

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO.66 OF 2019

**(Arising from High Court Miscellaneous Application No.79 of
5 2007 arising from Consolidated Civil Suit No.45 of 2007)**

- 1. NANTONGO CANDY**
- 2. KAYEMBA PETER**
- 3. NABWAMI LYDIA**
- 4. NAKABUUBI SOFIA**
- 10 5. KATABALWA CHARLES**
- 6. NALUKWAGO SAFINA**
- 7. NAKUYA RITAH**
- 8. MUYUNGA F**
- 9. NABAYUNGA SSALONGO**
- 15 10. KAYEMBA PETER**
- 11. NABWAMI LYDIA**
- 12. KATABALWA CHARLES**
- 13. NAMAWANDA JANE**
- 14. NAMYALO CATHERINE::::::::::::::::::::::::::::::::::::: APPELLANTS**
- 20 15. NAKUYE CLENTIA**
- 16. NAKAFERO SCOVIA**
- 17. NAKYEWA MAURICE**
- 18. NALUKWAGO PROSSY**
- 19. KANAKULYA JOSEPH**
- 25 20. MUGALULA JOSEPH**

21. SSEWANKAMBO MIKE

22. NALUBIMBA LILIAN

23. NANSENKO MARY F

24. SSEKYEWA G. W

5 25. LUBEGA JOHN

26. MUGEJERA CEASAR

27. NAKINTU FLAVIA

28. MUTAZIBWA

29. NSAMBA ANORL

10

VERSUS

GATEWAY BUS SERVICES::::::::::::::::::::::::::::::::::::RESPONDENT

CORAM: HON. JUSTICE CATHERINE BAMUGEMEREIRE,JA

HON. JUSTICE STEPHEN MUSOTA, JA

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HON. JUSTICE MUZAMIRU M. KIBEEDI, JA

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA

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This is an appeal from the ruling of the High Court at Masaka by Oguli Oumo J. dated 29 June 2015 in High Court Miscellaneous Application No.79 of 2007, arising from Consolidated Civil Suit No.45 of 2007.

Background of the Appeal

On or about the 30th July 2004 an accident occurred on the Kampala-Masaka Road involving the Respondent's Motor Vehicle. The appellants claimed that the said Motor Vehicle was being driven

negligently and the accident was solely due to the negligence of the Respondent's driver. They accordingly claimed damages resulting from negligence.

As a result of the accident, some of the appellants Nantongo Candy, Kayemba Peter, Nabwami Lydia, Nakabuubi Sofia, Katabalwa Charles, Nalukwago Safina and Nakuya Ritah filed Masaka High Court Civil Suit No.45 of 2007 against the Respondent as defendant.

Subsequently Muyunga F, Nabayunga Milly, Kabogere Ssalongo, Kayemba Peter, Nabwami Lydia and Katabalwa Charles filed Masaka High Court Civil Suit No.46 of 2007 against the Respondent as defendant.

Thereafter, Namawanda Jane, Namyalo Christine, Namakuye Clementia, Nakafeero Scovia, Nakyewa Mauricia, Nalukwago Prossy, Kanakulya Joseph, Mugalula Joseph, Ssewankambo Mike, Nalubimba Lilian, Nanseko Mary Florence, Ssekyewa G.W, Lubega John, Mugejera Ceaser, Nakintu Flavia, Nanteza, Mutazibwa and Nsamba Arnorl filed Masaka High Court Civil Suit No.440 of 2007 against the Respondent as defendant.

On 23rd March 2011 the Respondent filed Miscellaneous Application No.33 of 2011 for consolidation of the Civil Suits which was granted. On 14th July 2014 the Respondent filed Miscellaneous Application No.79 of 2014 arising from the Consolidated Civil Suit No.45 of 2007 seeking orders that;

a) *The claimants in the above suit are concocted, fictitious, illegally before court with no locus standi.*

b) *The claims by some of the plaintiffs in the above consolidated civil suit are time barred and should accordingly be dismissed*

5 c) *The Advocate acting on behalf of the Plaintiffs in the above consolidated civil suit does not have instructions and is thus not properly before the court*

d) *Costs of the application be provided for.*

The appellants filed three affidavits in reply to the application
10 opposing and praying for its dismissal. On 25th May 2015
Miscellaneous Application No.79 of 2014 came up for hearing. The
parties prayed to file written submissions and court granted that
prayer and parties indeed filed written submissions as directed by
the Court.

