

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA**

CIVIL APPEAL NO. 051 OF 2012

5 (Arising from Misc. Application No. 1/2012-Kamuli)
(Arising from Civil Suit No. 059/2009-KAmuli)

KABITANYA
ROBERT
10 **APPELLANT**

VERSUS

15 **1. JOHN KABITANYA**
2. NABUTI ISIRAIRI PETER
3. NABUTI
FRED
RESPONDENTS

20 **BEFORE: THE HON. JUSTICE GODFREY NAMUNDI**

JUDGMENT

25 This is an appeal against the Ruling of the Magistrate Grade 1, His Worship Ismail Zinsanze sitting at Kamuli on 6/3/2012.

The facts giving rise to these proceedings are as follows:
30 In the head suit before the magistrate (Civil suit No. 59/2009), the Defendants did not apparently file a defence within the required time limit.

The magistrate commenced hearing of the case, and at some stage during the said proceedings, the Defendants' filed a written statement of defence.

- 5 Witnesses on both sides were heard, cross examined and the case was finally set down for Judgment which was delivered on 6/1/2011. The Plaintiff's claim against the Defendants was dismissed.
- 10 The Plaintiff then filed an Application under Section 98 CPA and Order 46 r. (1) (b) and r. (8) CPR, seeking orders to have the Judgment of the Court reviewed/set aside and Judgment entered in favour of the Applicant.
- 15 The Application was premised on the grounds that since the Defendants in the head suit did not file their written statement of defence within the time prescribed under Order 9 CPR, they had no locus to have been heard, their defence should have been disregarded and the matter should have
20 proceeded exparte.

It is noteworthy that during the hearing of the head suit, the Plaintiff did not object to the participation of the Defendants. I am sure the said proceedings were only challenged
25 because the Plaintiff's claim was dismissed.

The Application for Review was dismissed by the Magistrate, holding that final Judgment having been delivered, the Applicant's only option was to file an appeal against the said Judgment.

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The Applicant/Appellant was not satisfied with the decision and filed the following grounds:

1. That the trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record hence occasioning a miscarriage of justice.

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2. That the trial magistrate erred in law when he neglected the legal issues involved in the application, hence occasioning a miscarriage of justice.

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3. That the trial magistrate erred in law when he held that the only remedy available to the Appellant was an appeal.

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For the Appellant it was submitted that Order 9 r. 1 CPR is mandatory.

The Defendants accordingly had no locus in this matter.

25 Reference was made to:

1. Kitariko Vrs. Twino Kalama (1982) HCB 97.

2. Westmond Land Asia BID Vrs. A.G. (Misc. Application No. 815/99) and

3. National Bank of Kenya Ltd. Vrs. NJAU

5 In **Westmond Land Asia (supra)**, it was held that where a party fails to comply with the provisions of Order 9 r. 1 CPR, such party is precluded from the locus to take part in any further proceedings including application to stay proceedings.

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In reply, it was submitted for the Respondents that all parties were accorded a fair hearing, the Appellants and Respondents cross-examined and a decision was made. That failure to file a defence does not occasion a
15 fundamental breach of proceedings. Reference was made to **Girigoli Byakunasa Vrs. B. Nkoba & Another, Fort Portal CA 7/99**. In that case, the Defendants were allowed to participate in the proceedings.

20 The High Court on Appeal found that this was a minor procedural mishaps.

I have considered the submissions by both Counsel. Suffice it to say that proceedings for Review by a trial Court are
25 meant to correct minor errors e.g. mathematical errors that do not go to the merits of the case.

Secondly, if the Applicant thought that there were grave errors in the exercise of jurisdiction by the magistrate, then he should have filed an Application for Revision under
5 Section 83 CPA before the High Court instead of seeking to Review the Judgment.

Thirdly, once Judgment was delivered after both parties were heard, the Applicant should have instead filed an appeal
10 against the Judgment and cited the errors as grounds of Appeal.

In **Girigoli Byakunasa Vrs. B. Nkoba & Another, CA 7/1999**, the magistrate in the lower Court on realising that
15 the Defendants had not filed a Written statement of defence, disregarded their evidence on record much as the said evidence was on record with both parties having participated in the proceedings.

20 Justice Bamwine as he then was held as follows:

**“The general principle of law is that failure to file a defence operates as an admission of all allegations in the Plaint except as to damages and that a Defendant who files no
25 defence cannot be heard.”**

He went further:

“In the instant case while no defence was filed, the Court allowed the Appellant, mistakenly or otherwise, to participate in the proceedings.”

5

In my view, while it is beyond dispute that failure to file a defence raises a presumption or constructive admission of the Plaintiff’s claim.....where at no stage, no objection is raised against the Defendants’ participation, it would be
10 sheer procedural pendantsry for Court to pretend that it has not heard any such defence, when all of it is already on record..... The effect of the rule favouring filing of pleadings is to ensure that the issues for determination are well articulated and defined.

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It is my considered view that the instant case is on all fours with the authority cited above.

The Defendants were allowed to participate in the
20 proceedings and even went ahead and filed a defence. It would be absurd for Court to pretend that the Defendants never participated when their evidence is on record.

The procedural mishap (caused by both the Court and the
25 Appellant’s silence at the trial) can be cured by invoking

Article 126 (2) (e) of the Constitution and Section 101 CPA.
Rules of procedure should not be used to defeat its ends.

5 The Court has sufficient material to exercise its discretion
and determine the suit on its merits. I accordingly find that
there was no injustice caused, the parties having been
accorded the right to be heard. The only remedy available
to the Applicant was to file an appeal against the Judgment
of the trial Court in Civil Suit No. 59/2009. This Appeal must
10 fail for lack of merits. It is self-defeating. The Ruling and
Orders of the trial magistrate are upheld.

Godfrey Namundi

15 **JUDGE**

07/04/2015

07/04/2015:

20 Both parties in Court
Mangeni for Respondents
Were for Appellant

Court: Judgment read in Court.

25

Godfrey Namundi

JUDGE

07/04/2015