

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
[LAND DIVISION]  
CIVIL APPEAL NO. 50 OF 2019**

**(ARISING FROM MISCELLANEOUS APPLICATION NO. 281 OF 2018)  
(FURTHER ARISING OUT OF CIVIL SUIT NO. 0065 OF 2017, CHIEF  
MAGISTRATE'S COURT OF WAKISO AT WAKISO)**

**MARIA GORRETI NAKALEMA:::APPELLANT**

***VERSUS***

- 1. CHARLES ANTHONY KYEYUNE**
- 2. ST. MICHAEL ESTABLISHMENTS LTD**
- 3. CENTENARY RURAL DEVELOPMENT BANK:::::::::::::::::RESPONDENTS**

**BEFORE: HON. JUSTICE BERNARD NAMANYA**

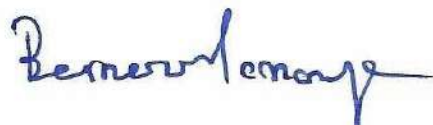
**JUDGMENT**

**Introduction:**

1. This Judgment is in respect of an appeal filed against the Ruling of His Worship Sajjabi N. Norbert, a Magistrate Grade One sitting at the Chief Magistrate's Court of Wakiso at Wakiso delivered on the 18<sup>th</sup> March 2019 in favour of the respondents.

**Background:**

2. The background to this appeal is that the appellant (a wife of the 1<sup>st</sup> respondent) sued the respondents for fraudulently transacting in family land comprised in Busiro Block 189 Plot 49 land at Busuju (hereinafter "the suit land"). The 1<sup>st</sup> respondent is the registered proprietor of the suit land. In the lower court, the



appellant contends that Mr. Charles Anthony Kyeyune (the 1<sup>st</sup> respondent) is married to her by virtue of a holy matrimony entered into on the 13<sup>th</sup> November 2010 at the Sacred Heart Lubaga Catholic Church. The appellant claims to have 3 children with the 1<sup>st</sup> respondent. The appellant claims that the 1<sup>st</sup> and 2<sup>nd</sup> respondents mortgaged the suit land to Centenary Bank (the 3<sup>rd</sup> respondent) without obtaining a spousal consent from her which is wrongful and illegal. When the 1<sup>st</sup> respondent was applying for a loan from the 3<sup>rd</sup> respondent, he stated under oath, in a Statutory Declaration dated the 17<sup>th</sup> August 2015 that he is single and not married. The appellant avers that she was legally married to the 1<sup>st</sup> respondent on the 13<sup>th</sup> November 2010.

3. On the 14<sup>th</sup> September 2018, when the matter came up for hearing before the learned Magistrate, the appellant and her lawyer were absent as a result of which Civil Suit No. 65 of 2017 was dismissed under Order 9 rule 22 of the Civil Procedure Rules. The appellant filed Misc. Application No. 281 of 2018 under Order 9 rule 27 of the Civil Procedure Rules seeking to set aside the dismissal order and reinstatement of Civil Suit No. 65 of 2017 on grounds of negligence of counsel but the learned Magistrate dismissed the application.

**Grounds of the appeal:**

4. The appellant filed the instant appeal against the ruling and orders of the learned Magistrate delivered on the 18<sup>th</sup> March 2019 on two grounds:
  - i) The learned trial magistrate erred in law and in fact in ruling that the appellant has not demonstrated sufficient cause to warrant reinstatement of the case; and
  - ii) The learned trial magistrate erred in law and fact when he condemned the appellant unheard on merits



**Representation:**

5. At the hearing of the appeal, the appellant was represented by *Mr. Aisu Isaac Nicholas* of M/s Tumusiime, Iumba & Co Advocates while the 3<sup>rd</sup> respondent was represented by *Mr. Derick Magezi* and *Mr. Ziwa Anthony* of M/s Muhumuza-Kiiza Advocates.