15 On the 29th June 2015, Court gave its ruling allowing the application
with the following orders;

1. *That the claimants in the above suit are concocted, fictitious
and illegally before court with no locus standi*

20 **2.** *That the claims by some of the plaintiffs in Consolidated
civil suit No.45 of 2007 are time barred and are accordingly
dismissed*

3. *Counsel for the plaintiffs is hereby ordered to pay the
Applicant's costs of the suit personally as he ought to have
known that the suit was barred by the statute of limitation
25 and that the plaintiffs are fictitious and concocted.*

The appellants were dissatisfied with the ruling and orders of the High Court and lodged this appeal.

The Appeal

5 The Memorandum of Appeal the appellant raises the following grounds of appeal;

1. ***The Learned trial Judge erred in law and fact when she dismissed consolidated Civil Suit No.45 of 2007 Nantongo Candy and Others vs Gateway Bus Services without giving the appellants a fair hearing.***
- 10 2. ***The trial Judge erred in law and fact when she ruled that the claims by the Appellants/Plaintiffs in consolidated Civil Suit No.45 of 2007 Nantongo Candy and Others vs Gateway Bus Services are time barred***
- 15 3. ***The Learned trial Judge erred in law and fact when she ruled that the plaintiffs in consolidated Civil Suit No.45 of 2007 Nantongo Candy and Others are concocted, fictitious and illegally before court with no locus standi.***
- 20 4. ***The learned trial judge erred in law and fact when she ordered that counsel for the appellant pays the costs of the dismissed suit.***
5. ***The learned trial Judge erred in law and fact when she condemned counsel for the appellants to pay costs of the dismissed consolidated suit without giving him a fair hearing***

6. *The learned trial judge erred in law and fact when she ignored their submissions and thereby arriving at a wrong conclusion*

5 7. *The trial Judge erred in law when she failed to strike out the affidavit of Joan Ketrina in Miscellaneous Application No.79 of 2014 for telling obvious falsehoods*

8. *The learned trial judge erred in law and fact when she failed to find that the respondent's failure to file an affidavit in rejoinder and submissions in reply was an admission of the appellant's averments.*

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The Appellant proposes that this Court grants orders that;

1. *The orders of the learned trial judge dismissing consolidated Civil Suit No.45 of 2007 Nantongo Candy & Others vs Gateway Bus Services be set aside*

15 2. *The file be sent to another judge to continue the hearing of consolidated Civil Suit*

3. *The appellants pray for costs in the lower court and court of Appeal*

4. *The orders directing the Appellants' advocate to pay costs of the suit be set aside*

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5. *The Appellants' advocate prays for costs of the lower court and the court of Appeal.*

Representations/appearances

At the hearing of the appeal, Mr. Wakabala Herbert appeared for the Appellants and Okong Innocent of Kob Advocates appeared for the Respondent. All parties adopted their scheduling notes and submissions as their arguments in this appeal. Court will consider the parties' submissions in determination of the grounds of this appeal.

Duty of this court as a first appellate court.

This is a first appeal arising from the decision of the High Court in exercise of its original Jurisdiction. It is therefore important for this court to remind itself of its duty as a first appellate court. The duty of a first appellate court is well settled. In the case of ***Kifamunte Henry v Uganda (Supreme Court Criminal Appeal No.10 of 1997)*** it was held that

“The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by the impressions made on the judge who saw the witnesses. However, there may be other circumstances quite apart from

manner and demeanour, which may show whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact turning on credibility of witness which the appellate Court has not seen. See Pandya vs. R. (1957) E.A. 336 and” Okeno vs. Republic (1972) E.A. 32 Charles B. Bitwire ys Uganda - Supreme Court Criminal Appeal No. 23 of 1985 at page 5.

