

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FOR PORTAL
CIVIL APPEAL NO. 067 OF 2018
(ARISING FROM CIVIL SUIT NO. 006 OF 2018,
(Kamwenge Chief Magistrate's Court)

1. DR. MICHEAL FINDLAY
2. MRS. KIM FINDLAY
3. MOREEN KARUNGI
4. ABBOTT PATRICIA ::::::::::::::::::::::::::::::::::: APPELLANTS

VERSUS

THE REGISTERED TRUSTEES OF
KAMWENG MARANATHA ::::::::::::::::::::::::::::::::::: RESPONDENT

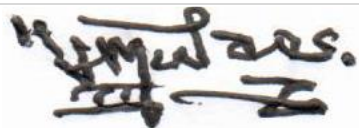
BEFORE: HON JUSTICE VINCENT WAGONA

JUDGMENT

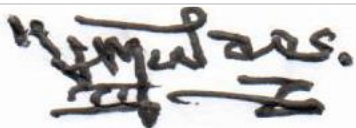
Introduction:

1. This was an appeal against the decision of His Worship Barigye Saidi, Magistrate Grade One, Kamwenge delivered on 20th November 2018. The appellant appealed against the orders made in Civil Suit No. 006 of 2018.

Brief Background:

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2. The Respondent filed civil suit no. 006 of 2018 in the Chief Magistrate of Kamwengeat Kamwenge against the defendant seeking declarations inter-alia that land comprised in Kibale Block 60, Plot 116 at Galiraya, Kamwenge District belongs to the Respondent; that the defendants were illegally withholding the title and in wrongful possession of the Hospital Furniture and equipment.
3. The defendants (appellants) filed a defense on 26th June 2018 in which they denied the allegations by the respondent (defendant) and averred that the suit land was purchased by the 1st defendant (appellant) in 2008 at shs 640,000,000/= and the same was developed with a health centre which was named Maranatha Health Centre. The appellants contended that it was Rev. Kwizera who was trespassing on the suit land.
4. The appellants also included a counter claim seeking orders inter-alia, that the defendant to the counter claim (respondent) is not the owner of the suit land and that the same was vested in the Registered Trustees of Maranatha Health Centre comprising of Mr. Stanley Musoni, Nyangoma Stella Maris and Rwaheru Maureen Kirungi, an order of a permanent injunction, general damages and costs of the suit.
5. The respondents through their lawyers filed a notice of withdrawal of the suit through M/s Mwesige–Mugisha & Co. Advocates on 8th November 2018. The said suit was withdrawn by the trial magistrate on 20th November 2018 by way of a minute on the notice of withdrawal which was filed in court. The appellants



being aggrieved with the said order lodged an appeal to this court challenging the same.

The grounds:

6. The appellants framed the following grounds for determination by this court:

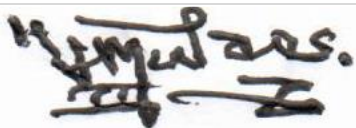
- i. That the learned Trial Magistrate erred in law and fact and occasioned a miscarriage of justice when ordered that the matter (Civil Suit No. 6 of 2018) is withdrawn and dismissed with no orders as to costs contrary to the law thereby occasioning a miscarriage of justice.
- ii. That the learned trial Magistrate erred in law and fact when he ordered that Civil Suit No. 006 of 2018 is withdrawn and dismissed without hearing the parties as to costs thereby occasioning a miscarriage of justice.

Representation and Hearing:

7. *Mr. Mugabi Geoffrey of M/s Acellam Collins & Co. Advocates* appeared for the Appellants while the Respondent was represented by *M/s Factum Associated Advocates*. The parties filed written submissions.

RESOLUTION:

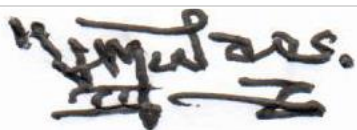
Preliminary Objection No. 1: Whether the Respondent duly instructed Factum Associated Advocates in this suit.



