

5

The Republic of Uganda  
In the High Court of Uganda Holden at Soroti  
Civil Appeal No. 25 of 2023

*(Arising from the Chief Magistrate’s Court of Kumi at Kumi Civil Suit No. 22 of 2022)*

10

- 1. Sulaiman Nambira
  - 2. Muhamad Wanyenya
  - 3. Aisha Kayinza
  - 4. Kakayi Safinah
- } :: Appellants

15

Versus

Siraji Mwenyi Bukenya :: Respondent

*(Appeal from the Judgement and Orders of the Ag. Chief Magistrate of the Chief  
Magistrate’s Court of Kumi at Kumi delivered on 19<sup>th</sup> January 2023 by Her  
Worship Hope Namisi)*


20

Before: Hon. Justice Dr Henry Peter Adonyo

Judgement

1. Introduction:

The plaintiffs (now appellants) instituted Civil Suit No. 22 of 2022 in the Chief  
Magistrate’s Court of Kumi at Kumi under Order 36 Rules 1,2 and 3 of the Civil  
Procedure Rules S.I 71-1 (summary suit) against the defendant (now respondent)  
for recovery of UGX 50,000,000, interest and costs of the suit.

1 

5 The appellants claim that in the agreement dated 13<sup>th</sup> March 2020, the plaintiff  
(appellants) sold their piece of land located at Amus village, Amus parish,  
Kwarikwari sub-county in Bukedea district to the defendant at an agreed  
purchase price of UGX 100,000,000. The appellants aver that the defendant  
deposited UGX 50,000,000 upon execution of the said agreement, leaving the  
10 balance of UGX 50,000,000 to be paid by 13<sup>th</sup> November 2020.

The appellants contend that the defendant has since defaulted to pay the balance  
despite the plaintiffs' repeated demands.

On the other hand, the respondent applied for leave to appear and defend vide  
Miscellaneous Application No. 040 of 2022 in the Chief Magistrate's Court of  
15 Kumi at Kumi, to which the appellants filed a reply upon which the respondent  
rejoined.

On 19<sup>th</sup> January 2023, during the hearing of the application for leave to appear  
and defend, the respondent's counsel moved the court under Order 19 Rule 2 of  
the CPR and sought leave, which was granted, to cross-examine the 1<sup>st</sup>  
20 appellant/then respondent on the affidavit in reply to that application premised  
on the supposed inconsistencies in the affidavit in support of the specially  
endorsed plaint vide Civil Suit No. 22 of 2022 and the affidavit in reply with a view  
that the cross-examination shall enable the Court to reach a just decision.

In the cross-examination, counsel for the respondent made it be recognized by  
25 court that the 1<sup>st</sup> appellant was illiterate for there was no *jurat* on the affidavit in  
support of the specially endorsed plaint vide Civil Suit No. 25 of 2022.

Upon this revelation, counsel for the respondent raised a preliminary objection  
that the affidavit in support of the summary suit was incurably defective pursuant  
to Section 3 of the Illiterate's Protection Act which requires that all documents

5 prepared for illiterates to bear jurats to evidence that the contents of the affidavit were read and explained to the illiterate deponent.

Counsel for the respondent then prayed that the summary suit be found defective and be dismissed with costs.

Counsel for appellants mistakenly conceded to the objection but informed the  
10 Court that it had no jurisdiction to dismiss a summary suit for want of a fatally defective affidavit because suits that do not comply with the requirements of Order 36 of the CPR morph into ordinary suits.

The trial Court, in a ruling delivered on 19 January 2023, firstly found that the affidavit in support of the specially endorsed plaint vide Civil Suit No. 22 of 2022  
15 was incompetent for lack of a *jurat* as per the legal requirements.

Secondly, the trial magistrate dealt with the issue of whether a summary suit not supported by an affidavit is competent or not.

In resolving this, the trial court observed that Order 36 was silent, but she invoked her inherent jurisdiction and struck out the appellants' suit with costs because  
20 the specially endorsed plaint without a supporting affidavit did not comply with Order 36 of the CPR, in effect Miscellaneous Application No. 40 of 2022 was also dismissed with costs.