**Duty of the first appellate court:**

6. The duty of the first appellate court was stated in the case of *Uganda Revenue Authority v. Rwakasaija Azarious & 2 Others*, Court of Appeal Civil Appeal No. 8 of 2007 as:

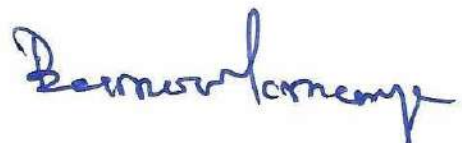
*"This being the first appellate court, it is the duty [of court] to re-appraise the evidence on record as a whole and come to its own conclusion bearing in mind that it has neither seen nor heard the witnesses and should make due allowance in that regard."*

7. I shall keep the above principle in mind while resolving the grounds of the appeal.

**Consideration and determination of the appeal:**

**Ground 1: The learned trial Magistrate erred in law and fact in ruling that the appellant has not demonstrated sufficient case to warrant reinstatement of the case.**

8. The gist of this ground of appeal is that the learned Magistrate Grade 1 ought to have considered the failure of the appellant's counsel to appear when the suit was called for hearing as constituting sufficient cause for setting aside the dismissal order and reinstating the suit. In the lower court, the appellant argued that the





mistake of counsel should not be visited on the appellant and that the appellant herself had been vigilant in prosecuting the suit.

9. Counsel for the appellant submitted that the appellant instructed Twikirize & Co. Advocates to conduct her case, and they bore the ultimate responsibility for prosecuting the matter. That her previous lawyers failed to take the requisite steps to prosecute the suit.
10. Counsel for the appellant also submitted that court has on several occasions held that the mistake of counsel however negligent or deliberate should not be visited on an innocent litigant who is interested in having the matter concluded.
11. The learned Magistrate considered the application and decided that the appellant was personally present in court on the 29<sup>th</sup> June 2018, was fully aware of the next hearing date and could therefore not blame her lawyer for not informing her about the next hearing date. The learned Magistrate noted that the appellant's lawyer appeared in court only on the 16<sup>th</sup> November 2017 and on subsequent occasions, the appellant personally attended in the absence of her lawyer.
12. I have perused the court record. The appellant instructed M/s Twikirize & Co Advocates to represent her in Civil Suit No. 65 of 2017. The said Advocates continued to act in the matter until they were replaced by M/s Tumusiime, Irumba & Co Advocates on the 8 November 2018. A notice of change of advocates is on court record. In view of the above record, M/s Twikirize & Co Advocates bore the ultimate responsibility for the conduct of the suit. The learned Magistrate was wrong in finding that because the appellant had regularly attended court sessions, her Advocates were no longer responsible.
13. Order 9 rule 27 of the Civil Procedure Rules provides that:




*“In any case in which a decree is passed ex parte against a defendant, he or she may apply to the court by which the decree was passed for an order to set it aside; and if he or she satisfies the court that the summons was not duly served, or that he or she was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him or her [...].”*

14. In the case of Nicholas Roussio v. Ghulam Hussein Habib Virani (Civil Appeal 9 of 1993) [1993] UGSC 19, the Supreme Court of Uganda held that:

*“[...] the courts have attempted to lay down some of the grounds or circumstances which may amount to sufficient cause. A mistake by an advocate though negligent may be accepted as a sufficient cause. [...] Illness by a party may also constitute sufficient cause.”*

15. I have considered the facts of the case before me. The appellant deponed an affidavit in support of Misc. Application No. 281 of 2018 seeking to set aside dismissal of the suit, and for its reinstatement. She stated that she instructed her lawyers, Twikirize & Co Advocates to prosecute the suit on her behalf but when the case was called for hearing on the 14<sup>th</sup> September 2018, her lawyers were absent. This prompted the appellant to instruct another firm of lawyers, Tumusiime, Irumba & Co Advocates to take over conduct of the matter.
16. In my view, the mistake of the appellant's former lawyers to attend court when the suit was called for hearing cannot be visited on the appellant. The court record shows that the appellant was vigilant in prosecuting her suit. For instance, the appellant personally attended court on the 16<sup>th</sup> November 2017, 1<sup>st</sup> February 2018, 17<sup>th</sup> April 2018, and 29<sup>th</sup> June 2018.

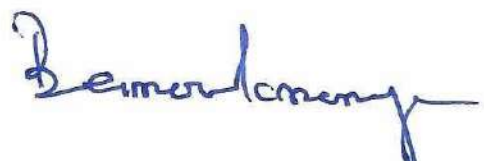




17. I am satisfied that the appellant proved sufficient cause for setting aside the order of dismissal and reinstatement of Civil Suit No. 65 of 2017. Therefore, the learned Magistrate erred in law and fact in ruling that the appellant had not proved sufficient cause to warrant reinstatement of the case.
18. Ground 1 of the appeal therefore succeeds.

