

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA,
AT KAMPALA
CIVIL APPEAL NO.59 OF 2009

LAKERI NALUWOOZA ::: APPELLANT

VERSUS

1. NAMWANDU YAKE LUNKUSE KYAZZE
2. ISRAEL NYANZI ::::::: RESPONDENTS
3. GODFREY KATEMBWA

BEFORE: HON. JUSTICE V. F. MUSOKE-KIBUUKA

JUDGMENT

The background to this appeal, briefly, is that the appellant instituted Civil Suit No. 236 of 1990 against the three respondents claiming that they had trespassed upon her land.

Civil Suit No.236 of 1990 which was filed in the Chief Magistrate’s Court at Mengo appears to have taken a very long time to be resolved. As a consequence, by the year 2008, the second respondent was dead. The appellant then filed Miscellaneous Application number 09 of 2008, under Order 6 rule 19 seeking leave to amend the plaint in Civil Suit No.236/1990, to substitute five persons who were claiming to be beneficiaries of the estate of the second respondent for the second respondent. It would also appear from the ruling by the Chief Magistrate that by the time of the hearing of Miscellaneous Application No.09/90 also the first and third respondents had also died.

In those circumstances, the applicant opted for withdrawing the case against both the first and third respondents so that she could maintain the suit against the defendants

substituted for the second respondent after the amendment of the plaint for the purpose of substitution.

The learned Chief Magistrate recorded the withdrawal of Civil Suit No.236 of 1990 against both the first and third respondents and ordered that it was effected. Then he invoked the provisions of Order 25 rule 1 (1) and ordered that applicant ought to pay the costs of the first and third respondents before she could pursue the case against the second respondent or his legal representatives. It is the Chief Magistrate's Order for costs against the appellant that constitutes the subject matter of this appeal.

Even though the Memorandum of appeal contained four grounds of appeal all of which were argued by both counsel, this court sees no need to reproduce them here. It also sees no need to state the arguments advanced by either counsel in respect of those grounds of appeal. Instead, court sees one single issue which emerges in this appeal. It is whether the learned Chief Magistrate was right to order the appellant to pay the costs of the first and third respondents before proceeding further with the case against the second respondent or whether the ruling and orders made by the learned Chief Magistrate are unsustainable?

It is clear to court that the learned Chief Magistrate was not oblivious of the fact that both the first and third respondents were dead when he issued the order for costs which is the subject of this appeal. The learned Chief Magistrate mentions that fact in the first paragraph of his ruling in which he made the order for costs. It is, therefore, not true as learned Counsel Mr. Othieno contends that the issue of the death of the first and third respondents was never in issue or highlighted all but that it was a simple withdrawal of the case by the appellant against the first and third respondents.

In making the order constituting the subject of this appeal, the learned Chief Magistrate invoked the provisions of Order 25 rule (1), of the Civil Procedure Rules, and ordered that the appellant pays the costs of the first and third respondents. That, in the view of this Court was clearly wrong in law. Order 25, of the Civil Procedure Rules, only applies

to instances where a suit is withdrawn against a party who is not dead. Where that happens rule 1(1) of Order 25 requires that upon the withdrawal, the party withdrawing the claim partly or wholly pays the costs of the party against whom the claim has been withdrawn. That was not the case, in respect of the appellant in the instant appeal. The first and third respondents were both dead.

Where the party against whom a claim is withdrawn is dead, as was the case with both the first and third respondents in the instant case, the law applicable is not Order 25 of the Civil Procedure Rules. Instead, it is Order 24 rule 2 of the Civil Procedure Rules that is the law that is relevant. It is that law of Procedure that the learned Chief Magistrate ought to have invoked in this case. To invoke Order 25 rule 1, of the Civil Procedure Rules, and order the payment of costs, instead of Order 24 rule 2, which does not require the payment of costs, was an irregularity or mistake that caused great injustice to the appellant. The order which the learned Chief Magistrate made is clearly contrary to law. It must in the view of this court, be vitiated. *Mawji Vs. Arusha General Store [1970] E.A. 137.*

It appears to court also to have been wrong, in a ruling in Miscellaneous Application No.09 of 2008, for the learned Chief Magistrate to have issued the order requiring the appellant pay costs to the first and third respondents when those respondents were not even parties to the application. The order could only be made appropriately in Civil Suit 236 of 1990 itself and not in Miscellaneous Application No.09 of 2008.

In the circumstances, therefore, this appeal succeeds. The order issued by the lower court against the appellant requiring her to pay costs to the first and third respondents upon withdrawing Civil Suit No.236 of 1990 against each of them is set aside for being both illegal and irregularly issued against the appellant.

Civil Suit No.236 is returned to the Chief Magistrate's Court for trial against the legal representatives of the second respondent.

The costs for this appeal are to abide by the outcome of Civil Suit No.236 of 1990.

V. F. Musoke Kibuuka

Judge

02.04.09