

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT-01-CV-LD-CA-060 OF 2013
(Arising from HCT-01-MA-057-OF 2015)
(Arising from FPT-00-CV-LD-CS-018 OF 2007)

AUGUSTINE KIIZA (Through his
Attorneys Kijwara Christopher, Muzoora George William

and Nyemera
Francis)::.....:APPELLANT

VERSUS

KATUSABE VICENT)::.....:RESPONDENT

BEFORE: HON. MR. JUSTICE OYUKO ANTHONY OJOK

JUDGMENT

BACKGROUND

The Applicant instituted a Civil Suit Vide No. 018 of 2017 against Stella Bonabana for
Trespass on his land situate at Kigonyera, Mwenge, Kyenjojo District. Stella died and was
substituted with the Respondent in 2007. That the main suit was however dismissed. The
appellant then filed an application **FPT-00-CV-LD-MA-40 OF 2014** to set aside the
dismissal which was also dismissed with costs on June 19, 2015; thereafter the Appellant
filed an application in High Court under HCT-01-CV-MA-No. 057 of 2017 seeking to
enlarge the time within which to appeal and stay execution pending appeal which was
allowed hence this appeal.

The appellant appeals against the decree in the lower Court on three grounds set in the
memorandum of appeal;

1. That the learned trial Magistrate erred in law and in fact when he dismissed the
Appellant's suit under Order 17 Rule 4 of the Civil Procedure Rules.
2. That the learned trial Magistrate erred in law and in fact when he dismissed the
Appellant's suit under Order 17 Rule 4 of the Civil Procedure Rules when the
Appellant was sick and bed ridden.
3. That the learned trial Magistrate wrongly dismissed the Appellant's suit without any
hearing

Representation

M/S Luzige, Lubega, Kavumba & Co. Advocates appeared for the Appellant and M/S KRK
Advocates appeared for the Respondent.

Duty of first appellate court

It is the duty of the first appellate court to appreciate the evidence adduced in the trial Court. Where the trial Court had resorted to perverse application of the principles of the appellate Court may re-appreciate the evidence and reach its own conclusion. (See **Begumisa & Others Vs Tibebaga [2004] 2 E.A 17, Zaabwe Vs Orient Bank Ltd SCCA NO. 4 of 2006**)

Argumentation of the grounds

Counsel for the Appellant argued all the grounds together.

He submitted that the Appellant's case was dismissed on the 18th day of April 2014 as the Appellant had not appeared in Court on several occasions. The appellant had sufficient cause for the non appearance as he was having a grave illness , mainly hypertension, suffering from memory loss and dizziness and for quite a long time been confined to his bed due to sickness which made him to miss many court sittings or hearings resulting in the dismissal of his case. All the medical proof is on record to show that indeed the appellant was/is still a sick man and that was a sufficient reason to preclude him from appearing to follow up his case.

Secondly, the non appearance of former counsel for Appellant in the main suit cannot be visited on the litigant as at least the former lawyer had instructions to follow up the appellant's case but did not carry them out.

He submitted that the Appellant should not bear the burden of his former Advocate of not appearing in Court, whilst he was served with hearing notices.

He further submitted that since the subject matter is land which is a intricate subject. The appellant be given a chance to defend and pursue his rights in the main case.

However counsel for the Respondent submitted that the suit in the lower court was never dismissed for want of prosecution as alleged by Appellant's counsel. It was dismissed for failure of the appellant to produce evidence. Order 17 Rule 4 vests a Judicial Officer hearing a matter with the discretion and power to decide a suit a suit immediately when a party to whom time has been given fails to produce his evidence. The record indicates that right from November 7, 2007, the Appellant was given numerous opportunities to present his evidence which he failed to do. The Appellant had even stopped attending Court until March 21, 2012 when the suit was adjourned in the presence of both parties. On October 25, 2012, the Respondent's counsel threatened to have the matter be dismissed as the next hearing as at that stage even no scheduling memorandum had been filed. The Appellant was given more time up to May 9, 2013 but he was still absent, had no representative and no evidence was adduced. Even on that day, the appellant was given another opportunity up to August 2013. As late as February 26, 2014, thee case was again given a last adjournment in the absence of both the appellant and his counsel. This time, the plaintiff was personally served with the hearing notice for April 8, 2014 and an affidavit of service duly filed in Court on April 7, 2014. When neither the plaintiff nor his counsel failed to turn up on that day, the learned trial

Magistrate Grade I exercised his jurisdiction and dismissed the suit under Order 17 rule 4
80 Civil Procedure Rules. This was a clear indication that the appellant was no longer interest in
prosecuting his case. It follows that the trial Magistrate acted judiciously when he exercised
his discretion to decide the suit on April 8, 2014.

He further submitted that with respect to the Appellant's grave illness, no one time did the
appellant or his counsel produce any medical or other evidence to show that the appellant was
85 ill during trial. If at all he was indeed sick, the appellant had ample time in the 8 years the
trial lasted within which to appoint representatives to act for him or to at least send someone
to court to inform either his advocate or the court of that sickness. This was never done. The
Appellant's dilatory conduct cannot now be masked by claiming that he was prevented by
sufficient case as he was ill. Besides, good sense would require any litigant who is
90 represented not to act passively but to make provisions for his case to continue by appointing
representatives. However, due to his complacent behaviour he only appointed attorneys on
April 22, 2014 after the matter had been dismissed. It is astonishing how a person with
memory loss can issue valid powers of attorney. That is if at all he was aware of what he was
doing.

