

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA **AT**
MENGO
(CORAM: ODER, KAROKORA AND KANYEIHAMBA J.J.S.C.)
CIVIL APPEAL NO.3 OF 1996
BETWEEN
KAMURASI CHARLES:..... APPELLANT
AND

1. ACCORD PROPERTIES LTD)RESPONDENTS
2. CHRISTOPHER SEKISAMBU)
*(Appeal from the judgment and orders of the High Court of Uganda at Kampala
(Tsekooko, .J. as he then was) dated March,1993 in H.CC.SNo46 of 1990)*

JUDGMENT OF KANYE1HAMBA

This is an appeal against the judgment and orders of the High Court (Tsekooko J., as he then was) striking out the plaint between the applicant and the respondents for abuse of the process of the Court and ordering that Counsel for the appellant in that case, Mr. Mugenyi & Company Advocates, personally pay the costs in the suit.

The facts and merits of this case are not relevant except in so far as they relate to the circumstances leading to this appeal. Counsel for the applicant filed two suits in the High Court each naming two different sets of defendants. The first plaint was instituted on 25 January 1990 between **Kamurasi Charles** as plaintiff and **Serugooti Estates Limited** and one **Christopher Ssekisambu** as defendants. The suit was filed and given a number in the High Court Registry as Civil Suit No.46 of 1990. Summons to enter appearance seems to have been issued by the Court. Without any notice or application to amend this suit, another plaint, this time, between **Kamurasi Charles v. Accord Properties Ltd.** and **Christopher Ssekisambu** was also filed and served on the defendants much later, possibly on 28th of March 1990 and the defendants entered appearance and filed a written statement of defence dated 23 April, 1990. The second suit was also given the same number in the registry as Civil

Suit No.46 of 1990. Both complaints indicate that they were signed by the same counsel of Mugenyi and Company, Advocates, of Kampala, on the same day, namely, 24th January 1990.

In an amended complaint dated 17th October, 1991, which only related to the second suit, the same firm of advocates did, without reference to the parties in the first suit, amend the particulars of the special damages allegedly incurred by the applicant. In an accompanying affidavit by Yesero Mugenyi of the same firm of advocates, the said Yesero stated, inter alia, that on 25th January, 1990 he had filed a complaint which had been served on defendant Accord Properties Limited. Counsel did not refer to the first complaint or parties therein. The subsequent proceedings before the learned trial judge were conducted as if only one complaint had been filed against one set of defendants.

During the perusal of the record of proceedings and consideration of submissions for the parties, the trial judge discovered that there had been two complaints filed in court on behalf of the applicant. The learned judge considered this and the silence on the matter by counsel for the applicant as tantamount to abuse of the process of the court. On 18/03/1993 the learned trial judge ordered the second complaint to be struck out with costs against the applicant's counsel and, it is against those orders that this appeal was filed before this court.

When the appeal first came before us on 19th July, 1999 only counsel for the applicant, Mr. Hamu Mugenyi, was present. He submitted that the affidavit by the court's clerk indicated that no service to the respondents was effected because the appellant who normally resides in Fort Portal did not know the respondents' address and was therefore unable to assist in the service. He further submitted that his firm had attempted to serve the respondents through their former counsel who declined service as they were no longer under the instructions of the respondents. Mr. Mugenyi therefore applied for an order authorising substituted service in accordance with rule 1 (3) of the Rules of this court. We made the order and directed that such substituted service shall be effected through advertisements in the "New Vision" and "Bukedde" newspapers. The Court fixed the next hearing of the appeal for 9th November, 1999, in order to allow for an extended period in which to effect the substituted service and give enough time for the respondents, wherever they may be to read it and instruct counsel, if any, in good time.

When the hearing of the appeal resumed on 9th November, 1999, again only Mr. Ham Mugenyi of Mugenyi & Company Advocates, for the appellant was present. He contended

that he could not explain why the respondents were not present since his firm had effected substituted service in accordance with the order of court made on 19th July, 1999. We noticed that the alleged substituted service was published in both newspapers in their issues of 31st November, 1999, barely a week before the hearing of the appeal was to commence. Apparently for more than three months counsel for the appellant kept silent and did nothing about the order for substituted service, presumably hoping that no one connected with the respondents would see the advertisements in time to alert them, let alone allow sufficient time for any counsel they may instruct to read the brief and get well acquainted with the facts to be able to represent them adequately. Sadly for this particular appellant, there is more to it than what appears in those advertisements. A close analysis of the advertisements which appeared in the two newspapers and which counsel for the appellant, Mi. Ham Mugenyi, proudly produced before the court show that once again the parties have mysteriously changed names. Instead of having **Charles Kamurasi v. Serugooti Estates Ltd.** and Christopher Ssekisambu, or Kamurasi Charles v. M/s. **Accord Properties and** Christopher Sekisambu the substituted service was published for yet another set of respondents, namely M/s. Accord Properties and CHRISTOPHER SEBULIBA (emphasis mine). I shall return to this matter later in this judgment.