The duty of the Court of Appeal to re-appraise evidence on an appeal from the High Court in its original jurisdiction is set out in **rule 29 Rules of the Court of Appeal** as follows;

“30(1) on any appeal from a decision of a High Court acting in the exercise of its original jurisdiction, the court may;

(a) re-appraise the evidence and draw inference of fact,

(b) in its discretion, for sufficient reason take additional evidence or direct that additional evidence be taken by the trial Court or by commissioner;

(2)

(3)”

I shall abide by this duty as I resolve the issues in this appeal.

Consideration of the Appeal

I shall deal with the grounds of Appeal in the order in which they were raised in the Memorandum of Appeal starting with ground 1 all through to ground 8.

- 5 ***Ground 1 The Learned trial Judge erred in law and fact when she dismissed consolidated Civil Suit No.45 of 2007 Nantongo Candy and Others vs Gateway Bus Services without giving the appellants a fair hearing.***

10 The Appellants' submission on this ground of Appeal is that the trial Judge did not give the plaintiffs a fair hearing yet the trial Judge ought to have found out whether parties were around or not. Further that they were condemned unheard yet the right to a fair hearing is "non-derogable" under Article 44 of the Constitution.

15 The Respondent's submission is that any hearing in respect of Civil Suit No.45 of 2007 is independent of the hearing of Miscellaneous Application No.79 of 2014. That the latter application was concerned with the propriety of Civil Suit No.45 of 2007 before the court. Therefore, the right to a fair hearing in the circumstances did not apply to the appellants because they were not properly before the
20 Court in Civil Suit No.45 of 2007. That there was no derogation from the right to a fair hearing because it did not apply to the Appellants in issue.

Determination of Ground 1:

Contemplated in a fair hearing is a fair opportunity to be heard. One cannot act fairly without giving the victim an opportunity to be heard. This entails; the right to present evidence, to cross examine, and to have findings supported by evidence. **See Election Petition Appeal No. 04/2009; Bakaluba Peter Mukasa versus Nambooze Betty Bakireke.** The right to a party to be given an opportunity to give his or her own evidence if he so chooses in his or her defence and that he should if he or she so wishes call witnesses to support their case is paramount. The principles of a fair hearing include but are not limited to prior notice, adjournments, cross-examination, legal representation and disclosure of information. There is a duty of giving the person against whom the complaint is made a fair opportunity to make, correct or to controvert any relevant statement brought forward to his prejudice.

In the instant appeal I am inclined to agree with the submissions of Counsel for the Respondents on ground 1 of appeal and find that **Miscellaneous Application No.79 of 2014** was clear on the claim that the appellants were fictitious and had no cause of action or locus standi to lodge the suit. The application was served on the appellants' counsel and indeed he responded to the application through the Affidavits of Wakabala Susan dated 6th August 2014, Namyalo Catherine dated 11th May 2015 and of Nakabuubi Sophia dated 30th April 2015.

Nothing stopped the appellants to file an affidavit in reply to the application for each of the Appellants to prove that they were not fictitious and describing the nature of their claim/cause of action. They had the opportunity to do so but chose not to take it on. The appellants in my view were given a fair opportunity to be heard. There was indeed a fair hearing given to the appellants by the trial Judge. They were given opportunity to file their written submissions, file their affidavits in reply and their advocate of choice was given an opportunity to appear in court and address the court as demonstrated by the record of proceedings in **Miscellaneous Application No.79 of 2014.**

For the reasons I have stated above, I find no merit in this ground of appeal.

Ground 2. The trial Judge erred in law and fact when she ruled that the claims by the Appellants/Plaintiffs in consolidated Civil Suit No.45 of 2007 Nantongo Candy and Others vs Gateway Bus Services are time barred

The appellants' submissions.

The appellant submitted that section **3 of the Limitation Act Cap 80** allows a claimant who claims general damages for negligence and personal injuries to bring that claim within a period of 3 years. That the accident in question in this case occurred on 30th July 2004. That the suits under personal injuries were filed on 19th July 2007 and 30th July 2007 well within the limitation period of three years. That

the case of Muyunga Florence vs Gateway Bus Services the was filed on the 19th July 2007 within the limitation period of three years.

