THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO.0391 OF 2017

(Arising from Civil Appeal No.114 of 2013)

BUTERA EDWARD::APPLICANT

VERSUS

MUTALEMWA GODFREY::RESPONDENT

(Coram: Elizabeth Musoke, JA, Barishaki Cheborion, JA and Hellen Obura, JA)

RULING OF CHEBORION BARISHAKI, JA

This is an application brought by notice of motion under Section 6(2) of the Judicature Act and Rules 40 (2), 41, 42(2) and 43(1) of the Rules of this Court.

The Applicant seeks the following orders;

a) A Certificate of Importance/ Leave be granted to the applicant to appeal to the Supreme Court of the Republic of Uganda

b) Costs of this application be provided for.

The grounds of the application were set out in the notice of motion supported by an affidavit deponed by the applicant, Butera Edward.

The application was opposed by the respondent through an affidavit in reply deponed by his counsel, Mr. Robinson Nkwatsibwe, contending that there was no merit in this application.

The applicant filed an affidavit in rejoinder contesting the validity of the affidavit in reply which was not sworn by a party to the appeal.

At the hearing of the application, Mr. Mudoola Denis appeared for the applicant while Mr. Patrick Kasumba appeared for the Respondent.

Counsel for the applicant submitted that the original suit in the Chief Magistrates' Court was brought under Order 36 of the Civil Procedure Rules (CPR) which is very restrictive on the remedies a party can be granted by Court. He argued that general damages were not part of the remedies a party could obtain under Order 36 of the CPR and the same were not proved. Counsel contended that although Court granted the respondent leave to file a defence, he did not amend his plaint therefore; the suit proceeded as though it was a summary suit.

Counsel further submitted that it was erroneous for Court to award the respondent general damages which he had not claimed. He argued that general damages were awarded on the basis that the applicant had not paid rent up to the date of judgment yet the plaint set out the specific period as March 2007 to April 2008. Counsel submitted that the period after April 2008 was not a subject of the suit and had the applicant been given an opportunity to prove that he was paying rent for the period after April 2008, he would have done so.

Regarding illegality, counsel for the applicant submitted that it is trite law that tenants are prohibited from subletting shops allocated to them in the market. He argued that if the law was not enforced, it would have an impact on all the markets within Kampala City. Counsel argued that strict adherence to such laws would enable Kampala Capital City Authority (KCCA) effectively manage the five (5) markets under its control. He invited Court to consider paragraph 12(d) of the affidavit in support of the motion on whether a party can obtain a relief from an illegality.

Counsel for the respondent opposed the application. He submitted that counsel for the applicant was on a fishing expedition because it was on record that although the matter was originally filed under summary procedure, leave to defend the matter was granted and the parties were given a chance to adduce evidence. He futher submitted that the respondent proved that the appellant was not paying rent and the Judge was right to find that there was no justification for the appellant's continued occupation of the premises without paying rent. Counsel contended that the respondent was severely injured because he was neither utilizing his premises nor receiving rent for it thus justifying Court's award of general damages to the respondent.

Regarding illegality, counsel submitted that the respondent was a tenant of Sheila Investments which had an agreement with KCCA. Counsel argued that the appellant did not state the law which prohibited Sheila Investments from

sub-letting the property to the respondent who in turn sub-let it to the applicant. Counsel prayed that the application be dismissed with costs.

In rejoinder, counsel for the applicant submitted that section 23 of the Kampala Markets Bye- Laws, 1974 prohibits any person to whom a pitch, stall or shop has been allocated from subletting his pitch, stall, shop or any portion thereof without the permission of the Market Authority. Counsel added that general damages were awarded to the respondent when he had not succeeded on the claim before Court. He prayed that the application be allowed as it contained issues of public importance.

I have carefully considered the Notice of Motion, the affidavit in support and in rejoinder, the affidavit in reply, the annextures thereto as well as the law and authorities relied upon. I have also considered the submissions of counsel on either side.

