THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE

CIVIL APPEAL NO.096 OF 2017

(Arising From Mbale Civil Land Suit No.037 Of 2014)

1.WANDERA ASUMAN

2.ABDALLAH MUSOGA KAFUKA :::::::::::::::::::::::::::::::::::: APPELLANTS

VERSUS

1.HAJJI MAWAZI WANDERA

2.BEATRICE GYAGENDA

3.ROBINAH NABULYA :: RESPONDENTS

JUDGMENT

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

[1] This appeal was brought by the plaintiffs/Appellants, against the decision of **H/W NANTAAWO AGNES SHELAGH,** Magistrate Grade 1, Mbale Chief Magistrate's court at Mbale, dated **17/12/2016.**

[2] The back ground of this appeal is that the plaintiffs/Appellants sued the defendants/Respondents in the lower court for a declaration that the plaintiffs are the beneficial owners of the disputed portion of land, a declaration that the activities of the defendants are illegal, a permanent injunction, general damages and costs.

[3] The plaintiffs in the lower court, averred that they are the beneficial owners of the suit land located at **Kilulu Zone, Nabweya Parish, Namanyonyi sub-county, Mbale District** which belonged to their late mother, **Nabukeera Safina**.

[4] They contended that the 1st defendant was married to 3 wives and later divided his estate amongst his wives, and the children were to benefit from their mothers' shares. That the plaintiffs' mother was given a portion of land with a house, where she lived together with her children

but unfortunately died, leaving the plaintiffs in occupation and use of the suit land.

[5] That the plaintiffs continued in peaceful occupation of the said land but were surprised by the 2nd and 3rd defendants' trespass activities in 2011 on the suit land. That the 1st defendant sold their mother's portion to the 2nd and 3rd defendants without their knowledge and consent.

[6] On the other hand, the defendants in their Written statement of defence(W.S.D) denied the plaintiffs' claims and contended that the plaintiffs are not the beneficial owners to the suit land since they (defendants), bought the same from the lawful owner, the 1st defendant at shs. 7,000,000/=.

[7] The defendants further averred that the 2nd defendant has been in possession of the suit land, cultivating on the same since 2011. That it is the plaintiffs who instead, trespassed on the same by constructing a pit latrine, for which they were charged and convicted of criminal trespass vide **Criminal Case No.551 of 2013.**

[8] The suit was dismissed for want of prosecution. On application for its reinstatement, the trial court ordered the plaintiffs/Appellants to pay or furnish security for costs as a condition for reinstatement. The plaintiffs/Appellants failed and or refused to pay the costs as ordered and the trial magistrate dismissed the plaintiffs' case. Being dissatisfied with the decision, the **plaintiffs/Appellants** appealed to this court on the following grounds as per their memorandum of appeal.

i. *The Learned Trial Magistrate erred in law and fact when she dismissed MBA-00-CV-LCS 037 of 2014 for failure to deposit security for costs of* ***UGX. 1,000,000/= (Uganda shillings one million only****).*
ii. *That the Learned Trial Magistrate erred in law and fact when she declined to hear and determine MBA-00-CV-LCS 037 of 2014 on its merits.*

Counsel legal representation

[9] The Appellant was represented by **Counsel Nabende** of Nabende Advocates, Mbale and the Respondents were represented by **Counsel Dagira (R.I.P)** of Dagira & Co Advocates, Mbale. Both counsel filed their respective written submissions as permitted by court.

Preliminary Objection

[10] Counsel for the Respondents raised a preliminary objection that the appeal is barred in law. He submitted that **Civil Suit No.37 of 2014** was dismissed under **O.26 r.2(1) CPR** for non-payment of the security for costs as ordered by court. That under **O.26 r. 2(2) CPR,** the procedure to be followed after dismissal, is to set aside the dismissal and not an appeal. Counsel submitted that the order refusing to set aside the dismissal order is what can be appealed against as of right under **O.44 r. 1(m) CPR.**

[11] He further submitted that the appeal was therefore incompetent, barred in law and it ought to be dismissed with costs, as the appellants ought to have applied for leave of court to lodge the same.

[12] Counsel for the Appellants did not submit on the preliminary objection that was raised by the Respondents' counsel.
This court will therefore proceed to determine the preliminary objection raised by the Respondents' counsel.

[13] **O.26 r.2(2) CPR** is instructive on the remedy available for a party whose suit has been dismissed under **rule 2(1)** and it provides thus;

> "*Where a suit is dismissed under this rule, **the plaintiff may apply for an order to set the dismissal aside,** and, if it is proved to the satisfaction of the court that he or she was prevented by any sufficient cause from furnishing the security within the time allowed, the court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.*"

[14] In the instant case, the magistrate having dismissed the plaintiffs' case for failure to furnish security for costs, the plaintiffs/Appellants sought to appeal the trial magistrate's decision and thus lodged this appeal. However, the right of appeal was not available for them because they had a statutory remedy to make an application for an order to set aside the dismissal as provided for under **0.26 r.2 (2) CPR,** and prove to the satisfaction of court that they were prevented by sufficient cause, from furnishing the security within the prescribed time, as directed by court.