That whereas the **section 6(3) of the Law Reform Miscellaneous Provisions Act** states that such suits shall be brought within a period of one year. The old law which is section 8(2)(ii) of the 1953 Law Reform Miscellaneous Provisions Ordinance is the replica of section 6(3) of the Law Reform Miscellaneous Provisions Act Cap 79. That the 1953 Ordinance amended the law and substituted the phrase “shall be commenced within 12 calendar months after the death of the deceased” with the words “shall be commenced within three years after the death of the deceased”. That the substituted words were omitted and not included in the new law. That the commissioner instead of producing the amendment to read three years the old provision was left to read one year. That as such the right law to be relied on is Section 36 of the Limitation Ordinance 1958. The accident in the instant case occurred on 30th July 2004 and the suit was filed on the 19th July 2007 well within the 3 years.

Respondent’s submission.

The Respondent submitted that the suit in contention was filed in 2007. That under the provisions of the Law Reform (Miscellaneous Provisions) Act Cap 79, this made it subject to the provisions of the law therein, specifically section 6(3) of the Act which limits the commencement of suits brought therein to twelve calendar months from the death of the deceased person. The record of Court reflects a copy of the Police Form 37 which documents an abstract of

particulars of an accident involving a motor vehicle. That the date of the accident, which is also the date at which the late Serwanja Mohammed passed on is reflected as the 30th July 2004. This means that the claim was brought around three years from the date of the
5 death of the deceased.

The commencement date of the **Law Reform (Miscellaneous Provisions) Act Cap 79** is indicated as the 3rd December 1953. Therefore, court ought to disregard the misapplication of the Limitation Ordinance of 1958 as the same is not the applicable law
10 to the facts in issue. That the appellants' claim was therefore barred by limitation in regard to time and therefore this Court should uphold the findings of the lower Court and dismiss the same for being time barred.

Determination of Ground 2:

15 I observe that the complaints in all the civil suits which were filed were poorly drafted. Counsel for the Appellants appears to have been trying to circumvent the limitation law and, in the process, did a bad job of drafting the claims. Nevertheless, I find that in all the complaints filed in court none of them was brought under the **Law Reform**
20 **(Miscellaneous Provisions) Act Cap 79**. The claims were straight-out claims of negligence which resulted in personal injuries for which all the plaintiffs claim damages. The advocates on both sides misdirected their submissions when they relied on Cap 79.

Therefore, I do not understand why the trial Judge applied the *Law Reform (Miscellaneous Provisions) Act Cap 79*. Clearly the plaintiffs'
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case as per the several complaints in the different suits which were consolidated show that theirs was a claim in negligence. As such the trial Judge erred in law and fact in finding that the suit was a claim under the **Law Reform (Miscellaneous Provisions) Act Cap 79** and as such time barred whereas not.

For the reasons I have state above I would find merit in this ground of appeal.

Ground 3 The learned trial Judge erred in law and fact when she ruled that the plaintiffs in consolidated Civil Suit No.45 of 2007 Nantongo Candy and Others are concocted, fictitious and illegally before court with no locus standi.

The Appellants' submissions.

Learned counsel for the appellant on this ground of appeal that the English law Dictionary defines concoct to mean invent an excuse, explanation or story in order to deceive others. That Fictitious is also defined to mean; not real or true, imaginary or fabricated, non-existent.

That on that basis there was no one fictitious as all the plaintiffs were manifested on the accident report dated 30th August 2004 and they even testified in court. That therefore this court should find that the plaintiffs are neither fictitious nor concocted.

Respondent's submissions

Counsel's submission is that the learned trial Judges including Oguli Oumo J. several times asked the Appellants to produce proof that

they were entitled to bring the suit. That the record shows that the appellant continually failed to provide that proof of their entitlement to bring the claim which eventually led to dismissal of the suit.

