

**THE REPUBLIC OF UGANDA**

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

**CIVIL SUIT NO. HCT-01-CV-CA-025 OF 2016**

**(Arising from KAS-00-CV-MA-006 OF 2016)**

5 **(Arising from KAS-00-CV-MA-032 of 2015)**

**(Arising from KAS-00-CV-MA-016 of 2015)**

**(Arising from KAS-00-CV-CS-LD-030 of 2014)**

10 **1. BALUKU ZAVERIO**

**2. MATSONGANI WISLEY.....APPELLANTS**

**VS**

15 **MUKANIRWA JOEL & 10 OTHERS.....RESPONDENTS**

**BEFORE: HON. MR. JUSTICE OYUKO. ANTHONY OJOK**

**JUDGMENT**

**BRIEF FACTS**

20 The Respondents sued the Appellants in the Chief Magistrate’s Court of Kasese at Kasese  
Vide KAS-00-CV-CS-LD-030/2014 for unlawful conversion of land and sought various  
reliefs as contained in the plaint, the suit proceeded exparte or the basis of an affidavit of  
service in respect of summons to file a defence alleging that the Appellants were served and  
did not file a defence, at execution level, the Appellants were served with Notice to show  
cause why execution should not proceed, the Appellants filed an application to set aside the  
25 exparte decree and stay of execution thereof vide KAS-00-CV-Ma-016 of 2015 contesting  
service on them which was dismissed on 16/10/2015; subsequently the Appellants filed  
another application for review of the order in **KAS-00-CV-CS-MA-016/2015 in KAS-00-  
CV-CS-LD-032/2015** which was dismissed for non-attendance of the Appellants/Applicants  
then, later the Applicants filed yet another application known and described as KAS-00-CV-  
30 MA-06 of 2016 to reinstate the dismissed application they had lodged in **MA-032 of 2015**  
which was dismissed on 5/5/2016 for want of merit.

This Appeal was against the order of the trial Chief Magistrate by his ruling on 5/5/2016  
where the application to reinstate MA-32/2015 was dismissed for want of merit. The appeal  
was of right and no leave from the trial court was required pursuant to O.44 r1 (1) (c) of the  
35 Civil Procedure Rules (SI 71-1) and to quote the same verbatim for purposes of this  
argument:-

“O.44 r.1 appeals from orders

(1) An appeal shall lie as of right from the following orders under section 76 of the Act –

- (a) .....
- 40 (b) An order made under rule 23 of IX rejecting an application for an order to set aside the dismissal of a suit.”

Clearly the application the basis of this appeal was taken under O.9 r.23 Civil Procedure Rules (SI 71-1) inter alia as others were enabling legislations under S. 98 Civil Procedure Act and O. 52 R.1,2,3 Civil Procedure Rules, this appeal is within the ambit of the order and rule  
45 where right of appeal is automatic without seeking leave from the trial Court, the application the basis of this appeal is KAS-00-MA-06/2016, so the assertion that leave ought to have been sought is not legally attainable.

The appellants being aggrieved by the order in KAS-00-CV-MA-06/2016 by its ruling of the trial Court delivered on 5/5/2016 now appeals to this honourable court and sets forth the  
50 following grounds of objections:-

1. The trial learned Chief magistrate erred both in law and fact when he summarily dismissed the application without first studying the application and the affidavit in support otherwise he should have found for the appellant/applicants which error occasioned a gross miscarriage of justice to the Appellants.
- 55 2. The learned Chief Magistrate erred in law and fact when he dismissed the application when sufficient cause was apparent in both the application and the affidavit in support which error occasioned a gross miscarriage of justice.
3. The learned chief Magistrate’s decision was against the weight of evidence before him in the application and the affidavit in support otherwise he would have found in  
60 favour of the Appellants which error occasioned a gross miscarriage of justice.

M/S Komunda & Co. Advocates appeared for the Appellants while M/S Sibendire, Tayebwa & Co. Advocates represented the Respondents. By agreement, both parties filed written submissions.

Its duty of the first Appellate Court is mandated to re-evaluate and/or re-appraise the  
65 evidence of the lower court and come to its own conclusion bearing in mind that this court never heard witnesses testifying so as to assess their demeanours- **See F. Zaabwe Vs Orient Bank Ltd SCCA No. 4/2006, Selle & anor Vs Associated Motor Boat Co. Ltd [1968] E.A 123 Akisoferi M. Ogola Vs Akiko & Another [1977] HCB 53 (Court of Appeal of Uganda).**

70 **Arguments on the grounds**

**Ground 1. The trial learned Chief Magistrate erred both in law and fact when he summarily dismissed the application without first studying the application and the affidavit in support otherwise he should have found for the appellant/applicants which error occasioned a gross miscarriage of justice to the Appellants.**

75 In the application before the trial Magistrate KAS-00-CV-MA-06 of 2016 was to reinstate KAS-00-CV-LD-032 of 2015 which had been dismissed on 3/3/2016 for non attendance of

the Appellant/ Applicants then and further it was seeking that KAS-00-CV-LD-032 of 2015 to be reinstated and be fixed for hearing interparties.

80 The grounds were valid that the Appellants were prevented by sufficient cause when the application was called for hearing and indeed as per the affidavits in support counsel for the Appellants came late and found that indeed the court was in the process of dismissing the application and when he intervened, was advised by the trial Chief Magistrate that he should re-apply for reinstatement, this is made out in the affidavit of Counsel in support known as 2<sup>nd</sup> affidavit in support of Notice of Motion especially 3,4,5,6,7 and 8 of the affidavit in support.

