THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
[Coram: Kasule, Kakuru &Egonda-Ntende JJA]

CIVIL APPEAL NO. 93 OF 2011

[Arising from the High Court of Uganda at Nakawa Civil Suit No. 162 of 2009]

KASHONGOLE GODFREY=========================APPELLANT

VERSUS

1.KAFEERO FRANCIS
2.NAKANJAKO
3.NAMULI PROSSY ============RESPONDENTS
4.SSENTONGO BENARD

[On appeal from the Judgment of the High Court of Uganda, (Mwondha J.,(as she then was)) of 17th March 2011]

JUDGMENT OF THE COURT

Introduction

1. The appellant was the plaintiff in the court below. He brought this action against the administrators of the estate of the late John Chrysostom Sentongo, the respondents now. The appellant was seeking orders of the High Court to direct the respondents to handle over a title of land comprised in Leasehold Register 1498 Folio 4 at Buwekula Mubende district together with duly signed transfer and mutation forms for the same, general damages and costs of the suit. The appellant had contended that he had purchased the said land from the late John Chrysostom Sentongo who had passed away before transferring the same to him.

2. The respondents opposed this action stating that the deceased who was their father had never sold any portion of his land to the appellant. The land in question belonged to the children of the deceased and not to the appellant. The appellant only entered the land in question after the death of their father. The papers in possession of the appellant were forgeries

and had not been executed by their father. They prayed that the suit be dismissed with costs.

3. The parties filed a joint scheduling memorandum. At the scheduling conference prior to the trial of the case the parties stated the number and names of witnesses they intended to call and the documents they intended to rely on. The court then made this order.

> 'In the interest of time counsel are advised to file sworn statements of their clients. The plaintiff should file by 10th May 2010 and serve the defendants to file by 24/05/10 and serve counsel for the plaintiff. The matter is reserved for cross examination on 25/06/2010 at 10.00am.'

4. On the 25th June 2010 the parties and counsel appeared before the learned trial judge who noted,

> 'I have not had time to read through the written witness (sic statements) to facilitate cross examination of the witness. The Government Analyst Mr Ntalirwe AM should be issued with hearing summons for them at 9.00am on the 10/09/10.'

5. There is no record of what happened on the 10th June 2010. Subsequently the case was called on the 25th January 2011 and the plaintiff together with his counsel were absent. The court made this order.

> 'That being the case, the defendants counsel is directed to file written submissions since there is nothing to cross examine. Counsel for the defendant should file written submissions by 21/02/11 and the same on the counsel for the plaintiff by his by 9th March 2011 and judgment reserved till 17/03/2011 at 11.00am.'

6. On 17th March 2011 judgment was delivered by the learned trial judge. The learned trial judge considered the written statements by the witnesses for the parties together with the documents that the parties had filed in the matter and held that the plaintiff had failed to prove his case, dismissing the same with costs. The appellant being dissatisfied with that judgment appealed to this court and set forth the following grounds of appeal.

> '1.That the trial Judge erred in law and fact when she delivered a judgment against the Appellant without hearing evidence from both sides.

2. That the Trial Judge erred in law and fact when she adopted a foreign and alien procedure of relying on witness statements in disposing of the case.
3. The trial and disposal of the case occasioned a miscarriage of justice to the appellant.
4. The Judgment is null and void.'

Submissions of Counsel

7. Mr Andrew Kahuma appeared for the appellant while Mr Nathan Osinde appeared for the respondent. With leave of court both counsel adopted the written submissions contained in the joint conferencing notes filed by the parties.

8. Mr Kahuma submitted that what happened in this case was that the judge ordered the filing of sworn written statements by the intended witnesses and directed that cross examination was to follow. When the plaintiff and his advocate did not turn up on the date the case had been set for cross examination the judge ordered the filing of written submissions and a date was set for delivery of judgment. The parties complied and filed written submissions and the court delivered the judgment on the due date. Counsel for the appellant contends that no trial or hearing of the case occurred and the case was decided in the absence of any evidence being adduced in the case. This was contrary to Article 28 (1) of the Constitution that provides for a fair and public hearing of all matters before the courts. Section 134 of the Evidence Act provides that the manner in which witnesses are produced and examined shall be regulated by law and practice and in the absence of any law by discretion of the court. Section 137 of the Evidence Act regulates the production and examination of witnesses. This provision was not complied with by the trial court. Order 18 rules 4 and 5 of the Civil Procedure Rules elaborate on the manner of taking of evidence from witnesses. These provisions were not complied with. Yet the provisions are couched in mandatory terms and ought to have been complied with.