That ruling led to this appeal in whose memorandum of appeal, the appellants raises three grounds for appeal that;

- 25 a) The learned trial magistrate erred in law when she dismissed the appellants' claim/plaint under O.XXXVI of the Civil Procedure Rules SI 71-1 (CPR) on the grounds of an incurably defective affidavit.





- 5 b) The learned trial magistrate erred in law when she dismissed the appellants' plaint/ claim without vested jurisdiction regarding the scope of the summary procedure and / or specially endorsed plaint, under O.XXXVI of the Civil Procedure Rules.
- 10 c) The learned trial magistrate erred in law when she judiciously exercised her inherent powers under Section 98 of the Civil Procedure Act, Cap 71, to dismiss the appellants' claim /plaint.

The appellant proposed that the findings of the lower Court be set aside.

2. Duty of the first appellate court:

15 This is the first appeal from the decision of the learned trial magistrate. The first appellate court must scrutinise and re-evaluate all the evidence on record to arrive at a fair and just decision.

This duty was well laid down in the case of **Kifamunte Henry vs. Uganda SCCA No. 10/1997**, where it was pointed out that

20 *"The first appellate court has a duty to review the evidence of the case and to reconsider the material before the trial judge. The appellate court must then make up its own mind, not disregarding the judgment appealed from but carefully weighing and considering it."*

Furthermore, in the case **Father Nanensio Begumisa and three others vs Eric Tiberaga SCCA 17 of 2000; [2004] KALR 236**, the obligation of a first appellate  
25 court was pointed as being;

5            *"...under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion."*

See also: *Baguma Fred vs Uganda SCCA No. 7 of 2004.*

3. Power of the Appellate Court:

10 Section 80 of the Civil Procedure Act, Cap 71, grants the High Court appellate powers to determine a case to its finality.

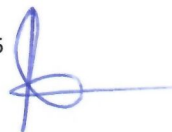
The above legal position regarding the duty and legal obligation of the first appellate court is considered while resolving this appeal.

4. Representation:

15 According to the pleadings filed in this appeal, the appellant was represented by Messrs. Masanga and Co. Advocates. In contrast, the respondent was represented by M/s Nangulu-Mugoda & Co. Advocates. Counsel representing the parties argued this appeal through written submissions. The submissions and the whole record of the lower court, including pleadings, proceedings, judgement,  
20 and orders, are considered while resolving this appeal.

5. Submissions:

Counsel for the appellants submits that the trial Court, instead of determining whether there were triable issues of law and fact or not in the Miscellaneous Application No. 40 of 2022 – Siraji Mwenyi Bukonya versus Sulaiman Nambira &  
25 3 Others seeking unconditional leave to appear and defend which was under hearing on 19 January 2023, the trial Court strangely entertained and resolved an



5 objection in the summary suit vide Civil Suit No. 22 of 2022 that was not before the Court for determination.

In support of his argument, counsel for the appellants' asserts that the evidence of determining the summary suit and not the application for leave is apparent in the ruling of the trial magistrate because it is evident from the title of her ruling.

10 Counsel for the appellants contends that during the hearing of the application for leave to appear and defend, it was as if the summary suit and the application for unconditional leave to appear and defend had been consolidated and being heard as one matter before the Court which was erroneous at law because the summary plaint and the application for leave to appear and defend did not have  
15 similar issues of law or fact nor were they about the same transaction at law.

Counsel for the appellants argues that it was an error of law and an injudicious exercise of jurisdiction to entertain a preliminary objection to the summary suit as counsel for the respondent had no audience to challenge the propriety of the summary suit because he had first to be granted leave to participate in the main  
20 summary suit. Counsel asserts that the court has very limited jurisdiction in applications for leave to appear and defend; that is, to either grant leave to appear and defend conditionally or unconditionally or not to grant leave at all.

Counsel for the appellants contends that the only option available if the trial Court was interested in hearing and giving the respondent audience in the  
25 summary suit was to grant the respondent leave to appear and defend and direct the respondent to file his Written Statement of Defence because the affidavit without a jurat was evidence attached to a Plaint and striking out left the Plaint as any other ordinary Plaint/suit.



