

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HCT – 01 – LD – CA – NO. 0047 OF 2018
(ARISING FROM CIVIL SUIT LD NO. 019 OF 2017)

5 **TABARO NELSENSIO ::::::::::::::::::::::::::::::::::: APPELLANT**

VERSUS

OMUKWENDA KAIJA BWANGO ::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE HON: JUSTICE VINCENT WAGONA

JUDGMENT

Introduction:

The appellant lodged an appeal against the ruling of His Worship Muhumuza Asuman Principal Magistrate Grade One, Kyenjojo Magistrate’s Court delivered on the 4th of July 2018 asking court to allow the appeal and set aside the ruling of the trial magistrate.

Background:

The appellant filed FPT – 21 – CV Civil Suit, Land No. 19 of 2017 seeking a declaration that the defendant is a trespasser to the suit land; a permanent injunction restraining the defendant, his agents and servants from interfering with the plaintiff’s suit land; an eviction order; general damages and costs of the suit. The Respondent filed a defence and the case was scheduled for hearing. The case was mention on different dates and on the 21st day of February 2018 scheduling

was done orally and parties were directed to file witness statements and exchange the necessary documents to be done before 25th April 2018 and the matter was accordingly adjourned to the same date. The case came up on different dates and was adjourned on ground that the appellant had not filed his statements and trial
5 bundle. On 24th May 2018 per the record, the trial magistrate made a ruling dismissing the suit in the following terms:

“1. That since the witness statements were filed out of time and there is no application for enlargement of time, the same offends the court order and are of no consequence.

10 *2. Secondly, there is no affidavit of service having struck out the defective one dated 4th/7/2018.*

3. The plaintiff has therefore failed to comply with the order of court dated 21st February 2019, I therefore dismiss this case as prayed under Order 17 rule 4 with costs to the defendant.”

15 The appellant being aggrieved with the said ruling lodged this appeal on the ground that: **The Learned Trial Magistrate erred in law and fact when he dismissed Civil Suit No. 019 of 2017 under Order 17 rule 4 of the Civil Procedure Rules on ground that the appellant’s witness statements were filed out of time.**

20 **Hearing:**

The appeal was filed on 31/07/2018 and the record of the lower court was received on 4th of March 2020. Since then the parties took no further steps. This court therefore decided to determine the appeal on the basis on the grounds of appeal framed and the record of proceedings of the lower court.

Duty of The First Appellate Court:

As a first appellate court, my duty is to subject the evidence of the lower court to a fresh and exhaustive scrutiny and draw fresh and independent inferences and conclusions. (*See Panday Vs R (1967) E.A 336 and Narsensio Begumisa & 3 others Vs. Eric Kibebaga, SCCA NO. 17 of 2002.*)

Consideration of the appeal:

The Learned Trial Magistrate erred in law and fact when he dismissed Civil Suit No. 019 of 2017 under Order 17 rule 4 of the Civil Procedure Rules on ground that the appellant's witness statements were filed out of time.

10 The trial magistrate hinged the dismissal on order 17 rule 4 of the Civil Procedure Rules that provides that:

Court may proceed notwithstanding either party fails to produce evidence.

15 *Where any party to a suit to whom time has been granted fails to produce his or her evidence, or to cause the attendance of his or her witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding that default, proceed to decide the suit immediately.*

20 In my view the above rule should be applied taking into other principles of law so as to ensure the substantive administration of justice. Under Article 126 (1) (e) of the Constitution, the courts are enjoined to administer substantive justice without undue regard to technicalities. It is not a mandatory requirement under Order 17 rule 4 of the CPR, that if a party is given time to do a specific act and fails to do so, the court must go ahead and determine the suit immediately. This depends on the nature of the act that a party has defaulted on. Order 17 rule 4 of the CPR gives the

court a discretion, which must be exercised judiciously. Thus Order 17 rule 4 of the CPR must be applied with kin regard to the facts of the matter and the interests of administering substantive justice.

In this case the appellant was given time to file his witness statements and serve the same. He defaulted on service of the same upon the defendant within the time allowed by court and on that basis the trial magistrate dismissed the suit under Order 17 rule 4 of the Civil Procedure Rules and struckout the affidavit of service of the statements on record.

What is clear from the record is that the plaintiff had filed his witness statements and was in court ready to proceed. The failure to serve the same upon the Respondent's counsel on time in view was curable by giving the parties a little more time. Not every noncompliance with directions of court calls for strict enforcement at the detriment of the party's right to seek remedies from court by the dismissal of the suit.

In the circumstances of this case, I am persuaded by the reasoning in the decision of European Court of Human Rights in *Ashingdane v United Kingdom* (1985) 7 EHRR 528, at para 57 where it was stated thus:

"Certainly, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication, since the right of access, 'by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals'. . . .

Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article

6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved." (Emphasis added)

In this case the plaintiff and his counsel were in court ready to proceed. They had already filed their witness statements though out of time and if in the mind of the trial magistrate he believed service was not proper, he would have ordered for proper service of the statements upon the defendant's counsel who in any event was in court, and have the matter stood-over or adjourned to another date for the defendant's counsel to prepare and cross examine the witnesses.

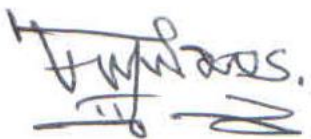
The appeal therefore succeeds with the following orders:

(a) That the Order by the Learned Trial Magistrate dismissing Civil Suit No. 19 of 2017 as well as the accompanying order for costs are hereby set aside.

(b) That Civil Suit No. 19 of 2017 shall be heard on the merits at the Chief Magistrate Court of Kyenjojo.

(c) That the Registrar of this Court is directed to transfer this file to the Chief Magistrate Court of Kyenjonjo for expeditious disposal of the case on the merits.

(d) Each party to bear their own costs.



Vincent Wagana
High Court Judge
FORT-PORTAL
11.01.2023