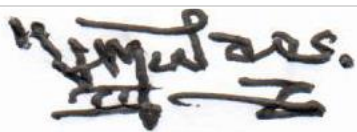
8. Mr. Mugabi for the appellants contended that on 14th April 2023, the appellants received a letter of instructions from M/s Factum Associated Advocates that purported to act for the Respondent. That on 19th April 2023, a letter was filed in court signed by Mr. Sabiiti Fenekansi, the programs Director of Kamwenge Maranatha indicating that M/s Factum Associated Advocates was acting without instructions from the Respondent.
9. That further on the 20th of April 2023, Kamwenge Maranatha Limited through its Director Programs wrote a letter warning the lawyers not to act illegally asking them to avail to the organization the particulars of the person who had given them instructions. That the advocates did not avail such particulars and as such M/s Factum Associated Advocates was acting without instructions.
10. Mr. Mugabi contended that regulation 2(1) of the advocates (Professional Conduct) Regulations provides that; ***“No Advocates shall act for any person unless he or she has instructions from that person or his or her duly authorized agent.”*** It was submitted that the submissions by M/s Factum Associated Advocates on the file should be struck out with costs.

CONSIDERATION BY COURT:

11. Regulation 2 (1) of the Advocates (Professional Conduct) Regulations S.1 267-2 provides that: ***No advocate shall act for any person unless he or she has received instructions from that person or his or her duly authorised agent.***



12. The above rule was considered in *Housing estates tenants Association Vs. Kabale Municipal Council, Civil Appeal No. 15 of 2013* where court observed that; “*a suit without instructions is incompetent.*” Further in *Okodoi George & Anor Vs. Okello Opaire Sam, Civil Misc. Application No. 0143 of 2016* Kawesa J noted thus: “*The import of the law above is that instructions ran with the action itself, they cannot be assumed.*”
13. In my view rule 2(1) of the Advocates (Professional Conduct) Regulations was intended to prevent advocates from acting without instructions. An advocate should not lend his or her legal counsel without instructions. This is intended to protect litigants from bearing liability or costs that may result from advocates acting without authorization or permission. In the same vein, the rule was geared towards avoiding a situation where the advocate's conduct of a case, is influenced not by his duty to his client who has instructed him but by concerns about his own self-interest in a case.
14. Instructions can be oral; or written, that is; in form of a remuneration agreement or a retainer agreement. However, instructions can also be ascertained from the conduct between the advocate and the client in relation to the instructions executed by an advocate. In *Ochieng Onyango and Kibet & Ohaga Advocates – Versus- Akiba Bank Limited* as cited in *Mereka & Company Advocates – versus- Zakhem Construction (Kenya) [2014] eKLR* the court held that: “*It is not the law that an advocate must obtain a written authority from a client before he commences a matter. The participation and authority of an advocate in a matter can be implied or discerned from the conduct of the*

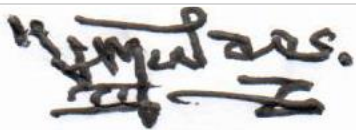


*client. In my view retainer is no more than an authority given to an advocate to act in a particular matter and manner. It may be restrictive, it maybe wide. And nevertheless it can be implied from the conduct of the Client/Advocate 'relationship'."**"Even if there has been no written retainer, the court may imply the existence of a retainer from the acts of the parties in the particular case..."*

15. In this case, in the affidavit of service in Civil Appeal No. 067 of 2018, the deponent indicated under paragraph 3 thus: *"That on the 24th day of March 2023, I proceeded to one of the Registered Trustees of the Respondent a one Reverend Kwizera Christopher with the help of the appellant's manager a one Fenekansi Sabiiti who identified him to me and I served him with the appellant's written submissions and he accepted service but refused to sign on my return copy that he could consult his lawyers."*

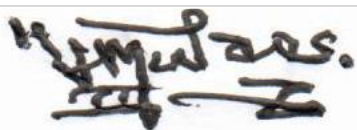
16. The above statement confirms that Rev Kwizera is a trustee for the Respondent. It also indicates the correct capacity of Mr. Sabiiti Fenekansi as a manager for the appellants. Counsel for the Respondent wrote a letter dated 13th April 2023 indicating that they were instructed by the trustees of the respondent who included Rev. Kwizera Christopher. Therefore, the letter dated 18th April 2023 purporting that the lawyers acted without instructions must have been meant to mislead court. I find that the lawyers were properly instructed to handle the appeal and overrule the objection.

Preliminary Objection No. 2: Whether this appeal is proper before this court.

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17. Learned counsel for the Respondent contended that the current appeal is against orders of court made under Order 25 of the Civil Procedure Rules. That for appeals under the said order, leave must be sought under order 44 of the Civil Procedure Rules before presenting the appeal. He contended that in the current appeal, the appellants did not seek leave before presenting this appeal, thus rendering the same illegal and procedurally irregular. Counsel contended that this was an illegality which cannot be left standing on the court record. He cited the case of *Asa Nabirye & Anor Vs. Isiiko Paul, Civil Appeal No. 062 of 2016 and Makula International Limited Vs. His Eminence Cardinal Nsubuga & Anor Civil Appeal No. 4 of 1981* to support his argument and asked court to strike out the appeal on the above basis with costs.