95 He further submitted that it is the duty of a litigant who instructs counsel to follow up by
making necessary inquires as to the status of the case and act within reasonable time to ensure
the progress of his/her case. However, this appellant did not exercise vigilance or diligence in
the pursuit of his case. He cannot now claim that he was prevented by sufficient cause.

Additionally, the Appellant cannot claim that his nonappearance was a result of mistake or
100 negligence of his counsel. The appellant's counsel properly carried out his instruction until he
lost contact with him. Right from November 7,2007 the Appellant's counsel attended court
more than the appellant actually did. This was until 2013 when he allegedly lost contact with
his client. Besides, the record indicates that the Appellant was aware that the matter was
coming up for hearing on 8 April 2014. He was personally served notices on March 20, 2014.
105 The Appellant still advanced no reason or excuse why he or his representatives failed or
refused to attend court to produce his evidence to prove his case inspite of being given time
to do so. In all this time the plaintiff had last come to court on October 19, 2010. On April 8,
2014 the matter was dismissed under order 17 rule 4 Civil Procedure Rules.

He further submitted that the general principle that illness of a litigant and mistake of counsel
110 do qualify as sufficient cause is subject to exceptions. These principles do not apply to a
passive litigant who is no longer interested in litigating his case. The Appellant was guilty of
dilatory conduct. He was neither diligent nor proactive in the pursuit of his case. Besides, the
appellant directly contributed to his and his counsel's conduct and was at all times privy to
these defaults. It is the duty of a litigant to follow the progress of his case by making inquiries
115 from his counsel which the appellant could easily do but failed to do.

He submitted that the trial Magistrate judiciously exercised his discretion by deciding the
Appellant's suit and all ground of appeal must therefore fail. That the appellant's intention is
to deny the Respondent the fruits of his decree in the main suit. Indeed it is now trite law that
a party who has judgment in his/her favour should not be lightly deprived of it.

120 **RESOLUTION**

Before resolving any grounds allow me to respond to the Preliminary objection raised by the Counsel of the Respondent that this appeal is incompetent since it was filed without first seeking leave of court. The Appellant's case in the lower court was dismissed under O. 17 r 4 of the Civil Procedure Rules. S. 76 of the Civil Procedure Act and O.44 r 1 of the Civil
125 Procedure Rules do not grant the appellant an automatic right to appeal against such a dismissal. It follows therefore that the appellant ought to have sought leave first which was never done. That it is trite law that where leave is required to file an appeal and such leave is not obtained, the appeal filed becomes incompetent and cannot be withdrawn.

According to Counsel, the appeal offends O. 44 r 2 & 3 of the Civil Procedure Rules and
130 therefore should be struck out. O.44 R (2) such leave to be allowed by Court to enlarge time upon giving sufficient grounds.

In this case the applicant applied by notice of motion under S.96 of the Civil Procedure Rules and O.51 R6 and O.52 R 1,2 & 3 of the Civil Procedure Rules for orders among others to be allowed leave within which to appeal against the decree in Civil Suit No. FPT-00-CV-LD-
135 CS-018 of 2007 made on the 8th April 2014 be enlarged or extended. On the 13/October/2016 leave was granted, I therefore see no reason again for the appellant to apply for another leave before me.

In fact under O.44 R (2) it envisage that if conditions under O.44 R1 of the Civil Procedure Rules is not complied with, then O.44 R2 is a must that leave be granted. Leave has been
140 granted by this very court therefore there was no need again to apply for leave except if the matter is going to Court of Appeal, then the 2nd leave must be granted by either High Court or Court of Appeal or if it is a second appeal. I therefore overrule the Preliminary Objection.

On the issue of the Magistrate dismissing the suit under O.17 R4 of the Civil Procedure Rules, not hearing the suit and that the appellant was sick and bed ridden.

145 The case of **Begumisa & Others Vs Tibebaga (2004) EA PP17** stated that it is trite law that the 1st Appellate court is bound to subject the evidence on record as a whole to fresh scrutiny and come to its own conclusion. The Appellate Court has to reconsider the evidence on record and make up its own mind but without disregarding the Judgment appealed from but carefully weighing and considering it.

150 According to the records, I have carefully perused the proceedings where counsel applied for the suit to be dismissed under **O. 17 R 4** and indeed the Magistrate dismissed it under that order.

On the 9th May 2013 both party appeared in Court, 23/01/2013 both Counsel appeared, plaintiff absent and the defendant present, on the 21/8/2013 both parties absent, 26/2/2014
155 defendant present, plaintiff absent and on the 8/4/2014 was the last adjournment Advocate for the defendant present together with the defendant, plaintiff absent.

O.17 R4 vests a judicial Officer hearing the matter with the discretion and power to decide a suit immediately when a party to whom time has been given fails to produce his/her evidence. True the plaintiff as proved above was given numerous opportunities to present his evidence
160 until 8th April 2014 when the matter was dismissed.

The conduct of the litigant is wanting. Indeed the litigant must follow up his/her case either through his/her Advocate or personally. Hospital receipts seem dubious and no proper address and were not adduced in the lower court. It is the litigant who should have brought to attention of Court about his/her sickness. Litigation must come to an end otherwise backlog
165 would be the song. Litigants chose his counsel and not court and this was not a case of probono.

I therefore agree with the Magistrate. This appeal is therefore dismissed with costs both in the lower court and this court.

Right of Appeal explained.

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OYUKO ANTHONY OJOK
JUDGE

175 **11/05/2018**

Judgment delivered in open court in the presence of;

1. None for the Appellant
2. Cosma Kateeba for the Respondent.
3. Beatrice clerk

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Oyuko Anthony Ojok

Judge

11/05/2018