There are eight grounds of appeal in the Memorandum of Appeal framed as follows:

- 1) *The learned trial judge erred in holding that there were two complaints which formed “a basis of prosecuting a suit” whereas the case was based and prosecuted on the basis of the complaint headed “Accord Properties Ltd. “as the first defendant only.*
- 2) *The learned trial judge misapprehended the proceedings prior to the trial in as much as it was clear that “Serugooti Estates Ltd.” was substituted by “Accord Properties Ltd” on the trial complaint before service and substitution required no formal application or leave as it is effected before service.*
- 3) *The learned trial judge completely misapprehended the due fine of abuse of the process of court in as much as the prosecution of the trial complaint citing “Accord Properties Ltd” and its service and prosecution were done within the rules of Civil Procedure with no prejudice to the parties and no inconvenience or loss of reputation on/dignity to the Court.*

- 4) *The learned trial judge was wrong to say that the case was prosecuted on the basis of two complaints both containing the same cause of action (except for the different defendants) and making the same allegations whereas at no stage did the plaintiff or his counsel make any reference to or rely on the complaint which had “Serugoti Estate Ltd” as first defendant since the latter had been substituted by “Accord Properties Ltd” as the proper party to the suit.*
- 5) *The learned trial judge erred in dismissing the plaintiff’s suit on an issue, which had not been pleaded, tried and even made a matter for argument and submission by the parties.*
- 6) *The learned trial judge committed a grave error in condemning and hence dismissing the plaintiff’s suit without first hearing his counsel on the issue on which the learned trial judge based his dismissal, which was contrary natural justice and occasioned grave miscarriage of justice.*
- 7) *The learned trial judge misdirected himself by insisting that the case was prosecuted on two identical complaints, whereas not; but even (if there are existed two identical complaints, the learned trial judge erred by not giving judgment on the complaint on which evidence had been given and ignore or strike out, if was necessary, the one on which no evidence or even reference had been made in the prosecution of the plaintiff’s case.*
- 8) *The learned trial judge was wrong to order payment of costs by the plaintiff’s counsel who in all the presentation and prosecution of his client ‘s case committed no professionally palpable act of misconduct or negligence but judged and took each step according to the best of his ability and understanding of the law assisted by his long experience.*

In my opinion, the grounds listed in the Memorandum of Appeal offend against the provisions of the rule 81(1) of the Rules of this Court which provides that:

“A Memorandum of Appeal shall set forth concisely and under distinct heads without argument or narrative, the grounds of objections to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make”

The only thing that can be said about these grounds is that they represent everything that the rules of court prohibit appellants or their counsel from doing.

Be that as it may, in the interests of justice and the appellant, we decided to hear counsel's submissions upon the same *ex parte*. Counsel for the appellant indicated that he would argue grounds, 1, 4, and 7 together, then grounds 2 and 3 together, 5 and 6 together, and lastly ground 8 separately. During the course of his submissions, counsel abandoned grounds 2, 3, 5 and 6.

On grounds, 1, 4, and 7 he contended that the case was prosecuted on the basis of one plaintiff. It was his submission that although the record shows that two plaintiffs had been filed, only one, which indicated Accord Properties Ltd as first defendant, was prosecuted. He contended that the fact that there was no formal amendment of one or the other of the plaintiffs or a consolidation of both should not have vitiated the proceedings. It was counsel's contention that since the first plaintiff was not served upon the respondents, it could not, in any way, form the foundation of the prosecution of the case. In consequence, the trial judge was in error when he held that the existence of the two plaintiffs amounted to an abuse of the process of the court. He further contended that since the first plaintiff was not raised in the trial by the appellant or his counsel, it could not have formed part of the proceedings to enable the trial judge to comment on it, let alone make it the basis of his order to strike out the second plaintiff. Mr. Mugenyi cited B.E.A Timber Co. vs. Indear Singh G.lj., (1959) E.A 163, in support of his submission.

In this judgment I will consider and dispose of the grounds of appeal as argued by counsel for the applicant.