The applicant brought this application under section 6(2) of the Judicature Act CAP 13 which states thus;

6(2). "Where an appeal emanates from a judgment or order of a chief magistrate or a magistrate grade I in the exercise of his or her original jurisdiction, but not including an interlocutory matter, a party aggrieved may lodge a third appeal to the Supreme Court on the certificate of the Court of Appeal that the appeal concerns a matter of law of great public or general importance, or if the Supreme Court considers, in its overall duty to see that justice is done, that the appeal should be heard."

Rule 39(1) (a) of the Judicature (Supreme Court Rules) Directions also shades more light on the same. It provides that:

(1) In civil matters—

(a) where an appeal lies if the Court of Appeal certifies that a question or questions of great public or general importance arise, application to the Court of Appeal shall be made informally at the time when the decision of the Court of Appeal is given against which the intended appeal is to be taken; failing which a formal application by notice of motion may be lodged in the Court of Appeal within fourteen days after the decision, the costs of which shall lie in the discretion of the Court of Appeal

From a reading of the above provisions of the law, it is evident that this Court may only grant a certificate to enable an appellant lodge a third appeal to the Supreme Court if it is satisfied that the appeal concerns a matter of law of great public importance or general importance.

In ***Namuddu Christine V Uganda SCCA No. 3 OF 1999,*** the Supreme Court held that for a question to be regarded as of public importance or general importance, it should be sufficiently general or public in application, as would need settlement or clarification by a higher appellate Court.

The Supreme Court of Kenya has in ***Hermanus Phillippus Steyn vs Giovanni Gnecchi-Ruscone, Application No.4 of 2010 (Supreme Court of Kenya)*** defined both "great public importance" and "general importance" to mean;

"A matter of general public interest could take different forms for instance, an environmental phenomenon involving the quality of air or water which may not affect all people, yet it affected an identifiable section of the population; a statement of law which may affect a considerable number of people in their commercial practice or in their enjoyment of fundamental or contractual rights; or a holding on law which may affect the proper functioning of public institutions of governance or the Court's scope for dispensing redress or the mode of discharge of duty by public officers"

Court further laid down guidelines for determining whether or not to grant a certificate of importance as follows;

i. *For a case to be certified as one involving a matter of general public importance, the intending appellant ought to have satisfied the Court that the issue to be canvassed on appeal was one the determination of which transcended the circumstances of the particular case and had significant bearing on the public interest;*

ii. *Where the matter in respect of which certification was sought raised a point of law, the intending appellant ought to have demonstrated that such a point was a substantial one, the determination of which would have a significant bearing on the public interest;*

iii. *Such question or questions of law must have arisen in the lower courts and must have been the subject of judicial determination;*

iv. *Where the application for certification had been occasioned by a state of uncertainty in the law arising from contradictory precedents, the Supreme Court could either resolve the uncertainty as it may determine, or refer the matter to the Court of Appeal for its determination;*

v. *Mere apprehension of miscarriage of justice in a matter most apt for resolution in the lower superior courts was not a proper basis for granting certification for an appeal to the Supreme Court. The matter to be certified for a final appeal in the Supreme Court ought to fall within the terms of Article 163 (4)(b) of the Constitution;*

vi. *The intending applicant had an obligation to identify and concisely set out the specific elements of general public importance which he or she attributed to the matter for which certification was sought;*

vii. *Determinations of fact in contests between parties were not by themselves, a basis for granting certification for an appeal before the Supreme Court.*

I shall take the above principles into account while resolving the application.

It is trite that the onus is on the applicant to satisfy Court that the question intended to be determined on appeal is one of great public or general importance.

The applicant argued that his intended appeal was based on serious questions of law which were of general public importance as captioned under paragraph 12 of his affidavit in support. Although he raised five (5) questions of law, I find that they can be summarised into four namely; whether a party can be

awarded general damages under O.36 of the CPR; whether a party can be granted a relief not prayed for in their pleadings; whether a party can obtain a relief from an illegality and whether a party can obtain a relief of ownership without any defined rights/interests. These questions are elucidated in paragraph 4 of the affidavit in rejoinder.