That the appellant's submission that the plaintiffs were manifested on the accident report is not enough to establish *locus standi*. That this Court held in the case of **Kithende Kalibogha & 2 Others vs Eleonora Wismer CACA No.34 of 2010** that;

10 *“locus standi is the right one has to be heard in a court of law or other appropriate proceeding...once one has a direct interest in a matter, then one is eligible to claim relief respecting that matter if that one's interest is being adversely affected...such a one is said to have locus standi and his or her cause of action is disclosed...a cause of action is created in a person once that person has a right,*
15 *the said right is being violated and the alleged violator is liable.”*

In **Gordon Sentiba & 2 Others vs Inspector General of Government SCCA No.06 of 2008**, the Supreme Court held that it is not the function of the Court to confer *locus standi* on persons.
20 Therefore, anyone to claim any relief from court ought to have the *locus standi* to appear before the same and do so. That therefore the findings of the lower court ought to be upheld.

Rejoinder by the Appellants.

In rejoinder, the Appellants' counsel submitted that the appellants are existing persons and they even testified in court. That the appellants had *locus standi* because they had suffered personal injuries and others had lost their bread winners as a result of the accident caused by the respondent. That the respondent in its various written statements of defense did not at any one time dispute the accident. As such at face value of the pleadings and testimonies in court, the appellants are existing persons who were properly before the court.

Determination of Ground 3:

On the onset I must state that I agree with the Appellants that the trial Judge erred in law and fact when she found that all the Appellants were concocted and fictitious. This is because in the Record of Appeal there is a Police Report showing that the following people were at the accident scene and were admitted at Masaka Hospital following the accident;

1. Nalukwago Safina F/A 26years of Kalagala
2. Nakabuubi Sofia Lumala F/A 29 years Kalisizo
3. Kanakulya Michael M/J son of Late Nsubuga
4. Step Mother -Namusoke
5. Sekiwa George William M/J 12 years
6. Buwanika of Kyango Kisungu Kalisizo
7. Flavia Nakintu F/J 12yrs Daughter of Late Semuju
8. Kizito Mother-Babirye Nola
9. Namawanda Jane F/J

- 10.** Nakyewa Mourine F/J 14 Daughter of Mr.Kasanga-
broken Arm d/o Kisenyi Richard of Kyangwe
- 11.** Katusabe Tabias M/A 21yrs of Kabira Bushenyi
- 12.** Musinguzi Hannington 31 yrs of Nsasi Ibanda
- 5 **13.** Sekiika M/A 24yrs of Nalukolo-fractured leg
- 14.** Serwada Kayemba M/A -Critical Condition
- 15.** Sewankambo Michael M/J 14yrs
- 16.** Mutesasira Gonzaga F/J 12 yrs
- 17.** Nabwami Lydia 31 yrs (two broken legs/injuries)
- 10 **18.** Mugarura Joseph M/A 17 years Pupil (P.7) of St. Mary's
Kisunku P/S Kalisizo
- 19.** Kasendwa Denis M/J 13yrs P.7 pupil
- 20.** Sembatya Edward M/J 13yrs P.6 pupil
- 21.** Sempera John Bosco M/J 10 yrs P.4 pupil
- 15 **22.** Mwebe Paul M/J 14yrs P.4 pupil
- 23.** Mutasibwa Frank M/J 12 yrs P.4 Pupil
- 24.** Katabalwa Charles 28yrs
- 25.** Nakakembo Scovia F/J 15yrs
- 26.** Nalubimba Lilimu F/J 15yrs
- 20 **27.** Nanseko Florence F/J 15yrs
- 28.** Nantongo Kandida F/A 48yrs teacher
- 29.** Kayanja Yasin M/J 13yrs
- 30.** Namakoye Keremensia F/J 11yrs
- 31.** Kaganza Dan M/J 16yrs
- 25 **32.** Mugesera Ceasar M/J 16yrs
- 33.** Nalukwago Meryan F/J 12yrs

34. Nakuya Rita F/A 26yrs

This clearly shows that the appellants, who also appear on the list, were not fictitious or concocted at all. For the reasons I have stated above, I would find merit in this ground of appeal.

- 5 ***Ground 4 The learned trial Judge erred in law and fact when she ordered that counsel for the appellant pays the costs of the dismissed suit.***

Appellants' submissions

Counsel for the Appellants submitted that there was absolutely no
10 justification for the trial Judge to visit costs of the suit on the advocate as there was nothing wrong with the advocate. That the advocate did not engage himself in any unprofessional conduct by virtue of representing the clients. That in the circumstances this court should find that the learned trial Judge erred in law when she
15 ordered that the advocate pays costs of the suit.