9. The method that the learned trial judge adopted was not known to the law. Filing sworn witness statements does not amount to the holding of a hearing or trial. This occasioned a miscarriage of justice. The resultant judgment was null and void. Mr Kahuma cited the case of Uganda co-operative Transport Union Ltd V Roko Construction Ltd Supreme Court Civil Appeal No.35 of 1995 [1997] KALR 88 in support of his submissions.

10. Mr Osinde, learned counsel for the respondent supported the judgment below, arguing that the parties had agreed to the procedure adopted by the judge. Since the plaintiff and his witnesses had not turned up the court had no choice but proceed to the next stage which was to receive submissions and write judgment. The court made no error whatsoever.

Analysis

11. All the four grounds of appeal in this case are all elements of one question on this appeal. The question to be answered on this appeal is whether or not in the court below the case before it was heard or not. Did a trial take place or not? Section 25 of the Civil Procedure Act provides,

> 'The court, after the case has been heard, shall pronounce judgment, and on that judgment a decree shall follow; except that—
> (a) if the defendant does not enter such appearance as may be prescribed, the court may give judgment for the plaintiff in default;
> (b) in cases for which rules have been made under section 41(2)(k) of the Judicature Act, it shall not be necessary for the court to hear the case before giving judgment.'

12. It is clear from the foregoing provision that judgment can only follow after the case has been heard. A trial ought to have taken place.

13. Order 18 of the Civil Procedure Rules regulates how trials are conducted. We shall set it out in part below.

> 'ORDERXVIII—HEARING OF THE SUIT AND EXAMINATION OF WITNESSES.
> **1. Right to begin.**
> The plaintiff shall have the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he or she seeks, in which case the defendant shall have the right to begin.
> **2. Statement and production of evidence.**
> (1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his or her case and produce his or her evidence in support of the issues which he or she is bound to prove.
> (2) The other party shall then state his or her case and produce his or her evidence, if any, and may then address the court generally on the whole case.

(3) The party beginning may then reply generally on the whole case; except that in cases in which evidence is tendered by the party beginning only he or she shall have no right to reply.

3. Evidence where several issues.
Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his or her option, either produce his or her evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his or her evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

4. Witnesses to be examined in open court.
The evidence of the witnesses in attendance shall be taken orally in open court in the presence of and under the personal direction and superintendence of the judge.

5. How evidence to be recorded.

The evidence of each witness shall be taken down in writing by or in the presence and under the personal direction and superintendence of the judge, not ordinarily in the form of question and answer but in that of a narrative, and when completed shall be signed by the judge.

6. Records made in shorthand or by mechanical means.
Notwithstanding rule 5 of this Order, the evidence given or any other proceeding at the hearing of any suit may be recorded in shorthand or by mechanical means, and, if the parties to the suit agree, the transcript of anything so recorded shall, if certified by the judge to be correct, be deemed to be a record of the evidence or other proceeding for all the purposes of the suit.

7. Summary of evidence in certain cases.
Notwithstanding rule5 of this Order, in all cases before any court in which the subject matter in dispute or amount claimed can be valued in money and that value does not exceed three hundred shillings, it shall be sufficient for the judge to make in writing a brief summary of the evidence given before him or her.

> **8. Any particular question and answer may be taken down.**
> The court may, of its own motion or on the application of any party or his or her advocate, take down any particular question and answer, or any objection to any question, if there appears to be any special reason for so doing.
>
> **9. Questions objected to and allowed by court.**
> Where any question put to a witness is objected to by a party or his or her advocate, and the court allows the question to be put, the judge shall take down the question, the answer, the objection and the name of the person making it.
>
> **10. Remarks on demeanour of witness.**
> The court may record such remarks as it thinks material respecting the demeanour of any witness while under examination.
>
> **11. Power fo deal with evidence taken before another judge.**
> (1) Where a judge is prevented by death, transfer or other cause from concluding the trial of a suit, his or her successor may deal with any evidence taken down under rules 1 to 10 of this Order as if the evidence had been taken down by him or her or under his or her direction under those rules, and may proceed with the suit from the stage at which his or her predecessor left it.
> (2) The provisions of sub rule (1) of this rule shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 18 of the Act.'

