

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT – 05 –CV –CA No. 0054 -2010

(Arising from NTUNGAMO C.S - No. 22/2009)

1. ABARAGAINÉ BENON }
2. BIRUNGI FELIX }
3. BIRIHANZE }
4. BIRIHANZE JENIPHER }
5. BIRIHANZE FARIDAH } APPELLANTS

VS.

ASHEMEZA GRACE RESPONDENT

BEFORE: HON.MR. JUSTICE BASHAIJA K. ANDREW

JUDGMENT

The appeal arises out of the ruling and orders of His Worship Sayekwo Emmy G. Magistrate Grade 1 delivered at Ntungamo (*herein after referred to as the “trial court”*) on 4/11/2010. The 3rd, 4th, and 5th Appellants are seeking that orders of the trial court be set aside with costs in the lower court and on appeal.

The brief facts are that the Respondent sued all the five Appellants in the trial court for recovery of Bibanjas, which the 1st Appellant had allegedly sold to them. The 1st Appellant had a relationship with the Respondent, out of which two children were produced. They subsequently separated, and the 1st Appellant sold the land to the 3rd, 4th, and 5th Appellants. The Respondent sued them, but later realised that she maintained no cause of action against them, and she withdrew the suit against them.

The trial court consented to the withdrawal, but did not award costs to the Appellants. It is against the decision not to award them costs that the 3rd,

4th, and 5th Appellants are now appealing. They advanced two grounds of appeal as follows:-

- 1. The learned trial magistrate erred in law and fact when he held that the Respondent withdraw the case against the 3rd, 4th and 5th Appellants without costs to them whereas the circumstances dictated otherwise.***
- 2. The learned trial magistrate erred in law in that he failed to exercise his discretion on costs to the 3rd, 4th and 5th Appellants Judiciously.***

It is the duty of this court, as a first appellate court, to re-evaluate the evidence of the trial court and re-appraise it afresh, and to draw its own conclusions. In doing so, however, it should make allowance for the fact that it neither saw nor heard the witnesses as they testified. See ***Selle v. Associated Motor Boat Co (1968) EA 123 at page 126; Banco Arabe Espanol v. Bank of Uganda, SC Civ. Appeal No. 8 of 1998; Kifamunte v. Uganda, SC Crim. Appeal No 10 of 1997; Begumisa v. Tibebaga SC Civ. Appeal No.17 of 2002.*** These are the guiding principles which this court will follow in resolving the issues raised in the instant appeal.

Ground I.

The learned trial magistrate erred in law and fact when he held that the Respondent withdraw the case against the 3rd, 4th and 5th Appellants without costs to them whereas the circumstances dictated otherwise.

The main complaint is that the trial court should have awarded costs to the 3rd, 4th, and 5th Appellants the moment it allowed the Respondent/Plaintiff to withdraw the suit against them.

Withdraw of suits by the parties is governed by **Order 25 of the Civil Procedure Rules**. Under **Rule 1** thereof, a plaintiff who withdraws the suit with or without leave of court after the defence has been filed is obligated to pay costs to the defendant. This Rule must be read together with **Section 27 of the Civil Procedure Act**, which stipulates the general principle that award of costs in every proceeding in the court is at the discretion of the court as regards by whom they are to be paid. See **Makula Internatinal v. Cardinal Nsubuga [1982] HCB 11 at p.15**. However, like all discretions, it must be exercised judiciously.

In addition, under **sub-section (2)** thereof, a successful party is entitled to costs, unless there is good reason to deny such party costs. See **Jennifer Behange, Rwanyindo Aurelia, Paul Bagenzi v. School Outfitters Ltd, CA Civ.Appeal No. 53 of 1999 (UR)**.

In the instant case, the withdrawal was with the consent of court after the Respondent realised that she had no cause of action against the 3rd, 4th, and 5th Appellants. Under **O 25 r.1 CPR**, they were entitled to costs because there is no good reason on record, within the terms of **Section 27 (2) Civil Procedure Act**, that was assigned by the trial court which would disentitle the Appellants to costs. The only reason on record is that court agreed with the Respondent that the case, indeed, existed only as between the 1st Appellant and Respondent and not the 3rd, 4th, and 5th Appellants. It follows that *Ground 1* of the appeal succeeds.

Ground 2.

The learned trial magistrate erred in law in that he failed to exercise his discretion on costs to the 3rd, 4th and 5th Appellants judiciously.

This ground arises from; and is closely related to *Ground 1* above. It is called for only to add that the appellate court would normally not interfere in the exercise of discretion by the trial court, unless the lower has applied

the wrong principle of law or has taken into account irrelevant factors or has omitted factors which are material, and the decision has occasioned a miscarriage of justice. See *Mbogo v. Shah [1968] EA 93; Ward v. James [1966] QB 279 at 293.*

In the instant case, the trial court failed to properly exercise its discretion when it did not apply its mind to the correct principle of the law, and as a result arrived at a manifestly erroneous decision of not awarding costs to the Appellants; which calls for the intervention of this court. *Ground 2* of the appeal succeeds.

The net effect is that orders of the trial court are set aside, and the 3rd , 4th , and 5th Appellants are awarded costs here on appeal and in the court below.

BASHAIJA K. ANDREW

J U D G E

22/08/2012