Respondent's submission

Learned counsel for the Respondent submitted that counsel for the Appellants showed a failure to advise his clients not to pursue the ill-fated litigation. The two or three litigants, in the presence of their
20 counsel were asked several times to establish their *locus standi* in Court and to actually produce all litigants in court and this led to several adjournments of the hearing of the matter in the lower court but they failed. That there was sufficient time for counsel to act

professionally which he failed to do. That as such it was just and fair for the court to hold that counsel pays the costs of the suit.

Appellants' Rejoinder

In rejoinder, counsel for the Appellants submitted that counsel for the Appellants is not at fault in anyway. That it was held in the case of **Abraham vs Jutsun (1965) 2 ALL.E. R** that an advocate can only be condemned to costs of the suit if he is guilty of dishonesty that is if he knowingly takes a bad point and thereby deceives the court. That none of the above was proved against the appellants' advocate.

10 **Determination of Ground 4:**

The trial Judge did not give any reasons as to why she was condemning counsel for the appellants to pay the costs of the suit and the application. This alone leaves the decision hanging in a balance. Further, a perusal of the court record still leaves the reasons unclear for ordering Appellants' counsel to pay the costs personally.

I find that for lack of reasons therefor indeed the trial Judge erred in law and fact when she condemned counsel for the appellant personally to costs.

20 ***Ground 5 The learned trial Judge erred in law and fact when she condemned counsel for the Appellants to pay costs of the dismissed consolidated suit without giving him a fair hearing.***

I have considered the submissions of both counsel for the appellant and the respondent.

In the instant case the respondent in the Miscellaneous Application which the trial Judge was dealing with did not pray for the order for counsel for the Appellant to pay costs personally. Further on the record of appeal there is no evidence to show that the trial Judge gave the Appellant any opportunity to be heard before the costs were given by the trial Judge.

I am therefore in agreement with the submissions of counsel for the Appellant that he was not given a hearing at all before he was condemned to personally pay costs. I would accordingly find merit in this ground of appeal.

Ground 6 The learned trial judge erred in law and fact when she ignored the appellants' submissions and thereby arriving at a wrong conclusion.

I have considered the submissions of both counsel for the appellants and the respondent. I have also considered the record of appeal. I am inclined to find no merit in this ground of appeal.

The trial Judge referred to the appellants submissions at pages 5, 8, 12 of the Judgment. I therefore find that the trial Judge did consider the appellants submissions but did not agree with them. She chose to agree with the submissions of the Respondent Company.

For the above stated reasons, I would find no merit in this ground of appeal.

Ground 7 The trial Judge erred in law when she failed to strike out the affidavit of Joan Ketrima in Miscellaneous Application No.79 of 2014 for telling obvious falsehoods.

5 I observe that the trial Judge did not consider the issue raised in this ground of appeal yet the appellants raised it in their trial written submissions at page 2 where they stated that;

“The respondents have three preliminary objections to raise to have the applicant’s affidavit sworn by Kaitirima Joan in support or the notice of motion to be struck out with costs.

10 *The affidavit in support of the motion is full of obvious falsehoods and therefore should be struck out with costs. In paragraph 5 of the affidavit of KAITIRIMA JOAN she states that;*

15 *5.The respondent claiming under the Law Reform (Miscellaneous Provision) Act are time-barred. The respondents should have commenced their actions within twelve calendar months after the death of the deceased persons under whom they are claiming.*

Paragraph 7 of the said affidavit further states;

20 *7.That they are thus time-barred and should accordingly be dismissed*

Your Lordship the above paragraphs are falsehoods calculated at hoodwinking this court to dismiss the respondents’ suit.”

This shows that what actually counsel for the Appellants had issue with was law applicable and how it should be applied. These were matters of law which the deponent was competent to testify about. An alleged error of law cannot be said to be a falsehood; it is an error. Therefore, I do not see any falsehood which the Appellants referred to in the submissions.

