THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 62 OF 2013

1. **OKURUT JOSEPH**
2. **AKIA JANE FRANCES**
3. **ANGUA FELIX**

::::::::::::::::::::::::::::APPELLANTS

VERSUS

1. **NEW BUBAJJWE PRIMARY SCHOOL SAMUEL SESSANGA**
2. **DAN LULE SESSANGA**

::::::::::::RESPONDENTS

BEFORE: HON. LADY JUSTICE ELIZABETH MUSOKE

JUDGMENT:

The appellants herein being dissatisfied with the ruling and orders of Her Worship Justine Atukwasa, delivered on 25/09/2013 appealed to this court on grounds that;

1) The trial Magistrate erred in law and fact when she ruled that the appellants had failed to prove that their Counsel had misled them.

2) The trial Magistrate erred in law and fact when she failed to evaluate the evidence on the record as a whole.

3) The trial Magistrate erred in law and fact when she ruled that the 1st and 3rd appellants did not show interest in the

applications since they had not sworn affidavits in support of the application.

4) The trial Magistrate erred in law and fact when she ruled that it is the 2nd time the matter had been dismissed hence a clear case that the appellants were not interested in the case.

It is prayed that the appeal be allowed; the orders of the learned trial Magistrate be quashed, Civil Suit No. 175 of 2009 be reinstated and the appellant be awarded costs of the appeal and the court below.

Perusal of the record shows that the appellants (then plaintiffs) instituted Civil Suit No. 15 of 2005 against the respondent (then defendants) in the High Court at Nakawa. The appellants' claims against the respondents therein were premised on unlawful termination from employment, payment of salary arrears; payment of salary in lieu of notice; general and exemplary damages; interest and costs of the suit.

In the written statement of defence; the defendant alleged that the termination was lawful in as far as the plaintiffs had committed acts of gross misconduct; the defendants therefore invited the court to dismiss the suit with costs.

Before the matter could be heard and determined, it was transferred vide letter dated 25/06/2009 and signed by the Assistant Registrar to the Chief Magistrates Court at Nabweru for

further management since it fell well within the jurisdiction of that court.

At Nabweru court, the file was duly received and subsequently given a sequential number, that is, Civil Suit No. 175 of 2009. It is noted from the record that the parties tried to settle out of court but in vain. Subsequently preliminary points of law were raised by Counsel for the defendant; the same were however dismissed with costs to the plaintiffs accordingly.

Suffice it to note, the matter suffered several adjournments due to absence of the plaintiffs in court and on 13th September 2011, it was dismissed under Order 9 rule 22 of the Civil Procedure Rules and costs awarded to the 3rd defendant who was present on the said date.

On 4/10/2011; the appellants filed Civil Miscellaneous Application No. 239 of 2011 seeking orders that the dismissal of Civil Suit No. 175 of 2009 be set aside and costs of the application be provided for. This application was supported by an affidavit deponed by the 2nd appellant herein, Akia Jane Frances stating that they were not only misled by the former advocates, that is M/S Kaggwa Oyesigire & Co. Advocates but that they would also suffer grave injustice if the application was granted.

In reply to the said motion, the 2nd respondent opposed the application stating among others that the appellants had fixed the matter for the date of 13/09/2011; they ought to have been

present on the one hand and that the failure by the 1st and 3rd appellants to swear affidavits in support of the motion meant that they were not interested in the application.

In her ruling, the trial Magistrate found that the appellants herein did not show any sufficient reason as to why they did not attend court when the matter had been fixed for hearing. The application was accordingly dismissed, hence this appeal.

This is a first appeal. It is the duty of the first appellate court to review the record of the proceedings for itself in order to determine whether the conclusion reached upon the evidence by the trial court should stand. See ***Tindimwebwa Narisi Vs Mutebi Salim HCCA No. 57 of 2007***.

I will now turn to the grounds of appeal in the chronology adopted by Counsel on either side.

Ground 1: The trial Magistrate erred in law and fact when she ruled that the appellant had failed to prove that their Counsel had misled them;

It was submitted for the appellants that they were duly represented by M/S Kaggwa Oyesigire & Co. Advocates in conducting the matter for and on their behalf. This therefore signified that this firm of advocates ought to have updated their clients/appellants in regard to the hearing of the application. As such the failure to do so should not be visited on the appellants.

Counsel therefore referred to the authorities of ***Mugo Vs Wanjira [1970] EA 481; Mort Mart Vs Yona Kanyomozi SCCA No. 6 of 1999,*** for the proposition that mistake of Counsel should not be visited on the litigant.

