**THE REPUBLIC OF UGANDA**

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

**CIVIL APPEAL NO. 203 OF 2013**

*[Appeal from the order by the High Court (Faith Mwondha, J.) in High Court Civil Suit No. 36 of2011]*

1. Moses Lwanga
2. Wasswa Dunstan
3. Kalanzi Ivan Appellants
4. Ssendawula Edward
5. Namakula Magdaline

***VERSUS***

1. Lauben Kalibbala Serwanga
2. Serwanga Foundation Ltd Respondents
3. Registrar of Titles

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1.Moses Lwanga

2 .Wasswa Dunstan

3.Kalanzi Ivan

4.Ssendawula Edward

30 5. Namakula Magdaline…………………………….Appellants

Verses

1. Lauben Kalibbala Seruwanga

2. Seruwanga Foundation Ltd

3. Registrar of Titles…………………………………..Respondents

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***Coram:*** Hon. Mr. Justice A.S. Nshimye, JA

Hon. Mr. Justice Remmy Kasule, JA,

Hon. Lady Justice Solomy Balungi Bossa, JA

**JUDGMENT OF THE COURT**

The appellants sued the respondents in Civil Suit No. 36 of 2011 in the High Court, at Nakawa.

The suit arose out of a dispute as to ownership and use of land comprised in block 503 plot 83 situate at Luwule, Namasera, Wakiso District.

The prayers sought from Court against the respondents included a declaration that the suit land forms part of the estate of the late Kulanima Musoke Serwanga, cancellation of the 2nd respondent as the registered proprietor of the suit land and reinstatement of the same into the names of the appellants and the 1st respondent.

The respondents opposed the prayers sought by the appellants and prayed for dismissal of the suit.

The case came up for hearing a number of times before Hon. Lady Justice Faith Mwondha, then of the High Court, Nakawa. It was finally adjourned to 06.05.2013 at 9.00 a.m. for hearing. On 06.05.2013 the 1st plaintiff, Kalanzi Samuel Ssewanyana, was present. The others were absent. The 2nd respondent had 3 representatives present as well as their Counsel, Joseph Kiryowa who

also held a brief for Sam Seguya, Counsel for the respondent.

The 1st Plaintiff withdrew from the case and was so allowed by the Court. Counsel for the defendants then prayed for the dismissal of the suit as the plaintiffs were absent. The Court dismissed the suit. The appellants lodged this appeal.

Counsel Frederick Zaabwe represented the appellants; Samuel Seguya was for 1st respondent and Joseph Kiryowa for 2nd respondent.

Mr. Zaabwe, with no objection from Counsel for respondents, withdrew the appeal against the 3rd respondent.

The Court allowed the application with no order as to costs.

A preliminary objection was raised by Counsel for the respondents that the appeal was incompetent in law. Counsel for the appellant maintained that the appeal was competent.

Court has resolved to resolve this preliminary objection first, since depending on the way it is resolved, the appeal can be wholly disposed of.

The essence of the preliminary objection, according to respondents' Counsel, is that ***HCCS No. 36 of 2011*** having been dismissed by the trial Judge on 06.05.2013 due to the absence of the appellants, (plaintiffs in the Court below) to prosecute their case, the appellants had no right in law to directly appeal to this Court, against the said dismissal, without first obtaining leave to appeal from the trial Court. Such leave was never obtained. Therefore the appeal is incompetent in law.

What the appellants ought to have done was to apply to the trial Court to set aside the order of dismissal of the suit. The appellants had not done this.

The respondents' Counsel thus prayed for the appeal to be struck out by reason of its being incompetent in law.

For the appellants, it was submitted that the circumstances of this particular case justified the lodgment of the appeal to this Court. The appellants could not apply to the trial Court to set aside the order of dismissal because; the trial Judge, (Faith Mwondha, J. as she then was) became a Justice of the Court of Appeal soon after making the order dismissing the suit. Yet it was the same trial Judge who ought to have entertained the application. Accordingly it was only the Court of Appeal which could set aside the dismissal order by way of appeal. Hence the appeal by the appellants.

This Court, in resolving this preliminary objection, has carefully considered the proceedings of the Court below, the submissions of respective Counsel, and both the statutory and case law on the point.

The High Court proceedings of 06.05.2013 show that after the 1st plaintiff who was the only plaintiff present, had applied to withdraw from the case, Counsel for the defendants (now respondents) prayed:

**"*Kiryowa - We have no objection to his withdrew***

***in the premises that there is no any other plaintiff in Court and yet they knew that the matter was coming up to-day, we pray that this suit be***

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***dismissed under order 9/22 CPR with costs.***

**Court -** ***The 1st plaintiff is withdrawn from the case and since the other plaintiffs are not in Court despite knowing this date, the suit is dismissed with costs as prayed by Counsel for the 2nd defendant (Sic)***

This Court notes that the hearing date of 06.05.2013 was fixed by Court on 26.02.2013 when all the plaintiffs and their lawyer, Godfrey Musinguzi, were present in Court. So each one of them was aware of the hearing date of 06.05.2013.

