

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0008 OF 2014

**(Arising from Koboko Grade One Magistrate’s Court Civil Suit No. 0003 of 2013 and
Miscellaneous Civil Application No. 0002 of 2013)**

REMO RICHARD APPELLANT

VERSUS

MIDIA SUB-COUNTY LOCAL GOVERNMENT RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

In the court below, the appellant sued the respondent for general damages for trespass to land, an order of eviction, a permanent injunction and costs. Before the suit could be heard, the appellant filed an application seeking a temporary injunction to issue against the respondent, restraining it, its servants, agents and employees from constructing, selling or otherwise wasting, alienating and / or damaging the suit land or unlawfully evicting the appellant from the land until final determination of the suit. He claimed to be customary owner and in possession of the land in dispute from which he and his family were being threatened with eviction by the respondent. He further claimed that the respondent had taken possession of and was occupying part of that land without his consent.

In its written statement of defence, the respondent denied any encroachment on the appellant’s land and contended instead that the land it occupies is registered in the names of Koboko District Local Government as per the title deed, a copy of which was attached to its defence. It contended further that the land it occupies was given to it by the appellant’s grandfather in 1949. The respondent subsequently applied for and was granted and offer of a freehold over the land which the appellant, who lives in the neighbourhood, subsequently trespassed upon its land by uprooting the survey mark-stones.

Pending the trial of that suit, the appellant filed an application for an interlocutory injunction, seeking to restrain the respondents, their servants, agents, employees or persons claiming under them from alienating, transferring, conveying and / or carrying out any transactions of any nature on the land and from evicting the appellant from the land until final disposal of the suit. Upon
5 hearing the application, the learned trial magistrate dismissed it on grounds that the applicant had not established that he had a prima facie case with a probability of success to warrant grant of the temporary injunction. He gave the following reasons, among others, for his decision;

10 Lastly, on grounds that the main suit was filed on the 5th of August 2013 while the statutory notice to sue the respondent had been served on the respondent on 3rd day of July 2013 comprising of 33 days notice in violation of the 45 days notice as required under section 2 (1) of The Civil procedure and Limitation (Miscellaneous Provisions) Act, Cap 72....this is a statutory requirement which cannot just be warned (sic) but has to be adhered to especially in a matter of this nature. The suit, that is to say the main suit, is thus incompetent and cannot just be ignored by the court.....An
15 application for a temporal (sic) injunction cannot be said to be in existence when there is no main suit from which it arises. In the present case the main suit is incompetent and has no chance of succeeding.....in conclusion of this application, this court therefore finds that the main suit lacks the 45 required days of statutory notice hence has no likelihood of succeeding.....This application is therefore
20 dismissed with costs and it also disposes of C.S. No. 0003 of 2013. Ththa it to say the plaint is struck off the record with costs.

Being dissatisfied with the decision the appellant raised two grounds; that the trial court erred in law and in fact in its interpretation of the law regarding disclosure of a prima facie case
25 justifying grant of a temporary injunction and that he erred in law and in fact in dismissing C.S. No. 0003 of 2013 without giving the appellant an opportunity of presenting his case.

Submitting in support of those grounds of appeal, counsel for the appellant, Mr. Buga Muhamad argued that the decision is erroneous in that statutory notice of 33 days does not make the main
30 suit incompetent and that was an error by the learned trial magistrate. He relied on *Kabandize and twenty others v. Kampala Capital City Authority C. A. Civil Appeal No. 28 of 2001*. In that case it was decided that the requirement to serve statutory notice against government, local governments or scheduled corporations is no longer a mandatory requirement in the view of article 274 on modification and article 20 of the Constitution on equality. The Civil procedure
35 and Limitation (Miscellaneous Provisions) Act was read with modifications to dispense with

special treatment of government as a litigant. Non compliance with the notice does not render the suit incompetent. He prayed that the appeal ought to be allowed with costs.