It is also the duty of the party claiming falsehood in an affidavit to prove it through cross examination of the deponent before making any such submission to court. The trial court had the power and authority to summon the deponent for cross examination under O.19 r.1 and 2 of the Civil Procedure Rules S.I 71-1 but the appellants did not move the court to exercise that authority and power. In the instant case the appellants' counsel did not discharge this duty.

As such I am inclined to find no merit in this ground of appeal and I hereby do so.

Ground 8 The learned trial judge erred in law and fact when she failed to find that the respondent's failure to file an affidavit in rejoinder and submissions in reply was an admission of the appellant's averments.

Order 12 rule 1 subrule (2) S.I 71-1 Civil Procedure Rules does not provide for affidavits in rejoinder in interlocutory applications. It states as follows;

“(2) Service of an interlocutory application to the opposite party shall be made within fifteen days from

the filing of the application, and a reply to the application by the opposite party shall be filed within fifteen days from the date of service of the application and be served on the applicant within fifteen days from the date of filing of the reply.”

The general rule on applications is **Order 52 of the Civil Procedure Rules** which under **rules 3 and 7** states;

3. Every notice of motion shall state in general terms the grounds of application, and, where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion.

7. All applications by summons shall be in chambers and, if supported by affidavit, a copy of any affidavit or affidavits relied upon shall be attached to each copy of the summons directed to be served.

It can be deduced from the above provisions that the law does not envisage filing of affidavit in rejoinder to an application. Therefore a party who intends to use additional affidavits must seek leave of court to file a supplementary affidavit in support of their application. Therefore, the failure of a party to file an affidavit in rejoinder cannot be interpreted as an admission of the facts in an affidavit in reply.

I therefore find no merit in this ground of appeal.

Conclusion

In the result, for the reasons I have given in this Judgment, I would, partially allow this appeal on grounds 2, 3, 4 and 5. The appeal accordingly fails on grounds 1, 6, 7 and 8.


- 5 The appeal having succeeded partially on four grounds and failed on four grounds I would order that each party bears its own costs of the appeal.

10 The orders of the trial Judge are hereby set aside and substituted with an order dismissing the Miscellaneous Application No. 79 of 2007.

The **Civil Suit No.45 of 2007** shall be set down for hearing before another Judge.

I so order.

15 Dated this 20th day of July 2022

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Stephen Musota
JUSTICE OF APPEAL

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL No.66 OF 2019
(Coram: Bamugemereire, Musota, Kibeedi JJA)**

5 **NANTONGO CANDY&28Others:..... APPELLANT
VERSUS
GATEWAY BUS SERVICES :..... RESPONDENT**

10 *(Arising from High Court Misc. App No.79 of 2007 arising from Consolidated
Civil Suit No. 45 of 2007 at Masaka by Oguli Oumo J.)*

JUDGMENT OF CATHERINE BAMUGEMEREIRE JA

15 The facts of this appeal are well-laid out in the lead Judgment of
my brother Musota JA and I will not regurgitate them here. I will
however, high light the background to this appeal. The appellants
were casualties of an accident involving the respondent's bus. They
filed several suits that were consolidated into High Court Civil Suit
20 No. 45 of 2007. While the latter suit was subsisting in the High
Court at Masaka, the respondent filed Miscellaneous Application
No. 79 of 2014. On 29th June 2015 Oguli Oumo J heard the
application and issued the orders which I have paraphrased as
follows:

- 25 1. That the Claimants in Consolidated HCCS 45 of 2007 were
concocted, fictitious and illegally before the court with no
locus standi
2. That the claims by some of the plaintiffs in the Consolidated
Suit No. 45 of 2007 were dismissed by reason of being time-
30 barred.
3. Counsel for the plaintiffs was ordered to pay the applicant's
costs personally on the ground that he ought to have known
that the suit was barred by statute of limitation and that the

CKB

plaintiffs were fictitious and concocted. The appellants being dissatisfied with the turn of events filed this appeal.

