the appellant felt aggrieved and dissatisfied and appealed to this court. Seven grounds were set out in the memorandum of appeal as follows.

1. The learned trial magistrate erred in law when she delivered a ruling in respect of the main suit yet parties had appeared for a hearing of an application for an interim order of injunction.
2. The learned trial Chief Magistrate erred in law when she refused/failed to make a ruling on the plaintiffs oral application for recusal of herself from the case but instead on her own motion gave a ruling dismissing the case.
3. The learned trial Chief Magistrate erred in law when she proceeded to make a ruling without hearing the parties who were in court.
4. The learned trial Chief Magistrate erred in law not to hear the application for interim order of injunction for which a hearing notice had been issued.
5. The learned Chief Magistrate erred in law when she struck out the main suit on ground that it disclosed no cause of action yet no party had applied for it.
6. The learned trial Chief Magistrate erred in law when she allowed a counter claim which had not been served upon the plaintiff to proceed without hearing from the counter defendant.
7. The learned trial Chief Magistrate erred in law when she awarded costs to the defendant yet no prayer had been made for them.

At the hearing of the appeal, one Male Mabirizi the M.D. of the appellant appeared for the appellant while Counsel Obiro Ekirapa appeared for the defendant. Both parties filed written submissions.

In submissions, the appellant abandoned ground (b). He argued the rest together save ground (f) which was argued separately. For the defendant, grounds (a), (c) and (d) were combined and the rest argued separately.

I will deal with the appeal like the appellant did. It was not disputed that hearing notices were issued for hearing the application for interim orders of injunction for 5/6/2014. When parties appeared the court took them through the pleadings, and thereafter made a ruling, not only in respect of the application, but also in respect of the main suit.

What were the pleadings, there was the amended plaint, the written statement of defence, the application for temporary injunction, and the application for interim orders of injunction together with the respective annextures. Each of these three matters was a suit in its own right. Each had a court case number, court fees were paid when registering each of them, and each had a separate file.

The matter which was cause listed for hearing, according to the undisputed facts was the application No. 415 of 2014. Was this matter heard, the record of proceedings does not bring this out. The record states that court engaged the parties in a lengthy discussion. Thereafter court ruled that following the definition of what constitutes a cause of action in Auto Garage & Others v. Motokov No. 3, [1971] EA 514, the pleadings fell short of that standard and dismissed the main suit.

A party who comes to court expects and is indeed entitled to be heard. This right is enshrined in the Constitution Article 28 (1), and this right is non derogable under Article 44(c). That right includes appearing before a court of law either in person or by a representative. Under O. 16 of the CPR the procedure for hearing of suits is set out. Each party is entitled to present their respective cases, with replies and rejoinders or examination in chief, cross examination and reexamination as the case may be. Where court does not observe the laid down procedures for the conduct of a fair trial, the same shall be held to be null and void. See Ms. Fans Min v. Belex Tours and Travel Limited SC CA No. 06 of 2013.

Parties appeared in court for the hearing of application No.415 of 2014. In the WSD the defendant, now respondent stated in paragraph 3 that they intended to raise a preliminary point of objection to the effect that the plaint did not disclose a cause of action. By this averment in the pleadings, the plaintiff was put on notice. Court was similarly informed, and so, was enjoined to provide such facilities to the parties to argue their respective cases in respect of that preliminary objection in accordance with O. 6 CPR. The parties had to be afforded the right to present their argument, and a right to reply granted plus a rejoinder. That way, the right to a fair hearing would have been observed.

From the record this was nor done. Counsel Ekirapa submitted that there was a lengthy discussion before the court pronounced itself. That may well have taken place, but that was not the substitute for formal presentation of legal arguments as indicated above. And this had to be clear from the record. Instead a ruling was delivered in respect of the main suit. The parties did not address court and the right of the plaintiff to present its defence or reply to the preliminary point of law was not given. The court did not give the appellant the right to a hearing before his suit was dismissed. This holding alone would be sufficient to dispose of this matter.

The court dismissed the suit No. 849 of 2014 on the ground that the pleadings did not disclose a cause of action. The court did not state under which law the suit was dismissed. It was argued for the respondents that the dismissal was under 0.7 r.l 1 CPR. This was an assumption based on a handwritten note by someone who was not disclosed to court that there was need to apply for leave before appealing. The note was on one of the appellants letters of demand for certified copies of trial court proceedings. That was not evidence before the court as to the law under which the suit was dismissed.

0.7 of the CPR deals with plaints. Rule 11 thereof provides in mandatory terms for the striking out of a plaint which, inter alia, does not disclose a cause of action. Under O. 40 CPR there is no automatic right of appeal, meaning leave has first to be obtained before instituting an appeal against an order made under 07 r. 11.

The learned Chief Magistrate stated in her ruling that she had ‘perused the pleadings in the main suit’, after some considerations which I will come to later, struck out the appellants suit for not disclosing a cause of action. 0.6.r 30 CPR empowers court to strike out ‘any pleading’ which, inter alia, does not disclose a reasonable cause of action. Orders under this rule are appealable as of right, and this was what the appellant relied on in this appeal.

Upon reading the above, I had no reason to disbelieve the appellant’s contention that the suit was struck out under 0.6 r.30. There was no evidence to the contrary. Therefore there was no need to apply for leave before filing the appeal.

The record of the trial court shows that the decision to strike out the suit was informed by the pleadings in the applications. The learned Chief Magistrate stated that upon reading the affidavit in support of the applications 414 and 415, and the annextures thereto, she was satisfied that the pleadings of the plaintiff did not disclose a cause of action. The respondent relied on the Motokov case supra. In that case, after his celebrated holding on what constitutes a cause of action, Spry V.P. continued (at page 520) that,

*‘the matter is one to be decided by perusal of the plaint and any annextures to it, not on a basis of evidence. ’*

The trial court in the present matter relied on evidence which was not annexed to the plaint. It was evidence which belonged to another matter, ie the application. The reliance ought to have been on the plaint alone as the courts have held. This is the view in Odgers on Pleadings 24th Edition paragraph 10.09 at page 207, which authority was also relied on by the respondent that,

*‘on an application based on this ground alone no evidence is admissible. The application is analogous to a demurrer and the court can only look at the pleadings and particulars, not any affidavit. ’*

For that reason also, the striking out would not be allowed to stand.

In respect to ground (f) of the appeal, the complaint was that the learned trial Magistrate allowed the counter claim to proceed before hearing from the counter defendants upon whom it was not served. That complaint is without merit. The Chief Magistrate did not order the counter claim to be heard in violation of, or in non compliance with the rules. All matters of irregularities, if any, would be dealt with by the trial court, and the order was that this would be the Grade I magistrate.

There was a complaint about award of costs that no party applied for them. The award of costs is at the discretion of the trial court. But according to S. 27 of the CPA, costs follow the event, save for good cause. There was no illegality or irregularity in the exercise by the learned trial Chief Magistrate of her discretion to award costs to the winning party in her court.

From the above the appeal is allowed. The ruling and orders of the lower court are set aside. The civil suit No.849 with the two Miscellaneous applications No. 414 of 2014 and 415 of 2015 shall go back to the Chief Magistrates court at Mengo for trial before another Chief Magistrate. Costs herein shall abide the results of the retrial.

Rugadya Atwoki Judge 07/09/2017.

Court: The Registrar of the Commercial Division of the High Court shall read this judgment to the parties.

RUGADYA ATWOOKI

JUDGE

07/09/2017