On the other hand, counsel for the respondent argued that the applicant is on a fishing expedition and he supported the findings of Court.

Order 36 Rule 2 of the CPR provides for the nature of claims that can be brought under that order to include recovery of a debt or liquidated demands founded upon a contract expressed or implied, on a bond or contract written for payment of a liquidated amount of money, on a guaranty where the claim against the principal is in respect of a debt or liquidated amount only, on a trust and upon a debt to the Government for income tax.

The record of the trial Court shows that the original suit was brought by way of summary procedure under Order 36 Rule 2 of the CPR and the plaintiff (the respondent herein) sought for recovery of Ugx 4,500,000/= (Uganda Shillings Four Million Five Hundred Thousand Shillings Only) as rent arrears, vacant possession of premises and costs of the suit. The record further shows that the applicant sought for and was granted unconditional leave to file a defence and that the suit was fixed for hearing.

It is now settled law that where a suit starts as a summary suit and leave to defend is granted, the suit becomes an ordinary suit. ***See Hanani Moezali V Moez Ramani HCCS No.416 of 2001.*** Based on the above position, since in this case the respondent was granted unconditional leave to file a defence, this made the suit ordinary.

The applicant also contended that despite not specifically claiming for general damages in his plaint, the respondent did not amend his pleadings to include the same. Additionally, the applicant argued that general damages should not have been granted under summary procedure altogether.

It is not disputed that the respondent did not file an amended plaint thereafter to include a claim for general damages. However, the trial Magistrate awarded him general damages of Ugx 5,000,000/= (Uganda Shillings Five Million only) for the inconveniences caused to the plaintiff for all the years he had not been using the suit premises. On appeal, the High Court upheld the said decision and on further appeal, this Court found no reason to interfere with the award of the lower Court.

The general position of the law is that a party should clearly state the reliefs claimed in their plaint **(See O.7 R.1 (g) of the CPR).**

The Supreme Court in ***Ms Fang Min V Belex Tours and Travel Limited SCCA No.6 of 2013 consolidated with Civil Appeal No.1 of 2014, Crane Bank Limited V Belex Tours and Travel Limited*** stated as follows;

".... It is now well established that a party cannot be granted relief which it has not claimed in the plaint or claim. See ***Attorney General V Paul Ssemogerere & Zachary Olum, Constitutional Appeal No.3 of 2004 (SC) and Julius Rwabinumi V Hope Bahimbisimwe, Civil Appeal No.10 of 2009 (SC); Hotel International Ltd V The Administrator of the Estate of Robert Kavuma, SCA No.37/95 and Standard Chartered Bank (U) Ltd V Grand Imperial Hotel Ltd.***

Since the Supreme Court has pronounced itself on the issue as to whether court can grant a relief to a party that has not claimed for it, I am of the considered view that it is no longer a matter of great public or general importance. The law on this point is certain and no contradictions in its application have occurred as can be seen from the harmony and consistency of precedent.

Regarding illegality, counsel for the applicant submitted that the issue of illegality also raised very serious questions of law because the law prohibits sub-letting by any trader or vendor of any shop or stall and that this was of great public importance to all markets in Kampala District. Counsel cited ***section 23 of the Kampala Markets Bye- Laws, 1974*** which states that;

"No person to whom a pitch, stall or shop has been allocated shall, without the permission of the Market Authority, sublet his pitch, stall or shop or any portion thereof"

The question of law raised therein is whether a party can obtain relief from an illegality or an illegal contract.

It is settled law that an illegality once brought to the attention of Court supersedes everything else raised by the parties. In ***Makula International Ltd v. His Eminence Cardinal Nsubuga & Anor [1982] HCB 11***, it was held, inter alia that;

> *"A Court of law cannot sanction what is illegal, an illegality once brought to the attention of Court, overrides all questions of pleading, including any admission made thereon."*

I therefore find that the issue of illegality herein is not a matter of great public or general importance.