On ground 1, 4, and 7, it is not in dispute that two plaintiffs were filed involving two sets of parties. On presentation of the second of those plaintiffs and in the amended plaintiff dated 17th October, 1991, and in the affidavit sworn and filed by Mr. Yesero Mugenyi of Mugenyi and Company, Advocates, counsel had opportunities to amend or seek leave to amend the pleadings. Indeed, it is quite inexplicable as to why he did not do so. However, the trial judge's findings are inescapable. In his judgment, the learned judge stated;

“The second plaintiff must have been slotted into the file about 28th March, 1990, without paying any fees, or for that matter, without leave to amend, if that had been the intention. I say so because summons to enter appearance was actually signed and issued by a different Ag. Registrar on 28th March, 1990. An attempt had been made to insert 25th January, 1990

as the date for issue but the Registrar deleted 25 and January and wrote 28 March,1990 which I believe to be the date when the summons and plaint were slotted into the file without payment of fees or amendments”

In the absence of any other plausible explanation, it is my opinion that the learned trial judge was entitled to come to this conclusion.

There are other instances in the prosecution of this case, which indicate that counsel for the applicant appeared to wish to short-circuit the process. For instance, counsel for the respondents filed a written statement of defence which was drawn on 23rd of April, 1990. Accord Properties Limited instructed new counsel and notified Messrs. Mugenyi and Company, Advocates on the 9th May, 1991 and yet those advocates claim to have received notification of the change of advocates on 11th September 1991. On the other hand, when the same firm of advocates amended the plaint on 17th October, 1991, there is no evidence that they notified the respondents or their counsel of the amendments proposed. It is peculiarly strange that on the day that the firm of Mugenyi & Company, Advocates, drew up their amended plaint is the same day that notice for a chamber summons under Order 75, rules 10 and 30 of the Civil Procedure Rules, was issued and served by the Deputy Chief Registrar. The service of the summons was considerably delayed until the 28th October, 1991, just a few days before the hearing. It was also on the 17th day of October that Mr. Yesero Mugenyi of the same firm and counsel for the appellant filed his affidavit in support of the application to amend.

Notwithstanding that notice for the hearing of the Chamber application to amend the plaint was fixed for 4th November 1991, for some inexplicable turn of events, that application was not heard until the 23rd September 1992. There is no record of the dates having been changed or counsel for the respondents notified. The only evidence available is that counsel for one of the respondents, namely, Accord Properties Ltd., Mr. Lwere appears to have been aware of the hearing of the application to amend the plaint on that day. However, on that day Mr. Mugenyi applied for leave to abandon the chamber summons for the application to amend the plaint and instead applied to have the case heard *ex parte* under Order 9 rule 17(1) (a) of the Civil Procedure Rules claiming that the consent form had been signed by counsel for the defence and was on file. Although the trial judge observed that the rule cited by Mr. Mugenyi did not apply to the situation, but having been convinced by Mr. Mugenyi that the defence consented to the hearing, the learned trial judge agreed to having the case heard *ex parte*.

It is again very strange indeed that the appellant's counsel who had been anxious to amend the plaint for what he said in his affidavit "for particulars of special damages which is likely to be prejudiced to the interests of the parties in this cause" was now ready and willing to proceed without that crucial amendment simply because counsel for the defendants was not present that day.

When counsel for the 1 respondent returned to the country from abroad, he expressed surprise that the hearing had proceeded in his absence for as he said, ***"I had the impression that on 23rd September 1992 the hearing was for only chamber application"***, which of course would have explained his absence because counsel normally do not oppose amendments to plaints. This was on the 7th October 1992 when the hearing of the plaint resumed. When Mr. Lwere, counsel for the respondent applied to recall the applicant (PWI) for cross-examination, Mr. Mugenyi objected strongly in the words, ***"I oppose the application. The suit was fixed for hearing by consent and not the chamber summons. Counsel was aware that the chamber summons was withdrawn"***

In my opinion, this was yet another instance showing Mr. Mugenyi of Mugenyi and Company, Advocates, abusing the process of the court. I do not believe that he had forgotten that when he first appeared before the same court in the absence of the counsel for the first respondent, he had used the following words to persuade the trial court to allow him to proceed ex parte.

"I apply for leave to abandon the chamber summons for the application to amend the plaint." Thus, Mr. Mugenyi was indulging in a deception for he knew as we all know that there was no way counsel for the 1 respondent could have known about this latest application by counsel for the appellant. I agree with the findings of the learned trial judge that there was an abuse of the process of court. It follows that grounds 1, 4, and 7 must *fail*. As Counsel for the appellant abandoned grounds 2, 3, 5 and 6, 1 will now deal with ground 8 of appeal.

On ground 8, counsel for the appellant submitted that the trial judge was in error to order payment of costs by the counsel personally. Counsel advanced two reasons for his submission. In the first instance, he submitted that counsel had done his best to prosecute the case to the best of his ability. There had been no negligence on his part nor had he attempted to deceive the court. Secondly, it was his contention that counsel was not given an opportunity to explain himself before the court and show cause why the order for such costs against him personally should not be made.