In reply, it was submitted for the respondents that at the time the trial Magistrate dismissed the suit; the appellants had not shown any intention to attend the hearing of the main suit and that the firm of advocates that was representing them failed to prosecute the matter hence leading to a dismissal. Counsel contended that the said 'failure' is not negligence. He invited court to reject this ground of appeal accordingly.

Perusal of the record shows that on 19/01/2010 the 2nd and 3rd appellants were in court while the 1st appellant, all the defendants and Counsel on both sides and the trial Magistrate were absent. On 25/08/2010, the appellants were all present. On 28/09/2010, Mr. Kaggwa for the appellants was in court although the rest of the parties were absent. On that date he stated that the original file in the High court at Nakawa had gone missing for a period of 2½ years. It was discovered but went missing again for a period of 7 months and that attempts to settle out of court were futile. The matter was adjourned to 4/11/2010, and later to 16/12/2010; on this date Counsel on either side were present. On 14/01/2011 Counsel for plaintiff was present and the rest of the parties were absent. On 5/5/2011 a ruling on preliminary points was delivered in presence of Counsel for the plaintiff.

On 13/9/2011 the plaintiffs and their Counsel were absent hence dismissal of the suit under Order 9 rule 22 of the Civil Procedure Rules which provided for the procedure when the defendant only appears. It reads:

> ***"Where the defendant appears, and the plaintiff does not appear, when the suit is called on for hearing, the court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part of it, in which case ....."***

The section is couched in mandatory terms: If both plaintiff and Counsel are absent and defendant present, suit is dismissible with costs to the latter. Under Order 9 rule 23, the party whose suit has been dismissed (under O9 r. 22) may apply for an order to set the dismissal aside, In an application for restoration of a dismissed suit, the applicant must show sufficient cause, that is, that he had an honest intention to attend the hearing, and did his best to do so; and was diligent in applying. It would appear to me that the appellants' Counsel had been diligent in having the matter prosecuted right from the time the file allegedly went missing to the time a duplicate one was created and eventually transferred from the High Court, Nakawa to the Chief Magistrate at Nabweru. Counsel had been vigilant in attending court save for that fateful day when the matter was dismissed. It was stated in the application for reinstatement that the appellants had not been informed of the next hearing by their Counsel. This could have

been an oversight on the part of the appellants' Counsel and probably explains their absence in court then.

It is trite law that a procedural error, or even a blunder on a point of law, on the part of the advocate (including that of his clerk), such as failure to take prescribed procedural steps or to take them in due time, should be taken with humane approach and not without sympathy for the parties, and, in a proper case, such mistake if the interests of justice so dictate because the door of justice is not closed merely because a mistake has been made by a person of experience who ought to have known better, and there is nothing in the nature of such as mistake to exclude it from being a proper ground for putting things right in the interests of justice and without damage to the other side. See ***Githeri Vs Kimungu [1976 – 1985) EA page 103.***

In the instant case, the case was dismissed on 13/09/2011. The appellants have not stated the date on which they learnt of the dismissal. However, the record shows that an application to set aside was filed on 4/10/2011, about three weeks after the dismissal.

In ***Marisa Vs Uganda Breweries Ltd [1988 – 90] HCB 131*** the court observed that although the rules do not provide for a time limit, the application to set aside an order of dismissal must be brought within a reasonable time.

In the instant case, I am of the considered opinion that the appellants' exercised due diligence in the matter. The short silence between dismissal and the application for restoration coupled with instruction of a new firm of advocates (M/S Wamimbi & Co. Advocates) is in my view, consistent with the alleged interest in the prosecution of the suit. In the circumstances, ground one of the appeal succeeds.

The rest of the grounds were argued jointly.

It was submitted for the appellants that had the learned trial Magistrate taken into account the period within which the appellants instructed new lawyers to file the application for reinstatement of the dismissed suit, she would have found that the appellants were indeed interested in prosecuting the dismissed suit.

It was further submitted that it was erroneous for the trial Magistrate to dismiss the application for reinstatement on the premise that it was supported by a single affidavit sworn by the 2nd appellant herein instead of all the parties to the application. Counsel therefore contended that this finding was offensive of Order 1 rule 1 in regard to joinder of parties; he maintained that the affidavit sworn by one of the party to the suit was sufficient.

It is settled law that if an affidavit is sworn by one of many applicants with the same cause of action; it is not necessary to state that it is sworn on behalf of others though it is preferable to

do so. See ***Camille Vs Meralli [1966] EA 46.*** For this reason I would fault the trial Magistrate's finding that failure for the other applicants to swear affidavits in support of the application meant that they had lost interest in the matter.