85 It was not the fault of the Appellants/ Applicants to have waited for their counsel to go to court more so when they had been told by their counsel to wait for him and they went together to court and actually travelled with their counsel to court, as evidenced by 1<sup>st</sup> affidavit in support of Notice of Motion by Baluku Zaverio (1<sup>st</sup> Appellant) in paragraphs 4,5 & 6 further if there was any mistake committed by Counsel for the Appellant/ Applicants, it  
90 could not be visited on the Appellants for the fault (if any) was of counsel for them and they should be allowed to pursue their case on its own merit.

There was medical evidence of Counsel's sickness which was attached to the affidavit in support of Counsel's affidavit in support of the application which was marked "A" which indeed was medical proof that indeed the advocate was sick. The grounds for setting aside the  
95 dismissal were given and accordingly the trial Chief Magistrate ought to have set aside the ex-parte order and reinstated the application for review; he did not do this in spite of the overwhelming evidence before him by affidavit evidence and hence he should be faulted. That this ground of appeal be allowed as it has merit.

100 However counsel for the respondent in his submission argued that it is trite law that a ground of appeal must be precise and not argumentative and do not figure out what this ground of appeal complains about. It is clearly argumentative.

The ground seems to suggest that the learned trial chief magistrate ought to have made judgment in favour of the appellants even when no submissions were made in support of the application.

105 It is on record that counsel Komunda who appeared in this matter being appealed against appeared for the applicants/appellants in court on the day the matter whose ruling is being appealed against came to court. However because he had sworn an affidavit in support of the application, he did not make any submission in support of the application. It was on that basis that the application was dismissed. Otherwise how would counsel have been both a witness  
110 and counsel at the same time?

The learned trial magistrate in the view of the above was right in finding that there was no sufficient cause given for the reinstatement of the application for review.

**My opinion on the ground 1:**

115 It is true that submission is not evidence and court can proceed and give judgment with or without submissions. The trial court would have read the application and affidavit in support of the application and decided accordingly depending on the evidence available. I therefore fault the trial chief magistrate by dismissing the application just because counsel never made his submission. This ground succeeds.

120 **Ground 2. The learned Chief Magistrate erred in law and fact when he dismissed the application when sufficient cause was apparent in both the application and the affidavit in support which error occasioned a gross miscarriage of justice**

125 The trial Chief Magistrate just simply dismissed the application on ground that it lacked merit, there were no convincing grounds on which he based the dismissal of the application; the reasons must be cogent and plausible not just to state that the application lacks merit, the lack of merit, was not disclosed to the Appellants/Respondents in the ruling of Court on the Appellant's side there was sufficient cause why the Appellants and their counsel came to court late and reasons of their late coming was disclosed in the supporting affidavits to the Application, to simply state that the application lacks merit without giving reasons is to say  
130 the least with due respect to the trial Chief magistrate, unjustified. The trial Chief Magistrate should be faulted on this ground as sufficient grounds did exist to have justified the setting of his order dismissing the application for non attendance.

135 However counsel for the respondent submitted that as already indicated, no submission was made in favour of the appellants since counsel was a witness in the matter. It is our humble submission that the learned trial magistrate would not have found cause when counsel had not made any submission as the record shows.

140 More so the learned trial magistrate did not find it that it was sufficient for a client to allegedly wait for his sick advocate at office instead of waiting at court. It was also never disputed that by the time the respondents left court at 12:00 noon on that day, the appellants and their counsel had not reached court.

It is our humble submission that whatever cause there might be in an affidavit, a submission has to be made it court about it at least referring the magistrate to the affidavit. This was not the case in this matter.

**My opinion on the ground 2:**

145 As argued in ground 1 submission is not evidence and medical form dated 3/3/16 from AFYA medical and diagnostic centre is attached to prove that counsel was sick and the litigants being lay persons didn't know that they should have been in court than waiting for their counsel in his office.

This amounted to sufficient cause and as such this ground also succeeds.

150 **Ground 3 The learned chief Magistrate’s decision was against the weight of evidence before him in the application and the affidavit in support otherwise he would have found in favour of the Appellants which error occasioned a gross miscarriage of justice**

A close study of the application and the attendant evidence attached by way of affidavit evidence, this was a fit and proper application to be allowed as sufficient cause existed to warrant setting aside the dismissal order and reinstating the application for review to be heard on merit inter parties as the matter was land which is sensitive in this country of Uganda, there was no cogent and plausible reason why he would have refused and or dismissed this application which had merit.

160 He further submitted that the trial magistrate be faulted for having not exercised his judicial discretion in not allowing this application and hence the same be allowed.

Counsel for the Respondents vehemently opposed the third ground and submitted that it is our humble submission that our argument of ground 2 answers this ground as well and prayed that it fails as well.

**My opinion on the third ground:**

165 Since ground 1 & 2 are answered in the affirmative, ground 3 is also answered in the affirmative. This ground succeeds.

In a nut shell all the grounds succeed, the appeal is allowed. The ruling and orders of the trial chief magistrate set aside, costs of the appeal and the lower court is awarded to the appellants, the application for review in KAS-00- Cv- MA- 032 of 2015 be reinstated and heard on merit.

Right of appeal explained.

Dated this.....day of .....2017

175 .....  
**OYUKO ANTHONY OJOK**  
**JUDGE**

Judgment delivered in the presence of;

- 180
1. Kateeba Cosma for the Appellant
  2. Both parties.
  3. In the absence of the Counsel for the Respondent
  4. Beatrice Court Clerk.

185  
.....

**Oyuko Anthony ojob**  
**Judge**  
**14/12/2017**

190