Counsel cited **Halsbury's Laws of England**, 3 Edition, Vol.36 page 198, *Abraham v. Justin*, j1963) 2 ALL.E.R.402, and *J.B. Kohli and Others v. Bachulal Popallac* (1964) E.A 219, for the proposition that an advocate should not be condemned to pay costs personally without being given opportunity to be heard. In the latter case, the East African Court of Appeal held that the judge who had ordered the first appellant to pay the costs personally without first giving him an opportunity to answer the complaint had erred. On the basis of his submissions and the authorities cited, Mr. Mugenyi prayed this court to allow the appeal, reinstate and order the retrial of the case on the basis of the second plaint and that the costs be paid by the respondents.

In his submissions before us, Mr. Mugenyi did not reveal anything new that was not in the record of proceedings before the trial Court. Nor, in my opinion, have his submissions to this court revealed anything new upon which counsel could have addressed the learned trial judge. Nevertheless, the general rule remains that a party must be given an opportunity to be heard before its rights are prejudiced or affected by a decision. I know that the Judge in this case invoked the provisions of section 101 of the Civil Procedure Act and exercised his inherent powers to penalise in costs an advocate found abusing the process of the Court. The Judge acted within the law and rules of court. However, having heard counsel's arguments this ground is based on one simple rule of natural justice, namely the right of a party to be heard before they are found liable. This rule embraces the whole notion of fair procedure and due process. It is well illustrated by the English case of *R. v. University of Cambridge (1723) 1 Str 557* where the University of Cambridge had deprived Bentley of his Degree without giving him opportunity to be heard. Without going into what transpired in the case, Bentley was able to have the act of the University declared a nullity because he had not first been heard in his own defence. One of the Judges on the Coram observed that even Adam had been called upon by God to meet the charge of having eaten an apple of the forbidden tree, before suffering expulsion. Consequently, in the instant case, although counsel's conduct appears to be blamed-worthy, justice demanded that he should not have been condemned without being heard. In my view, this ground should succeed.

Before considering the matter of costs in this appeal, I will return to the manner in which counsel for the appellant has conducted himself in prosecuting the appeal. I am in agreement that the appellant in this court as in the trial court is not blameworthy. He has been a victim of his counsel's blunders, which have surfaced even in this very court. It will be re-called that

when Mr. Ham Mugenyi first appeared before us, he indicated that his firm attempted to serve respondents through their former counsel who declined to accept service because they were no longer acting for the respondents.

However, in the second plaint drawn by M/s Mugenyi and Company, Advocates, the first defendant is a limited liability company whose address and company returns must be freely available in the office of the Registrar of Companies. The second respondent's address is given in the plaint as P.O. Box 30797. Apparently, the second respondent is, according to that plaint, an employee of the first respondent and was driving the latter's motor cycle Reg. No. UWX. 735. Consequently, either the plaint contains falsehoods or, Messrs Mugenyi & Company, Advocates, only want to hear from their clients in upcountry stations about parties who live and work in the city not very far from their chambers. In my opinion, counsel was in a position to do and could have done more in discovering the whereabouts of the respondents without waiting for information from their client who lived in Fort Portal.

This Court has little opinion of the way the grounds of appeal were framed which shows that this firm of lawyers has not read or does not care to find out the rules applicable in appeals to this Court, the highest in the land.

This kind of work undermines the claim for the senior partner of the firm that he has had long experience in the legal profession. Lastly, it is my opinion that, the deliberate or otherwise delay in publishing substituted service, coupled with a deliberate or otherwise insertion of wrong parties in the substituted service, all lend credence to the fact that Messrs Mugenyi & Company Advocates, have all along planned for this case and its appeal to be heard ex parte. This is unacceptable in this Court and it is also an abuse of the process of Court. All in all, I would dismiss this appeal and would award costs in this court to the Respondents

. DATED AT MENGO THIS 17th DAY OF . . . February 1999.

G.W. KANYEIHAMBA
JUSTICE OF THE SUPREME COURT.

I CERTIFY THAT THIS A
TRUE COPY OF THE ORIGINAL

W. MASALU MUSENE
REGISTRAR, THE SUPREME COURT.

JUDGMENT OF ODER JSC:

I have had the benefit of reading in draft the judgment of Kanyeihamba, JSC. The Appeal should be dismissed.

As Karokora, JSC, agrees, the Appeal is dismissed. The order of the Court shall be as proposed by Kanyeihamba JSC.

DATED AT MENGO THIS... 17th ...DAY OF . . . February....2000.

A.H.O ODER
JUSTICE OF THE SUPREME COURT_

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JUDGMENT OF KAROKORA JSC.

I have had the benefit of reading in draft the judgment prepared by my learned brother, Kanyeihamba, JSC. I agree with him that the appeal must Court.

DATED THIS 17th ...DAY OF February 2000

A.N. KAROKORA

JUSTICE OF THE SUPREME COURT.