On the other hand, it was submitted that the much as the learned trial Chief Magistrate held that the matter had been dismissed twice; the record does not show this position. Additionally, Counsel contended that it was not the appellants' fault that it had taken so long for the file to be transferred from the High Court at Nakawa to the Chief Magistrates court at Nabweru. In that regard Counsel contended that it was improper for the trial Magistrate to hold that the matter had taken long without taking off as a basis to dismiss the application for reinstatement.

Counsel conclusively invited court to allow the appeal, quash the orders made by the trial Chief Magistrate and order the reinstatement of the suit.

It was submitted for the respondents that the trial Chief Magistrate was right to disallow the reinstatement of the suit in so far as the orders relating to employment claims as sought by the appellants were untenable in a Magistrates court. He referred to ***Section 93 of the Employment Act No. 6 of 2006*** and the authority of ***Concern Worldwide Vs Mukasa Kugonza Civil Revision No. 3 of 2013 (High Court Soroti)*** for the proposition that Magistrates court do not have jurisdiction to hear and determine claims arising from

employment matters and that appeals from labour officer in regard to employment matters lie to the Industrial court.

Additionally, Counsel contended that no reason was given by the appellant for not attending court in absence of their lawyer. It was Counsel's contention that attendance of court to adduce evidence is by the witness and not Counsel and that the appellants for a period of 9 years failed to comply with Order 17 rule 4 of the Civil Procedure Rules.

I have critically perused the record, the trial Magistrate stated in her ruling;

> ***"The suit has been dismissed twice ..... this is a clear case where the plaintiffs/applicants are not interested in the matter....."***

The only time the suit was dismissed was on the 13/09/2011. It was on the basis of this dismissal that MA No. 239 of 2011, the subject of this appeal was instituted. It is therefore my finding that the trial Magistrate's conclusion that the suit had been dismissed twice, is without any basis.

On the other hand, I concur with Counsel for the respondents that this being an employment matter, jurisdiction is conferred on the Labour officer as per Section 93 of the Employment Act. I must however note that the High Court has unlimited jurisdiction to try and determine matters accordingly and as such its jurisdiction cannot be ousted. See Article 139 of the 1995 Constitution.

It is not in dispute that the original suit by the appellant was filed in the High Court at Nakawa and was only transferred to the Chief Magistrates court at Nabweru as per the letter of the Assistant Registrar. This could have been an oversight by the officers at Nakawa and the same cannot therefore be visited on the appellants.

Additionally, much as the respondents' Counsel has referred to Order 17 rule 4 of the Civil Procedure Rules which provides;

> ***"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."***

I wish to note that the dismissal of the main suit was not under Order 17 rule 4 above, as Counsel for the respondent wants this court to believe, but it was under Order 9 rule 22. Where as a dismissal under the latter can be set aside, a dismissal under Order 17 rule 4 can only be appealed against for the simple reason that a decision made under Order 17 rule 4 is a decision on the merit and it gives rise to a decree***. HCMA No. 279 of 2009 Nandaula Florence & Anor Vs Commercial Micro Finance Ltd & Anor.***

On the other hand, Counsel contended that the appeal was lodged out of time; that is after 120 days from the date of the

ruling by the trial Magistrate. He conclusively invited court to dismiss the appeal with costs.

In a rejoinder filed for the appellants, it was submitted that the ruling was delivered on 25/09/2013 and therefore a notice of appeal and memorandum of appeal lodged on 3/10/2013 was therefore within the 30 statutory days within which an appeal should be lodged. Counsel for the appellant conclusively reiterated his earlier submissions and prayers accordingly.

Perusal of the record shows that whereas the matter had been adjourned by the then trial Magistrate to 30/10/2012 for ruling, the same was never delivered until 25/09/2013. It was after this date that the appellants herein lodged their appeal on 3/10/2013; less than 10 days after the ruling. It is therefore my finding that the appeal was lodged within the statutory time/30 days from the date of the decision.

In the final result, the appeal succeeds. The orders of the trial Magistrate are set aside and the suit reinstated. The appellants are at liberty to file the same in the right forum subject to the period of limitation.

I make no orders to costs.

Before I take leave of this matter I have noticed that this appeal ought to have been lodged at the Central High Court, Nakawa in accordance with the High court (Circuits) Instrument SI 20 of 2004. I have however noted that there could have been

confusion from the onset when the matter was administratively transferred to Nabweru Chief Magistrates court.

Elizabeth Musoke

JUDGE

31/10/2014