5 Counsel avers that among the grounds for dismissing, striking out or rejecting a  
plaint under Order 6 Rule 30 and Order 7 Rule 11 of the CPR do not include  
defective affidavits and that the court cannot exercise inherent jurisdiction where  
there are clear statutory provisions.

On the other hand, counsel for the respondent contends that during cross-  
10 examination on 19<sup>th</sup> January 2023 in the hearing of Miscellaneous Application No.  
40 of 2022, it emerged that the 1<sup>st</sup> Appellant, who had sworn both the affidavit  
in reply to Miscellaneous Application No. 40 of 2022 and the affidavit in support  
of the specially endorsed plaint was illiterate yet both the said affidavits had not  
15 complied with the provisions of Section 3 of the Illiterates' Protection Act for the  
reason that the said affidavits did not include a certificate of translation or jurat.  
It is on that basis that counsel for the respondents raised a preliminary objection  
that the 1<sup>st</sup> appellant's affidavit in support of the summary plaint was  
fundamentally and incurably defective and ought to be struck out and also the  
summary suit vide No. 22 of 2022 be struck out for being incompetent.

20 Counsel for the respondent submits that whereas counsel of the appellants  
argues that omitting to include the supporting affidavit merely has the effect of  
converting a suit into an ordinary suit, this is an erroneous position as there is no  
such mandate enabling the trial Court faced with such a situation to automatically  
convert a summary suit into an ordinary suit and that this is the very reason why  
25 counsel for the appellants has not provided any supporting relevant legal  
provision because there is none.

Counsel for the respondents contends that whereas counsel for the appellants  
argues that Civil Suit No. 22 of 2022 was not before the trial Court on the said  
date but only the application for leave to appear and defend, a preliminary point  
30 of law can be raised at any time during the proceedings especially a point of law

5 that goes to the root of the suit. Counsel for the respondents contends that it is settled law that a preliminary objection shall be derived from the pleadings of the parties, and the court, in accordance with Order 6 of the Civil Procedure Rules, shall determine a point of law from the pleadings.

Counsel for the respondent submits that the failure to comply with the said  
10 provisions rendered the summary plaintiff incompetent and that the learned trial Magistrate was right to dismiss the said suit since the trial Magistrate did not enjoy jurisdiction to entertain an incompetent suit, and she had no mandate to convert a summary suit to an ordinary suit. Counsel for the respondents invited the court to dismiss the instant appeal with costs.

15 6. Court's Analysis and Resolution:

While perusing the appellants' submissions, I have noted there is counsel's prayer for leave that the appeal be allowed with costs contending that that prayer was an omission during the typing of the memorandum of appeal.

I find this to be answered one way or another only after determining the grounds  
20 of appeal.

Counsel for the appellants, in his submissions, chose to argue all the grounds simultaneously. I also find that all the grounds can be resolved concurrently, and I will do that exactly that.

a. Grounds One, Two and Three:

- 25 i. The learned trial magistrate erred in law when she dismissed the appellants' claim/plaint under O.XXXVI of the Civil Procedure Rules SI 71-1 (CPR) on the grounds of an incurably defective affidavit.



- 5      ii. The learned trial magistrate erred in law when she dismissed the appellants' plaint/ claim without vested jurisdiction in regard to the scope of the summary procedure and/or specially endorsed plaint under O.XXXVI of the Civil Procedure Rules.
- 10      iii. The learned trial magistrate erred in law when she judiciously exercised her inherent powers under Section 98 of the Civil Procedure Act, Cap 71, to dismiss the appellants' claim /plaint.

What can be deduced from the appellants' submissions juxtaposed with the grounds of appeal to be resolved are that;

- 15      a) Whether or not the learned trial magistrate erred in law when she dismissed the appellants' claim/plaint under O.XXXVI of the Civil Procedure Rules SI 71-1 (CPR) on the grounds of an incurably defective affidavit.
- 20      b) Whether or not the learned trial magistrate erred in law when she dismissed the appellants' plaint/ claim without vested jurisdiction in regard to the scope of the summary procedure and/or specially endorsed plaint under O.XXXVI of the Civil Procedure Rules.
- c) Whether or not the learned trial magistrate erred in law when she judiciously exercised her inherent powers under Section 98 of the Civil Procedure Act, Cap 71, to dismiss the appellants' claim /plaint.