Regarding whether a party can obtain relief of ownership without any defined rights/interests, counsel for the applicant did not demonstrate this. He did not rebut counsel for the respondent's submission that the respondent was a tenant of Sheila Investments which had an agreement with KCCA. As such, it is presumed that the assertions of the respondent remain unchallenged. I therefore do not find merit in this to amount to a question of general public importance.

In conclusion, I do not find merit in the application and it is accordingly dismissed with no order as to costs.

I so order

Dated at Kampala this 20th day of Dec 2019

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HON. MR. JUSTICE CHEBORION BARISHAKI

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION NO. 0391 OF 2017
(Arising from Court of Appeal Civil Appeal No. 0114 of 2013)

BUTERA EDWARD :: APPLICANT

VERSUS

MUTALEMWA GODFREY :: RESPONDENT

RULING OF ELIZABETH MUSOKE, JA

I have had the benefit of reading in draft, the lead judgment of my learned brother, Cheborion, JA, and I agree with the analysis, findings and conclusions therein. I have only a few additions to make.

The applicant's appeal, Civil Appeal No. 0114 of 2013 was dismissed by this Court. He was dissatisfied with the said decision, and intended to appeal to the Supreme Court. Since the original trial was before a Magistrate Grade I, the applicant's appeal to the Supreme Court would be a third appeal.

Under the law, a third appeal to the Supreme Court may only be lodged on the certificate of the Court of Appeal that the appeal concerns a matter of law of great public or general importance. **(See: Section 6 (2) of the Judicature Act, Cap. 13).** This is highlighted at page 5 of the lead judgment.

The present application was brought by the applicant for a grant of the said certificate from this Court. The key question, would then be, whether or not the intended appeal concerns a matter of law of great or public importance.

The questions which the appellant alleged to involve a matter of law of great or public importance, were expressed in the following issues:

> "a. **Whether a party can be awarded a relief that is not claimed for in the pleadings.**
>
> b. **Whether a party can be awarded general damages under a suit brought under O.36 CPR (Summary Procedure).**
>
> c. **Whether a Party can be awarded a relief totally different from the relief he/she claimed for in the pleadings.**
>
> d. **Whether a party can obtain a relief from an illegality and/or illegal contract.**
>
> e. **Whether a party can obtain a relief of ownership without defined rights/interests."**

It must be stated that issues (d) and (e) above do not arise within the context of this application. The three courts which heard this matter reached the same conclusion that the applicant was a tenant of the respondent. They also concluded that the relationship subsisting between the applicant and the respondent was lawful, and any allegations of illegalities had not been proven.

Further, issues (a) and (c), which the applicant wishes to submit to the Supreme Court for determination, have already been determined by that Court. In **Sinba (K) Ltd & 4 others vs. Uganda Broadcasting Corporation, Supreme Court Civil Appeal No. 03 of 2014**, it was held that a court can decide an unpleaded matter if the parties have led evidence and addressed court on the matter in order to arrive at a correct decision in the case and to finally determine the controversy between the parties.

An unpleaded issue, may include reliefs like general damages. In the context of the present application, the unpleaded issue was that of general damages. The applicant alleged that at the trial, the respondent had not pleaded general damages and yet the same were awarded to him. In reaching the

said decision, the trial Court reasoned that the respondent had been put through some inconvenience by the applicant, and the latter was liable to pay damages. The order to pay damages was confirmed by the first and second appellate Courts.

For a question to be regarded as one of public or general importance, it must never have been considered by the Supreme Court. The authority of **Namuddu Christine vs. Uganda, Supreme Court Criminal Authority No. 3 of 1999**, which is referred to at page 5 of the lead judgment offers some basis for the above proposition. In that case, it was held that for a question to be regarded as one of public importance or general importance, it should be sufficiently general or public in nature, as would need settlement or clarification by a higher appellate Court. The Supreme Court has already clarified on the above position in Sinba (supra), and for that reason, there is no compelling reason to have it sent there. In other words, the questions alleged by the applicant have already been settled.