This matter comes before us for Judgment. I have read the opinion of my brother Musota JA, and I am in agreement with the same. I
5 note that my brother Kibeedi JA is also in agreement and therefore the opinion of this court is that the appeal succeeds in part on grounds no.2,3,4 and 5. We agree that:

1. The claims were rooted in negligence and therefore **the Law Reform Miscellaneous Provisions Act Cap 79** was not
10 applicable. The trial Judge erred in law when she ruled that the claims by the appellants/plaintiffs in Consolidated High Court Civil Suit No.45 of 2007 Candy Nantongo and others v Gateway Bus Services were time barred.
- 15 2. Having re-appraised the evidence we found as a fact that all the 29 claimants were accident victims for reason of being either by-standers, other travellers or passengers in the ill-fated bus whose particulars were captured at the scene of the accident and elaborately described in the Police Form and the
20 subsequent Police Report following the accident which occurred on 30th July 2004. These persons were found to be real humans in flesh and blood, corresponding to the names and age description. The learned trial Judge therefore, erred in fact when she ruled that the plaintiffs in Consolidated High
25 Court Civil Suit No.45 of 2007 Candy Nantongo and 28 Others were concocted, fictitious and illegally before court with no **locus standi**.

CLB

3. The learned trial Judge erred in law and fact when she ordered that counsel for the appellant pays the costs of the dismissed suit. The justification is made in full in ground no. 4.

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4. An advocate may be ordered to pay costs where he has caused costs to be incurred without reasonable cause or has caused an escalation of costs by unduly delaying a matter, gross negligence, egregious misconduct or other default that appears to be rare and exceptional. We did not find any such gross negligence or egregious misconduct in this case. Neither did the learned trial Judge advance any reason as to why she was condemning counsel to costs. In our view, learned trial Judge erred in law and fact when she condemned counsel for the appellants to pay costs of the dismissed and consolidated suits without giving him a fair hearing.

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5. We carefully reviewed the record of proceedings and noted that when the learned trial Judge came to the conclusion that counsel was to pay costs she did not at any one time give him a fair hearing. The learned trial Judge erred when she failed to grant counsel an opportunity to be heard on the issue. We therefore find that the learned trial Judge erred when she condemned counsel to costs unheard.

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CRB

Consequently it is ordered as follows:

1. As a result of succeeding in the aforementioned Grounds No.2, No. 3, No. 4 and N.5, Miscellaneous Application No.79 of 2007 is hereby dismissed.
- 5 2. The orders of the trial Judge in Miscellaneous Application No. 79 of 2007 are hereby set aside.
3. High Court Civil Suit No.45 of 2007 is remitted to the High Court in Masaka and shall be set down for hearing before a different Judge.
- 10 4. Since the appeal partially succeeded in equal part, each party shall bear its own costs arising from this court.
5. The costs arising from the High Court shall abide the outcome of the hearing in full.

15 We so order.

Dated this 29th day of July 2022.

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CATHERINE BAMUGEMEREIRE
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO.66 OF 2019

(Arising from High Court Miscellaneous Application No.79 of 2007 arising from
Consolidated Civil Suit No.45 of 2007)

NANTONGO CANDY & 28 OTHERS :::::::::::::::::::: APPELLANTS

VERSUS

GATEWAY BUS SERVICES::::::::::::::::::RESPONDENT

CORAM: HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA

HON. JUSTICE STEPHEN MUSOTA, JA

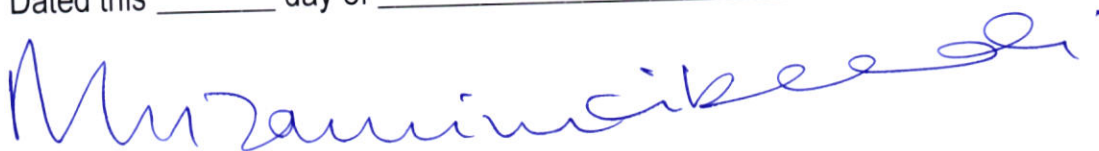
HON. JUSTICE MUZAMIRU M. KIBEEDI, JA

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JA

I have had the benefit of reading in draft the judgment by my brother, Hon. Justice Stephen Musota, JA.

I agree with his analysis, conclusions and the orders he has proposed.

Dated this _____ day of _____ 2022



Muzamiru Mutangula Kibeedi
JUSTICE OF APPEAL