All these three issues shall be resolved concurrently.

25      I will first deal here with the laws upon which the grounds of appeal are premised:

Order 36 Rule 2(a) of the CPR requires at the option of the plaintiff to institute a summary suit accompanied by an affidavit verifying, among others, the cause of action and the amount claimed, where the plaintiff seeks only to recover a debt

5 or liquidated demand in money payable by the defendant, with or without interest, arising upon a contract.

Order 36 Rules 3 and 4 of the CPR enjoin the court to pass judgment in default of an application for leave to defend. In other words, the provisions relating to the defendant's appearance to defend the suit upon applying for in the prescribed  
10 time and obtaining leave from court to defend the suit.

Order 36 Rule 10 of the CPR provides that,

**Where leave, whether conditional or unconditional, is given to appear and defend, the court shall have power to give all directions and make all orders as to pleadings, issues, and any further steps in the suit as may then appear reasonable or  
15 necessary, or may order the suit to be immediately set down for hearing.**

Section 3 of the Illiterates Protection Act Cap 78 enjoins any person who shall write any document for or at the request, on behalf or in the name of any illiterate to also write on the document his or her own true and full name as the writer of the document and his or her true and full address, and his or her so  
20 doing shall imply a statement that he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over and explained to him or her.

**Section 98 of the Civil Procedure Act, Cap 71 (CPA),** empowers this Court to make  
25 such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

In critical consideration of the grounds of this appeal, the appellants' pertinent contentions and questions that arise from the submissions are;

5 - Why did the trial Court, on 19<sup>th</sup> January 2023, strangely entertain and resolve the respondent's point of law in summary suit vide Civil Suit No. 22 of 2022 that was not before the Court for determination during the hearing of an application seeking unconditional leave to appear and defend vide Miscellaneous Application No. 40 of 2022?-

10 In reply to this, counsel for the respondent submits that he was granted leave to cross-examine the 1<sup>st</sup> appellant who had sworn both the affidavit in reply to Miscellaneous Application No. 40 of 2022 and the affidavit in support of the specially endorsed plaint because of inconsistencies between the affidavits and that during the cross-examination, it emerged that the 1<sup>st</sup> appellant was illiterate  
15 yet both the said affidavits had not complied with the provisions of Section 3 of the Illiterates' Protection Act for the reason that the said affidavits did not include a certificate of translation or jurat upon which he then raised a preliminary objection that the 1<sup>st</sup> appellant's affidavit in support of the summary plaint was fundamentally and incurably defective and ought to be struck out and also the  
20 summary suit vide No. 22 of 2022 be struck out for being incompetent.

Upon my perusal of the file and proceedings regarding Civil Suit No. 22 of 2022 of the Chief Magistrate's Court of Kumi at Kumi, I note that Miscellaneous Application Number 40 of 2022 seeking leave to appear and defend was scheduled for hearing on 19<sup>th</sup> January 2023.

25 During its hearing, which was indeed supposed to be for establishing triable issues to either grant or not grant the applicant unconditional leave, the applicant then sought leave to cross-examine the respondent on the affidavit in reply.



5 This leave was granted and it was established thereof that the 1<sup>st</sup> appellant was illiterate which fact rendered the affidavit in support of the summary suit as not comply with Section 3 of the Illiterate Protection Act.

In regards to this proceeding, it is on record that counsel for the appellants agreed to that finding with the trial magistrate then resolving to striking off the  
10 affidavit in support of the summary suit upon invoking the court's inherent powers.

However, on careful consideration of the issues which were at hand before the learned Chief magistrate, I find that the procedure adopted by the lower trial court as one which was unknown to our procedures.

15 This is because Miscellaneous Application Number 40 of 2022 which was before the Learned Chief Magistrate was one in which the applicant therein was seeking leave to appear and defend the main suit.

