

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT MBARARA

**HCT-05-CV-CA-0033-2004**  
(Arising From MBR-00-CS-0033-2002)

TUMWINE EMMANUEL .....APPELLANT

VS

ELIPHAZI NIINI..... RESPONDENT

**BEFORE: THE HON. MR. JUSTICE P. K. MUGAMBA**

**JUDGMENT**

This is an appeal from the ex parte judgment of the Chief Magistrate's Court, Mbarara, in its original jurisdiction. Three grounds of appeal were advanced which were the following:

1. The trial magistrate wrongly allowed the hearing of the case in the absence of the appellant in the given circumstances and as a result the appellant was wrongly condemned unheard which occasioned both a miscarriage of justice and the law.
2. The trial Chief Magistrate wrongly entered judgment for the respondent who had not established his claim on the evidence on record.
3. The trial Chief Magistrate erred in law and on evidence by awarding the respondent special and general damages of Shs. 200,000/= when the same had not been specially proved as required by law.

Under Order 9 rule 17 (1) (a) of the Civil Procedure Rules court may proceed to hear the suit ex pane if the plaintiff is present in court but the defendant, despite due notice, is absent. Apparently the learned Chief Magistrate proceeded under this provision. Both the plaintiff and the defendant had been present in court on 8th April 2003 when the case had been adjourned to 11th June 2003. That fact is evident from the record of proceedings. What is also evident from the proceedings is the entry for 11<sup>th</sup> June 2003. It shows that on that day both parties were absent. For unknown reasons right underneath the record is acknowledgment that Mr. Ngaruye appeared for the

plaintiff. The court then proceeded to hear the evidence of the plaintiff. It is amazing how the plaintiff who had earlier been recorded absent could now go ahead and testify. I must note for the record that while the original entry showing parties were absent is in black ink what followed later is in blue ink. I note also that the court was deemed constituted without a clerk or interpreter. All this is irregular.

Counsel for the respondent urges that under Section 100 of the Civil Procedure Act the record of the court for 1 1th June 2003 could be regarded as an accidental slip and corrected. I do not know how counsel would reconcile this with the proposition that possibly there was such accidental slip in the record for the preceding hearing date so that as a matter of fact the appellant herein was then not in court; hence his absence. I am persuaded to find that both litigants were not in court when it convened on 11th June 2003. What was recorded took place probably later in the day. Be that as it may court gave an ex parte judgment. Similarly I find that it is within the rights of the aggrieved party to appeal such judgment. See Section 67 (1) of the Civil Procedure Act and. of course, S. 220 of the Magistrates Courts Act.

From the foregoing I find there was a mistrial and to consider grounds 2 and 3 would in the circumstances be ungainly. This appeal succeeds and a re-trial is ordered.

Since none of the parties is to blame for what transpired in the course of hearing before the trial court costs are to abide the outcome of the re-trial.

P. K. Mugamba

Judge

30th May 2005

30<sup>th</sup> May 2005

Mr. Ngaruye for respondent

Mr. Kwizera for appellants

Ms Tushemereirwe court clerk/Interpreter

Court: Judgment read in court.

P. K. Mugamba

Judge