18. In response counsel for appellant submitted that the issues raised by the respondent's counsel are curable under article 126 (2) (e) of the Constitution. It was submitted that when pleadings have been brought under a wrong procedure or law, courts have held from time to time that it is curable as a defect since there is no real harm, prejudice or miscarriage of justice occasioned to the respondent. Counsel cited the case of *Alcon International Vs. Kasirye Byaruhanga (1995) 111 KALR* which was cited with approval in *Amon Bazira Vs. Maurice Peter Kagimu HCMA No. 1138 of 2016* where Justice Musoke held that: "*Procedural defects can be cured by the innovation of Article 126 (2)(e) of the Constitution.*"



19.Counsel further contended that appeal against the order of withdraw is not an interlocutory decision that require leave. That the current appeal does not fall under Order 44 of the Civil Procedure Rules as such leave is not required.

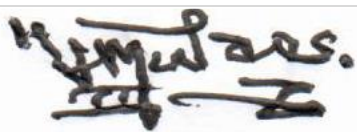
CONSIDERATION BY COURT:

20.The appeal at hand arises from the order by the His Worship Barigye Saidi, Magistrate Grade One, Kamwenge delivered on 20th November 2018 where he allowed a withdraw of Civil Suit No. 06 of 2018 with no orders as to costs. The appellants being aggrieved by the decision of the trial magistrate to deny them costs appealed to this court challenging the said order.

21.Order 25 of the Civil Procedure Rules governs withdrawal of suits. In determining whether or not a party has an automatic right of appeal against a decision made under a given Order of the Civil Procedure Rules, reference should be made to Section 76 of the Civil Procedure Act and Order 44 (1) of the Civil Procedure rules.

22.Under Section 76 of the Civil Procedure Act, an order withdrawing a suit under Order 25 of the Civil Procedure Rules is not among those which are appealable as of right. Similarly, Order 44 (1) of the Civil Procedure Rules does not list Order 25 as one where orders made there under, are appealable as of right.

23.The Hon. Lady Justice Eva Luswata in *Asa Nabirye & Anor Vs. Isiiko Paul, Civil Appeal No. 062 of 2016* observed at page 5 thus “*Indeed, an order made under Order 25 CPR does not envisage an appeal and in the unlikely event*

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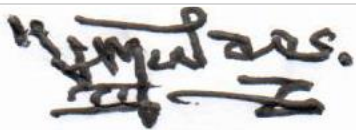
that there was one aggrieved by such an order, then they would first have to seek leave to appeal under Order 44 CPR which was not done.”

24. I therefore find that a party who wishes to appeal against orders made under Order 25 of the Civil Procedure Rules must comply with order 44 rule 2 by seeking leave to appeal.

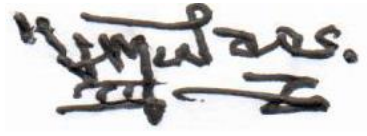
25. A party cannot plead article 126 (2) (e) of the Constitution to circumvent the requirements of the law. This was considered by the Supreme Court in *Kasirye & Byaruhanga and Co. Advocates vs. Uganda Development Bank, SCCA No.2 of 1997 and Horizon Coaches vs. Edward Rurangaranga, SCCA No. 18 of 200* where it was observed thus: *“We have underlined the words ‘subject to the law’. This means that clause (2) is no license for ignoring existing law. A litigant who relies on the provisions of Article 126 (2) (e) must satisfy the Court that in the circumstances of the particular case before the Court it was not desirable to pay undue regard to a relevant technicality. Article 126 (2) (e) is not a magic wand in the hands of defaulting litigants.”*

26. In this case the appellants were required to seek leave before lodging the appeal which was not done. The appellants who are the defaulting litigants cannot seek refuge under article 126 (2) (e) of the Constitution. I therefore find that this appeal is incompetent for failure to seek leave before filing the same.

27. I thus uphold the second preliminary objection. . This point of law disposes of the entire appeal and thus there is no need for me to go through the merits of the

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appeal. This appeal is therefore hereby dismissed with costs awarded to the Respondent. I so order.

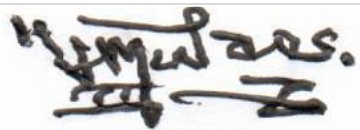
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Vincent Wagona

High Court Judge

FORT-PORTAL

DATE: 24/8/23

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