[15] From the foregoing therefore, I find that the Appellants did not follow the procedure provided under **O.26 r.2(2) CPR** but instead, opted to

appeal to this court against the trial magistrate's decision. This is so because, the Appellants' case was dismissed under **O.26 r. 2(1) CPR** of which the remedy is clearly provided for, under **rule 2(2)** that was not undertaken. The appeal would only lie as of right, against an order rejecting the application to set aside the dismissal as provided under **O.44 r.1(m),** but not against an order dismissing the suit.

[16] I, in the circumstances, find merit in the preliminary objection raised by the Respondents' counsel and therefore, find this appeal incompetent. However, for purposes of completeness and disposal of this appeal, I shall proceed to determine the appeal on merit.

Determination of the appeal

[17] In **FR. NARSENSIO BEGUMISA & 3 ORS. VS. ERIC TIBEBAGA [2004] KALR 236**, court held thus;

> *"It is a well settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact and law.*

It is therefore the duty of this court as a first Appellate court to evaluate the evidence and facts that were before the trial court and arrive at its own conclusion as to whether the decision and orders of the trial court can be supported both at law and by the facts.

Grounds 1 and 2.

[18] The grounds revolve around the trial magistrate's failure to hear the case on merit thereby dismissing the plaintiffs'/appellants' suit, and as such, the grounds will be resolved together.

Counsel submissions.

[19] The Appellant's counsel submitted that the Respondents were not being put to undue expenses by defending MBA-00-037 of 2014 as the suit was not frivolous and vexatious. That the suit would succeed had the trial court proceeded on the merits. Counsel invited court to find, that, had the trial magistrate considered the facts of the case, the 2nd and 3rd Respondent's application for security for costs would have been dismissed and the suit would proceed on merit.

[20] Counsel for the Respondent on the other hand, replied and submitted that the trial magistrate did not error when she made an order for

payment of security for costs, for the reason that the Appellants did not appear in court on several occasions which warranted the order in those circumstances. Counsel further submitted that the Appellants did not contest the order to pay the security by way of Review or Appeal and that therefore, the appellants willingly accepted to pay the same before the next hearing date. That for over 7 months, the Appellants had failed to pay any part of the said security. He concluded by stating that the two grounds of appeal ought to fail and prayed that the appeal be dismissed with costs.

Analysis

[21] On perusal of the decision/ruling of the learned trial magistrate, it is apparent that the plaintiffs/Appellants applied to the trial court for reinstatement of **civil suit No.37 of 2016** which had been dismissed on the 15/09/2016 for want of prosecution. The trial court ordered the plaintiffs to pay costs which she termed as security for costs as a condition for reinstatement of the suit. The plaintiffs later failed and or refused to pay the security for costs as ordered and the suit was dismissed under **O.26 r.2(1) CPR,** which is to the effect that:

> *"If security is not furnished, within the time fixed,*
> ***the court shall make an order dismissing the suit***
> *unless the plaintiff or plaintiffs are permitted to*
> *with draw from the suit."*

[22] The above provision was considered in the case of **BANCO ARABE ESPANOL Vs BANK OF UGANDA (1999)2 E.A 24,** where it was held, inter alia, that it is common ground that court's power to dismiss the suit under **order 26 r. (2)1** is automatic upon the plaintiff's failure to comply with the order of security for costs; and that court has no alternative but to dismiss the suit in the event of non-compliance with terms of the order of furnishing of security for costs.

[23] In the instant case, it is important to note that before the trial court proceeded under the above rule i.e to make the order dismissing the plaintiff's suit, it recognized the fact that the case was a land matter which necessitated the same to be heard on merit. The trial court therefore ordered that the civil suit be reinstated, on **condition** that the plaintiffs/appellants pay **shs. 1,000,000/=** into court, as security for costs before proceeding with the hearing of the main suit.

[24] In my view, it appears that trial magistrate noted that the plaintiffs had not taken keen interest in pursuing and prosecuting their case which led to the initial dismissal by court, for want of prosecution and in the subsequent application for reinstatement of the suit by the plaintiffs, this prompted her to make an order for payment of security for costs as a condition for reinstatement of the suit. This was intended to avoid wasting court's time in hearing a suit where the plaintiffs seemed not prepared to proceed yet, it was their case. The plaintiffs conceded to furnish court with the security for costs as they took no steps to either Review or Appeal the order, but for unknown reasons, the order was not complied with.

It is upon the failure for payment of the security for costs of **shs. 1,000,000/=** as ordered by court, that the plaintiffs' case was dismissed under **O.26 r 2(1) CPR.**

[25] The fact that the Appellants'/plaintiffs' counsel never protested the order granting costs, by way of an application for Review or by an Appeal, meant that the Appellants were neither aggrieved nor dissatisfied with the order. As a result, the trial court had no option but to dismiss the suit upon the Appellants failing or refusing to pay the costs for almost 8 months as ordered.

[26] In consideration of the above circumstances, I am unable to fault the trial magistrate's decision of dismissing the plaintiffs'/appellants' case for failing to pay security of costs as they had been ordered by court. The trial court lawfully exercised its power under the law having considered the circumstances at that time, and thereby, rightfully dismissed the plaintiffs' case.

Therefore, this appeal stands dismissed with costs to the Respondents.

I so order.

Byaruhanga Jesse Rugyema

JUDGE.

2nd/08/2021.