THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CV-CA-0036-2011

(FROM PALLISA CIVIL SUIT NO. 33 OF 2009)

1. **ESTHER NAMULINDA**
2. **MWIDU AMUNON…….…..……APPELLANTS**

VERSUS

1. **MAGOOLA BENEDIKITO**
2. **JOHN MWIDU**
3. **KACHAKACHA DAN……...……...……RESPONDENTS**

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

Appellants were plaintiffs in civil suit 33/2009 for trespass to land. The suit was filed before Chief Magistrate Pallisa.

The matter was dismissed on 30.09.2010 for want of prosecution with costs on account of the failure of plaintiff and their advocate to appear on the day of hearing. The appellants also filed Miscellaneous Application No.33/2009 for setting aside the exparte judgment in civil suit No. 33/2009 which was also dismissed with costs.

Appellant was dissatisfied with the whole decision hence this appeal.

Grounds of appeal were that:

1. The learned trial Magistrate erred in law and fact when he failed or neglected to properly evaluate the evidence before him.
2. The decision of the learned trial Magistrate has occasioned a grave failure of justice.
3. The learned erred in law and fact when he failed to visit locus in quo.
4. The learned trial Magistrate's judgment is riddled with fundamental misdirections and non directions in law and fact which occasioned a miscarriage of justice to appellant.

The Respondents never defended this appeal.

According to *PANDYA V. R (1957) EA. 336.*

A first appellate court must consider and weigh the evidence, understand and evaluate the same and come to its own conclusions without disregarding the findings of the trial court.

I have duly gone through the lower court record; and do find as herebelow:

Ground 1: Neglect to evaluate evidence on record

The proceedings of Civil Suit 33/2009, show that on 30.09.2010, the court was moved by defense counsel to dismiss the matter because both plaintiff and his counsel appeared to have lost interest in the matter. The court noted that since 12.11.2009, neither the plaintiff nor his lawyer had appeared in court, showing apparent lack of interest in the matter. The claim was therefore dismissed with costs.

The law under O.9 r.22 of the Civil Procedure Rules is that:

> "*Where the defendant appears and plaintiff does not appear, when the suit is called on for hearing, the court shall make an order that suit be dismissed….*"

This is what the learned trial Magistrate did.

There was no error in the above decision.

On 17.3.2011, the record shows that appellants filed and argued an application to set aside the above order.

Appellants argued that the law under O.9 r.12 and 27 of the Civil Procedure Rules allows them to file the application and they relied on **Namulinda**'s affidavit to pray for setting aside the exparte order.

The trial Magistrate agreed with respondents and disallowed the application. While finding for respondents the learned trial Magistrate dwelt much on the failure by plaintiffs to prosecute the case from 12.11.2009 to 30.09.2010 a period of over 8 months.

In the current submissions, appellants faulted the learned trial Magistrate for ignoring the rights of the applicants to a lawyer of their choice as per Article 22 of the Constitution. They also referred to *Adula Omuto v. Henry Nyombi (1998-2000) HCB 31* to argue that a party should not be punished for the mistakes of counsel.

Whereas I agree with the learned trial Magistrate that there was laxity in prosecution of the case, I find that the learned trial Magistrate did not accord the law its rightful position in order 9 r. 22 of the Civil Procedure Rules, which allows a party to have an exparte judgment set aside if sufficient cause is shown. Whereas the learned trial Magistrate dwelt on plaintiffs' failure to attend and prosecute for 8 months, he ignored the pleadings of applicant explaining this delay. He did not bother to examine whether the plaintiff was stopped from attending on account of reasonable cause.

This was a fatal failure since his decision was not founded on legal principles but on his personal convictions. I therefore find that ground 1 was proved.

Grounds 2 and 4

These grounds appear a repeation of ground 1 above. It is clear that the above decision occasioned a grave failure of justice. It was also riddled with fundamental misdirections and non directions in law and fact which occasioned a miscarriage of justice to the appellant.

The facts show that the failure to prosecute the case was the act of legal counsel. the law in O. 9 r.27 of the Civil Procedure Rules allows a party to who shows

sufficient cause to be granted an order setting aside the exparte order. A party who engages a lawyer expects the lawyer to handle the matter professionally on his behalf. The affidavit in support of **Namulinda** showed that her lawyer having failed to prosecute the case, she has now got other lawyers who have acted diligently and have filed this appeal. They also promptly argued the application in the lower court. I find that the "laxity of counsel" cannot be visited on the applicant. In *SHABIR DIN V. RAM PARKASH ANAND 22 (1955)EACA 48(CA-K*). It was held that:

> "*For an application to succeed a mistake by plaintiff's advocate (though negligent) may be accepted*."

And in *Nakiridde v. Hotel International (1987) HCB 85*, it was further held:

> "*The main test for reinstatement of a suit is whether the applicant honestly intended to attend the hearing and did his best to do so. Two other tests are merely the nature of the case and whether there is a prima facie defence to the case.*"

I am inclined to find that the nature of plaintiff's case (land) involving the family property of the plaintiff as (widow) inherited by the defendant one (**Magoola**)- is a very important matter which shouldn't be terminated without hearing its merits. I

am also inclined to believe that appellant's counsel in the lower court was negligent.

By those findings she can rightly obtain an order setting aside the exparte judgment under O.9 r.27 of the Civil Procedure Rules, she having shown sufficient cause. The failure by the learned trial Magistrate to find as such occasioned a grave failure of justice as per (ground 2) and was a miscarriage of justice as per (ground 4). The two grounds have both been proved.

In the final analysis, this appeal succeeds on all grounds.

The lower court judgment and orders are accordingly set aside. The matter should proceed on merit interparties before another Chief Magistrate at Pallisa. Costs granted to appellants. I so order.

Henry I. Kawesa

JUDGE

20.3.2015