14. The foregoing provisions envision an oral hearing with witnesses being called in person and examined by the parties. Provision is made for proof of certain facts by way of sworn statements or affidavits. This is Order 19 Rule 1 of the Civil Procedure Rules which states,

> 'Any court may at any time for sufficient reason order that any particular fact may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable; except that where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorising the evidence of that witness to be given by affidavit.'

15. The court is authorised to order particular facts to be proved by affidavits but where it appears that cross examination will be necessary no order

shall be made authorising evidence to be given by way of affidavits. It cannot be asserted that the procedure adopted in the court below in this case was in compliance with Order 19 rule 1 of the Civil Procedure Rules.

16. Neither can it be asserted that the procedure adopted in the court below followed what is prescribed in order 18 of the Civil Procedure Rules. No witnesses were called. No hearing took place. The parties filed sworn witness statements which the learned judge took as evidence in the case plus annexures to the pleadings or documents that the parties had filed and that formed the basis upon which the judgment was pronounced.

17. We are aware that a practice has developed in some divisions of the High Court of Uganda in which witness statements are filed before the hearing of the case but such witness statements must be adopted at the hearing of the case by the witnesses in question in person and such a statement is taken to form the examination in chief of that witness's evidence with cross examination following as appropriate.

18. We approve of efforts taken to develop procedures that expedite the hearing and determination of cases but such procedures must be consistent with the existing law and must not be in conflict with such existing law.

19. What happened in the court below in this case was that there was simply no trial or hearing of the case. The order to file witness statements was made on the day the case was fixed for a scheduling conference. Scheduling conference is governed by Order 12 and rule 1 thereof states its purpose as,

> 'The court shall hold a scheduling conference to sort out points of agreement and disagreement, the possibility of mediation, arbitration and any other form of settlement…'.

20. A scheduling hearing is a preliminary step prior to the holding of the trial of the case.

21. Though witness statements had been filed, following the orders made at the scheduling conference, no hearing took place at which such witness statements would have been admitted into evidence as examination in chief. Cross examination and re examination would have followed if necessary. The initial date of hearing of the case was 25th June 2010, even though the learned trial judge stated that this was for cross examination.

In accordance with our rules of procedure this was the day for hearing. The court was not ready and it adjourned the hearing to 10th September 2010. On that day it is not known what happened. The case was never called.

22. Subsequently the case was fixed for hearing on 25th January 2011 and on that day the plaintiff and his counsel were absent. The learned trial judge then ordered that written submissions be filed. This order was premature. No trial had taken place thus far. What ought to have happened, if the court was satisfied that the plaintiff was aware of the hearing date, the court ought to have dismissed the case under Order 9 rule 22 of the Civil Procedure Rules, which states,

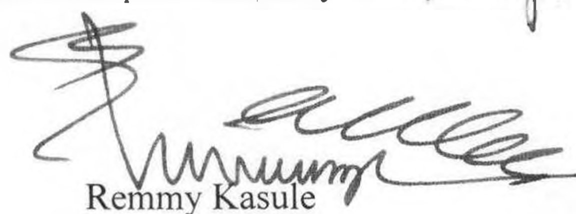
> '22. **Procedure when defendant only appears.**
> Where the defendant appears, and the plaintiff does not appear, when the suit is called on for hearing, the court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part of it, in which case the court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.'

Decision

23. We have no alternative but to allow this appeal, set aside the judgment of the court below and direct that a trial be held. We so order.

24. As to the costs of this appeal in the circumstances of this case we order that they abide the outcome of the trial in the High Court.

Dated signed and delivered at Kampala this 16th day of August 2017



Remmy Kasule
Justice of Appeal

Kenneth Kakuru
Justice of Appeal

Fredrick Egonda-Ntende
Justice of Appeal

16/8/2017
Andrew Kahuma for Appellant.
Appellant present.
Osmide for Respondents absent
Respondent Nos 3 & 4 present
Amin c/c
Ct: Judgment read in Court.