

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CIVIL APPEAL No. 0026 OF 2015**

(Arising from Amuru Grade One Magistrate's Court Civil Suit No. 010 of 2013)

5 1. AKUTA ALFONSE }
2. ODUR P'CILO }
3. ACEN BETTY OTONYONG } APPELLANTS
4. AKELLO BIRONIKA JOKENE }
VERSUS

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LAKONY DAVID LIVINGSTONE RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

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The background to this appeal is that trial in the court below proceeded *ex-parte* even after the appellants had been given opportunity to file defence out of time and after service of several hearing notices upon them. Their subsequent application to set aside the *ex-parte* judgment and decree was dismissed. When the appeal came up for hearing, it was established that the first and
20 second appellants entered a consent judgment on appeal. It is only the third appellant who filed a memorandum of appeal but neither she nor her counsel was present in court. Since there was no explanation of their absence, the court had the option under the provisions of Order 43 rule 14 (1) of *The Civil procedure Rules*, to dismiss the appeal for want of prosecution but opted to decide it on merit. The court therefore invited counsel for the respondent to make his
25 submissions.

The record of appeal indicates that there was proof of service filed by a court process server, by way of an affidavit of service dated 22nd March, 2013. The appellants appeared in court on 8th July, 2014 and were given fourteen days to file their defence and the case was adjourned to 28th
30 August, 2014. They never turned up on that day and no explanation was furnished. Hearing proceeded *ex-parte* but on several dates thereafter hearing notices would be served, still they did

not show up. In light of those background facts, the trial court found no merit in the application to set the ex-parte judgment aside and dismissed it with costs.

Being dissatisfied with the decision, the appellants appealed to this court on the following
5 grounds;

1. The trial Court erred in law and fact by not evaluating properly the evidence on record and appreciating the position of the law in relation to the question of the appellants' right to be heard and thus came to the wrong conclusion.

10 Mr. Geoffrey Boris Anyoru argued in his submissions that the decision is correct in law. The appellants neither disclosed what defence they had to the suit nor justified their failure to defend the suit.

I have subjected the record of proceedings before the trial court to a fresh and exhaustive
15 scrutiny and re-appraisal before coming to my own conclusion as required of the court as a first appellate court (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17 of 2000; [2004] KALR 236*). According to Order 9 rule 20 (1) (a) of *The Civil Procedure Rules*, where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, if the court is satisfied that the summons or notice of hearing was duly served, it may
20 proceed ex parte. In the instant case the court record indicates that the third appellant was in court on 8th July, 2014, when the matter was adjourned to 28th August, 2014. There was no explanation for her absence that day. Accordingly leave is properly granted to the respondent to proceed ex-parte.

25 A party who wilfully and voluntarily absents himself or herself from proceedings cannot claim breach of fair hearing where he or she has wilfully absented himself from the hearing or failed to give evidence when called upon to do so (see *Attorney-General of Rivers State v. Gregory Obi Ude and 12 others, (1993) 2 NWLR (Pt.278) 638; (1993) 2 SCNJ 47*). In the final result, I have found no merit in the appeal. Accordingly it is dismissed with costs to be borne by the third
30 appellant.

Dated at Gulu this 25th day of October, 2018

Stephen Mubiru

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Judge,

25th October, 2018.