Although by 06.05.2013, according to the Court proceedings of that day, Counsel for the plaintiffs had withdrawn from representing them in the suit that was no ground for the rest of the plaintiffs, other than the 1st plaintiff from being present in Court, or to cause a representative to be in Court.

The assertion by the appellants' Counsel that on 06.05.2013 the rest of the appellants had been committed to civil prison by some other Court, and that this was responsible for their absence was a bare statement by Counsel for the appellants in this appeal. This Counsel did not appear for the appellants at the trial stage of the dismissed suit. At any rate the statement is not backed up by any Court warrant of committal to civil prison of any appellant on 06.05.2013. Further, if this was the reason, then it ought to have been used as a basis for an application to the High Court, or any other Court of competent jurisdiction to set aside the order dismissing the appellant's suit on 06.05.2013. No such application was pursued by the appellants.

0.9 Rule 22 of the Civil Procedure Rules provides that when, on the day of hearing of the suit, the defendant appears and the plaintiff does not appear, and the plaintiff was aware of the hearing date, the Court:

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"……….shall makes an order that the suit be dismissed

Under 0.9 Rule 23, where a suit is dismissed as above, the plaintiff is precluded from bringing a

fresh suit in respect of the same cause of action. But the said plaintiff may apply for an order to set the dismissal aside on satisfying the Court that there was sufficient cause for his/her non-appearance when the suit was called for hearing.The appellants did not apply to the High Court, Nakawa, to set aside the order of 06.05.2013 dismissing their suit.

The submission by appellant's Counsel that he did not so apply because the trial Judge had joined the Court of Appeal since issuing the said order is not at all convincing to this Court. There is nothing in 0.9 Rule 23 that such application had to be made to the very Judge in person who issued the dismissal order of 06.05.2013. The Rule directs that the application be made to ***"the Court"*** which the applicant must satisfy that he/she had sufficient cause for the non-appearance. So any other of their Lordships in the High Court at Nakawa, other than Lady Justice Faith Mwondha, J, as the then was, could have entertained and determined the application, if the appellants had filed one.

As to a direct appeal to this Court against the order of dismissal of the suit, the principle is that the right of appeal is granted by statute.

Sections 76 and 77 of the Civil Procedure Act provide for appeals that may arise from orders made pursuant to the Civil Procedure Rules. Order 44 Rule 1 (1) provides for appeals from orders that lie as of right. An order made under 0.9 Rule 22 is not one of those appealable as of right. What is appealable of right is an order under 0.9 Rule 23 whereby Court has rejected an application for an order to set aside the dismissal of a suit. The appellants to this appeal, as already pointed out, never applied to the High Court for such an order. As such the Order and Rule does not apply to their case.

Order 44 Rules (2) and (3) are the ones that govern the case of the appellants. Rule 2 provides that an appeal under the Rules shall not lie from any other Order except with leave of the Court making the order or of the Court to which an appeal would lie if leave were given.

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Then Rule 3 dictates that an application for leave shall in the first instance be made to the Court making the order sought to be appealed form.

It follows therefore that the appellants ought to have made an application to the High

Court at Nakawa for leave to appeal to this Court against the order of 06.05.2013 dismissing their suit, before lodging the appeal to this Court.

If the High Court at Nakawa had refused to give them leave to appeal, then under Rule 3, they could have lodged the said application to this Court. The applicants did neither of this.

We are persuaded, and approve in this regard, the ***High Court (Kania, J)*** decision of ***Augustine Chebet .V. Brieza Torokoch (HCCA 6/96 (29.7.1997) at Mbale, [1997] KLR 558*** whose facts were somehow similar to those of the appellants in this appeal and the Court held:

> ***"The appeal was incompetent because under 0.9r.20 CPR when a suit is dismissed because of non-attendance of the plaintiff the plaintiff can only apply for reinstatement of the same by the Court dismissing it but such plaintiff (or applicant as in the present case) cannot appeal against the dismissal as of right."***

Accordingly we hold that the appellants' ***Civil Appeal No. 203 of 2013*** is incompetent in law and as such we strike the same out with costs to the respondents.

Having held as we have held above, we find it unnecessary to consider the grounds of appeal as contained in the appellants' Memorandum of Appeal.

We so order.

Dated this 26th day of October 2015

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Hon. Mr. Justice A.S Nshimye

Justice of Appeal

Hon. Justice Remmy Kasule

Justice of Appeal

Hon. Lady Justice Solomy Balungi Bossa

Justice of Appeal