On issue (b) above, whether a party can be awarded general damages in a suit brought under order 36 of the Civil Procedure Rules S.I 71-1 (Summary Procedure), there is sufficient authority to state that a suit brought under the summary procedure becomes an ordinary suit when leave to appear and defend is granted to the defendant. This is premised on the reading of the said rules.

Under order 36 rule 10, CPR, where the Court grants leave to appear and defend, it may make orders that the suit be set down for hearing. This means that the rules related to an ordinary suit come into play, and the plaintiff may amend his or her plaint to request for general damages. Therefore, the question, whether or not a party can be awarded general damages in a suit brought under order 36, CPR, but where the defendant obtains leave to appear and defend is not contentious at all, as the applicant wants it to appear.

Generally, as regards the present application, the applicant may have some apprehension that the decision of the Court of Appeal was erroneous. In **R v. Hinse [1995] 4 S.C.R 597**, the Supreme Court of Canada while

considering a similar application for leave to appeal held that the fact that the court below reached the wrong result, in itself, may not be sufficient to convince the court to grant leave to appeal.

The Supreme Court of Kenya adopted a similar view in **Hermanus Phillipus Steyn vs. Giovanni Gnecchi Ruscone, Application No. 4 of 2010**. This authority is referred to at pages 5 to 7 of the lead judgment. It was held that mere apprehension of miscarriage of justice, was not a proper basis for granting certification for an appeal to the Supreme Court.

What constitutes a question of law of public or general importance is not defined in the **Judicature Act, Cap. 13**. Some guidance may be obtained from Court decisions in similar applications, such as the guidelines in **Hermanus Phillipus Steyn case (supra) (See pages 6 to 7 of the lead judgment).** I would also make reference to the Canadian jurisprudence. The general approach of the Supreme Court of Canada has been to consider that the following non-exhaustive list of considerations point towards an issue of public importance[1]:

> **"1. The presence of a constitutional issue in the form of a challenge to a statute, a common law rule or a government practice.**
>
> **2. A conflict between courts of appeal of different provinces on issues that should be dealt with uniformly as between provinces;**
>
> **3. A novel point of law.**
>
> **4. Interpretation of an important federal statute or provincial statute that exists in several provinces."**

While, the above principles have been articulated by courts outside Uganda and are not binding, they are of huge persuasive value. In my view, only reasons analogous to the above reasons would qualify a matter as one involving questions of public or general importance. Such reasons are not

[1] See: Guidelines: Applications for Leave to Appeal by the Canada Supreme Court Advocacy Institute accessed from https://scai-ipcs.ca/leave-guidelines.html

disclosed in the present application where the applicant focuses on errors in this Court's decision.

I, therefore, have to agree with my learned brother Cheborion, JA that the applicant failed to satisfy this Court that his intended appeal to the Supreme Court would be concerned with questions of law of public or general importance, and his application should be dismissed.

Decision of the Court.

As Obura, JA agrees, by a unanimous decision, this application is dismissed with no order as to costs.

It is so ordered.

Dated at Kampala this ..... Day of ..... 2019.

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Elizabeth Musoke

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Musoke, Cheborion Barishaki & Obura, JJA)

CIVIL APPLICATION N0. 0391 OF 2017

BUTERA EDWARD::APPELLANT

VERSUS

MUTALEMWA GODFREY:::RESPONDENT

(Arising from Civil Appeal No. 114 of 2013)

RULING OF HELLEN OBURA, JA

I have read in draft the ruling of my learned brother Cheborion Barishaki, JA and I concur with his findings and conclusion that the application lacks merit and it should be dismissed with no order as to costs.

Dated at Kampala this 20th day of Dec. 2019.

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Hellen Obura

JUSTICE OF APPEAL