In his written submissions, counsel from the respondent the learned State Attorney Mr. Balala
5 Charles submitted that the decision in *Kabandize and twenty others v. Kampala Capital City Authority C. A. Civil Appeal No. 28 of 2001* was not a decision by the Constitutional Court and therefore the requirements of 45 days' statutory notice under *The Civil procedure and Limitation (Miscellaneous Provisions) Act* remain mandatory. The trial magistrate was right in dismissing the suit since the pleadings disclosed that the land in dispute was registered in the names of
10 Koboko District Local Government and not the respondent who was therefore wrongly sued.

What constitutes a prima facie case for purposes of grant of a temporary injunction was explained in *Godfrey Sekitoleko and four others v. Seezi Peter Mutabazi and two others, [2001 – 2005] 3 HCB 80* in that what is required is for the court to be satisfied that the claim is not
15 frivolous or vexations, and that there are serious questions to be tried. Although the applicant's pleadings must show a prima facie case with a probability of success, the court is not required at that stage of the trial to decide on the merits of the case. The court only needs to be satisfied the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. In this case the learned trial magistrate misdirected himself when he purported to determine a
20 substantial aspect of the merits of the case based on the pleadings when at page 10 of his ruling he opined that "the respondents are even incapable of disposing this land off the same being in the names of the District, the respondent being a sub-county are in position of paying the required damages to the applicant and no wonder the respondent is confident of that and the applicant will not be inconvenienced in any way."

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That notwithstanding, the operative reason for dismissal of the case was the trial magistrate's finding that the appellant had not complied with the 45 days' statutory notice required by *The Civil procedure and Limitation (Miscellaneous Provisions) Act*. I have perused the decision in *Kabandize and twenty others v. Kampala Capital City Authority C. A. Civil Appeal No. 28 of*
30 *2001*. Although that decision was by the Court of Appeal, it followed one by the Constitutional Court in *Rwanyarare and others v. Attorney General [2003] 2 EA 664* where it was held that

There is no sound reason under the Constitution why government should be given preferential treatment at the expense of an ordinary citizen. That provision of the Government Proceedings Act is an existing law, which under article 274 (1) of *The Constitution of the Republic of Uganda, 1995* should be construed with such modifications, adaptations as may be necessary to bring it into conformity with Constitution. As a result Article 20 (1) and Article 274 of the Constitution together would require Section 2 of *The Civil procedure and Limitation (Miscellaneous Provisions) Act* to be construed with such modifications, adaptations, qualifications and exceptions as is necessary to bring it into conformity with the Constitution. The court of Appeal then held;

Section 2 above is a law that gives preferential treatment to one party to a suit by requiring the other party to first serve it with a 45 days mandatory notice of intention to sue. The section is also discriminatory in that it requires one party to issue statutory notice to the other without a reciprocal requirement on the other. None compliance renders a suit subsequently filed by one party incompetent. Government and all scheduled corporations are under no obligation to serve statutory notice of intention to sue to intended defendants. On the other hand ordinary litigants are required to first issue and serve a 45 days mandatory notice upon Government and scheduled corporations. We find that in view of Article 20 (1) of the Constitution a law cannot impose a condition on one party to the suit and exempt the other from the same condition and still be in conformity with Article 20 (1) of the Constitution..... We accordingly find and hold that the requirement to serve a statutory notice of intention to sue against the Government, a local authority or a scheduled corporation is no longer a mandatory requirement in view of Articles 274 and 20 (1) of the Constitution.