**Ground 2: The learned trial magistrate erred in law and fact when he condemned the appellant unheard on merits.**

19. The essence of this ground of appeal is that the learned Magistrate Grade 1 undermined the appellant's right to be heard as provided for under the Article 28 (1) of the Constitution of the Republic of Uganda, 1995. Counsel for the appellant submitted that the appellant was not accorded the opportunity for her case to be heard on its merits. That this being a land matter involving fraud, it was pertinent that the matter be heard on its merits.
20. On the other hand, counsel for the respondents submitted that the appellant ought to have been vigilant in ensuring that her case is determined on its merits and she can therefore not fault court in dismissing her case.
21. In the case of Banco Arabe Espanol v. Bank of Uganda, Supreme Court Civil Appeal No. 8 of 1998), it was held that:
- "[...] the administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights. Unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem*

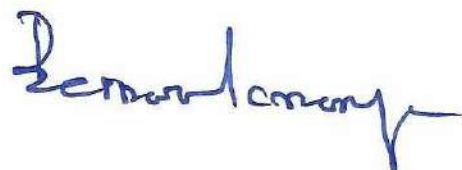


*that the main purpose of litigation, namely, the hearing and determination of disputes, should be fostered rather than hindered."*

22. Although it is not necessary to consider the merits of the case in an application for reinstatement of the suit (*see Nicholas Rousso (supra)*), the learned Magistrate ought to have had regard to the fact that the appellant contests the mortgaging of family land to Centenary Bank (the 3<sup>rd</sup> respondent) without her consent as a spouse. The appellant also alleges fraudulent conduct and actions on the part of the respondents, the merits of which ought to have been subjected to scrutiny by learned Magistrate. I have endeavoured to set out the facts of the underlying dispute between the parties in my background to this Judgment. In my considered opinion, the facts of Civil Suit No. 65 of 2017 require that the matter be heard on its merits.
23. The principles that underpin the exercise of judicial power laid out in *article 126(2)* of the *Constitution of Uganda* should always be borne in mind, and as the Supreme Court held in the case of *Banco Arabe Espanol (supra)*, justice should be fostered rather than hindered.
24. Accordingly, it is my finding that that there is merit in Ground 2 of the appeal and it succeeds.

**Conclusion:**

25. As both grounds of appeal have succeeded, this appeal is allowed with the following orders:



- 1) The Ruling and Orders of the learned Magistrate Grade 1, Ssajjabi Noah Norbert delivered on the 18<sup>th</sup> March 2019 in Misc. Application No. 281 of 2018 are set aside.
- 2) The Order of Dismissal of Civil Suit No. 65 of 2017: Maria Goretti Nakalema v. Charles Anthony Kyeyune, St. Michael Establishments Ltd & Centenary Rural Development Bank Ltd, Chief Magistrate's Court of Wakiso at Wakiso is set aside.
- 3) Civil Suit No. 65 of 2017: Maria Goretti Nakalema v. Charles Anthony Kyeyune, St. Michael Establishments Ltd & Centenary Rural Development Bank Ltd, Chief Magistrate's Court of Wakiso at Wakiso is reinstated and shall be heard on its merits.
- 4) The file is forwarded to the Chief Magistrate's Court of Wakiso at Wakiso for Civil Suit No. 65 of 2017: Maria Goretti Nakalema v. Charles Anthony Kyeyune, St. Michael Establishments Ltd & Centenary Rural Development Bank Ltd to be heard on its merits before another Magistrate with competent jurisdiction.

**I SO ORDER.**

  
**BERNARD NAMANYA**  
**JUDGE**  
*31<sup>st</sup> March 2023*



31 March 2023 at 10:08am.

Mr. Mugisha Hashim Mugisha of M/s Counsel for the appellant  
Tumusiime, Iumba & Co Advocates

Mr. Derick Magezi of M/s Muhumuza- Counsel for the 3<sup>rd</sup> respondent  
Kiiza Advocates

Cheptoeck Liz Court Clerk

**Mr. Mugisha Hashim Mugisha:**

The matter is for Judgment. We are ready to receive the Judgment.

**Court:**

Judgment delivered in open chambers.

  
**BERNARD NAMANYA**  
**JUDGE**  
**31<sup>st</sup> March 2023**