This means that trial magistrate should not have entertained the act cross-examination of the appellant with respect to the affidavit in support of the  
20 summary suit because the respondent at that particular time did not have locus in the head suit which would enable him to seek to cross-examine the appellant on the same in the absence of an order granting to him of leave to defend Civil Suit No. 22 of 2022.

Furthermore, the record show that the applicant therein had sought leave to  
25 cross-examine the respondent on the affidavit in reply to Miscellaneous Application No. 40 of 2022, to which the trial magistrate would have restricted him as such to matters of procedure and in compliance with the Order 36 of the Civil Procedure Rules.

- 5 This was not done yet it would only be tenable upon the grant of leave to defend Civil Suit No. 22 of 2022 that the defendant/applicant would have gained locus to comment on the propriety of the plaint which would even have then turned into an ordinary suit by virtue of Order 36 rules 2 and 3 of the CPR, were the trial magistrate to established triable grounds.
- 10 This is because as was held in *China Railway No. 3 Engineering Group Co. Ltd vs Segken Services Limited HCMA No. 161 of 2020*;

15 *“Order 36 is free-standing and all the necessary procedures, steps, and proceedings under suits instituted according to that order, are all provided therein. Rules as to computation of time according to Order 51 are not applicable to the procedure under Order 36. The provisions therein are meant to fulfill expeditious disposal of suits and if the Defendant does not adhere to the rules prescribed, the law will be invoked accordingly against them.”*

20 Even though in *China Railway No. 3 Engineering Group Co. Ltd vs Segken Services Limited (supra)*, the court was dealing with an application for an extension of time within which to apply for leave to appear and defend, nevertheless the court made the observation that *Order 36 is free standing and all the necessary procedures, steps, and proceedings under suits instituted according to that order, are all provided therein.....The provisions therein are meant to fulfill expeditious*

25 *disposal of suits and if the Defendant does not adhere to the rules prescribed, the law will be invoked accordingly against them.*

To me, the trial court on 19<sup>th</sup> January 2023 was dealing with the hearing of Miscellaneous Application No. 40 of 22 and as such it should have restricted itself

- 5 the hearing and the determining first that application and reserved other issues for later and to be dependent on the outcome of that application.

Accordingly, it is my finding and conclusion that the trial magistrate erred in law in entertaining the respondent to cross-examine the 1<sup>st</sup> appellant on the affidavit in support of the summary suit yet the respondent at that particular time did not  
10 have the audience to do so since the leave for the respondent to be made a party to the head suit had not been yet been granted and in fact was still under hearing. By the lower trial court allowing the respondent the opportunity to delve into a matter where he was not yet a party, I find that this process was a procedural irregularity which renders any other further actions taken thereafter a nullity.

- 15 That finding being so then I would resolve all the grounds of appeal which are related to each other in the affirmative in favour of the appellant and declare that this instant appeal has pronounced merits and is thus allowed for the reasons given above.

7. Conclusion:

- 20 The appellant prayed that the findings of the lower court be set aside and that the appeal be allowed with costs.

According to Section 27 of the Civil Procedure Act, costs follow the event. Thus, in the case of *Primchand Raichand Ltd & Another vs Quarry Services of East Africa & 6 Others [1972], EA 162* court held that ***"a successful litigant ought to be fairly***  
25 ***reimbursed for costs he had incurred ...."***


I find no reasons to not grant the requested costs. They are awarded to the successful party which is the appellants.

8. Orders:



- 5
- In the result, this appeal is found to have merits and it is allowed.
  - The ruling and orders of the trial Chief Magistrate in Civil Suit No. 22 of 2022 filed in the Chief Magistrate's Court of Kumi at Kumi, delivered on 19<sup>th</sup> January 2022, are set aside.
  - The costs of this appeal in this Court is awarded to the appellants in any
- 10
- I do also order that Miscellaneous Application No. 40 of 2022 be re-heard by the trial chief magistrate *de novo* and a decision made thereto before the said court proceeding to handler matters pertaining to the head suit.
  - The registrar of this Honourable Court is directed to ensure that the files
- 15
- herein are returned to the trial court for the implementation of the orders of this Honourable Court accordingly.

I do so order.



.....  
20 Hon. Justice Dr Henry Peter Adonyo

Judge

20/09/2023