The learned State Attorney argued that since that decision was not made by the Constitutional Court, Section 2 of *The Civil procedure and Limitation (Miscellaneous Provisions) Act* is still mandatory. I respectfully disagree. We follow the common law tradition where the doctrine of binding precedent requires that the rule in a relevant previous decision must be followed “because it is a previous decision and for no other reason....” (See M. Radin, *Case Law and Stare Decisis: Concerning Priijudizienrecht in Amerika*, (1933) 33 Columbia Law Review 200-201). Through the acquisition of “the accumulated experience of the past” and by binding later courts, precedents provide for uniformity to a large extent, which is one of the most basic demands of justice. It is for that reason that in *Smith v. Allwright (1944) 321 US 644, at 669*, Roberts J. commented; it of paramount importance that judicial decisions should not be like “a

restricted railroad ticket, good for this day and train only.” Failure to follow binding precedent creates “the inconvenience of having each question subject to being re-argued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real final court of appeal,” (see *London Tramways v. London County Council* 5 [1898] AC 375at Per Lord Halsbury at p 380). It is important to adhere to precedent in the interests of certainty and clarity (see *Kay and Another v. London Borough of Lambeth and others; Leeds City Council v. Price and others and others*, [2006] 2 WLR 570, [2006] 2 AC 465).

10 By virtue of that doctrine, the Court of Appeal “has a duty to apply (that is, is bound to follow) any decision of the House of Lords which ... actually settles or covers the particular dispute before the Court” (see C. Rickett, “*Precedent in the Court of Appeal*”, [1980] 43 Modern Law Review 136, at 137). In the hierarchical system of courts which exists in this country, “it is necessary for each lower tier to accept loyally the decisions of the higher tiers” (see *Cassell* 15 *v. Broome* [1972] AC 1027 at 1054). For that reason, due regard is to be paid to the essential role of binding precedent, which in *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 was explained thus;

20 Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules. Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former 25 decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

Whereas the highest court in the hierarchy has the liberty to depart from its earlier decisions or to overrule its own decisions, where such decisions are likely to occasion an injustice in a particular 30 case, or where it appears right to do so, and to modify the previous pronouncements when they cease to conform with the social philosophy of the day, the courts below do not have such a liberty. They are bound to follow such decisions unless they can be distinguished. The rule is so strict that even for the highest court, mere discovery that an earlier decision was wrong does not

of itself justify a departure from it (see *Jones v. Secretary of State for Social Services* [1972] 1AC 944). It is in this regard that Lord Reid in *Regina v. Kneller (Publishing, Printing and Promotions) Ltd; Kneller (Publishing, Printing and Promotions) Ltd v. Director of Public Prosecutions*, [1973] AC 435, [1972] 2 All ER 898, commented; “I have said more than once in recent cases that our change of practice is no longer regarding previous decisions of this House as absolutely binding does not mean that whenever we think that a previous decision was wrong we should reverse it. In the general interest of certainty in the law we must be sure that there is some very good reason before we so act.....I think that however wrong or anomalous the decision may be it must stand and apply to cases reasonably analogous unless or until it is altered by Parliament.”

To avoid an inconvenient but otherwise binding precedent, a court below has several options available to it; - to distinguish it by confining it to its narrow facts, thereby limiting the scope of its authority; to find that it was *per incuriam*, that is, the Court had overlooked an existing decision or statute relevant to the decision (see for example *London Street Tramways v. London County Council*[1898] AC 375); where the reasons for the rule have ceased to exist (*Cessante ratione legis cessat ipsa lex*); refuse to follow any statement in the decision which is not the ratio; freely choose which of two clearly inconsistent binding decisions to follow. A court is otherwise not justified to dismiss a binding precedent simply because it does not agree with the *ratio discendi*. In the instant case, I have not found any reason to distinguish the decision of the Court of Appeal which is not only binding on this court but was also binding on the court below.

The decision of the Court of Appeal was handed down on 4th March 2014 and that of the trial magistrate in the instant case on 6th March 2014. It was clearly binding on that court. In the final result, I find merit in the appeal and the appeal is accordingly allowed. The order of the court below is set aside, the suit and interlocutory application are re-instated for determination on their merits. The costs of this appeal and of the court below are awarded to the appellant.

Dated at Arua this 20th day of July 2017.

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Stephen Mubiru
Judge
20th July 2017