

**IN THE SUPREME COURT OF UGANDA**

**AT MENGO**

(CORAM: MANYIDO, D.C.J, ODER, J.S.C, SEATON, J.S.C)

**CIVIL APPEAL NO.13 OF 1990**

BETWEEN

LAWRENCE MUSIITWA KYAZZE ..... APPELLANT

AND

EUNICE BUSINGYE ..... RESPONDENT

(Appeal from a Judgment/Decree of the H/C of Uganda at kampala  
(Mrs. Justice C.K. Byamugisha dated the 30<sup>th</sup> day of August, 1990  
in civil suit No.898 of 1988)

**RULING**

The applicant sued the respondent in the High Court at Kampala and was successful. I do not believe it is necessary to go into the details of the suit and the judgment and decree therein. Suffice it to say that the applicant was successful and was awarded, inter alia, costs of the suit on 30<sup>th</sup> August, 1990.

The respondent appealed against the Judgment/ decree of the High court. In his memorandum of appeal he stated that he appealed “against the whole of the above – mentioned decision on the following grounds”. He then set out five grounds of appeal challenging the learned trial Judge’s findings on the jurisdiction of the court to hear the suit, on the merits of the case and on the award of mesne profits and general damages to be paid by the appellant to the respondent.

No ground of appeal expressly dealt with the Judge’s award of costs. The prayer in the memorandum of appeal, however, was that:

“(i) This appeal be allowed and the Respondent’s suit be dismissed; or in  
the alternative

(ii) The quantum of mesne profits and general damages be reduced;

(iii) The Respondent does pay the costs of the Appeal and those in the Court below”

This court on 19<sup>th</sup> April, 1991 gave its Judgment. The final part of the leading judgment of Seaton, J.S.C. with which the Vice president, Manyindo, D.C.J and Oder, J.S.C. concurred (including the proposed order) stated as follows:

“I would allow the appeal in part. I would set aside the order for recovery of possession, or vacant possession. I would substitute a declaration that the Respondent is legally the owner of the suit property and the Government interest in the lease was terminated by re-entry. I would dismiss the appeal against the awards of mesne profits and damages.

In the circumstances I would make no order as to costs of appeal.”

It will be observed that no reasons were given by the court for failing to make any order as to costs of the appeal. Further no order was made as to costs in the Court below, i.e. the High court.

As the appeal had been allowed only in part, Advocates for Respondent in the appeal, M/S Mubanguzi and Co., prepared a draft order embodying the decision of the court and submitted it for approval to M/S Kawanga and Kasule, Advocates for the Appellant. This was in pursuance to rule 34 (2) (a) of the Rules of this Court.

Learned Advocates for the Appellant refused to consent to the draft order. Accordingly Rule 34 (2) (c) was invoked and the parties have appeared through their counsel before me. They have prayed that the form of the order shall be settled.

I have listened carefully to their submissions. No complaint has been made against this Court’s failure, in its Judgment of 19<sup>th</sup> April, 1991 to give reasons for making no order as to costs. However Section 27 (1) of the Civil Procedure Act (cap.65) has been referred to. It is clear to me that this court was bound under the aforesaid section to apply the rule that “the costs of any action, cause or other matter of issue should follow the event unless the court or Judge should for good reason otherwise order”.

Presumably the Court did not make any order as to costs in the appeal because it was of the view that each party had been successful. Costs following the event therefore would mean each party

bearing his own costs. I believe, I would have been better if this reason had been expressed in the judgement. However this is the wisdom of hind-sight.

A more serious matter perhaps is the failure to make any order regarding the Judge's order as to costs in the lower court. That order was in accordance with section 27 of the Civil Procedure Act. The applicant had won practically all she had hoped for, save that she awarded interest at court rate instead of 25% as she had claimed.

This court subsequently found that the reliefs were wrongly awarded to the applicant. Our decision of 19<sup>th</sup> April, 1991 meant that vacant possession was not obtained but a declaration of ownership was given instead; further mesne profits and damages were left as the trial court awarded.

In effect the applicant obtained in the final result approximately half of what she set out to obtain. Costs are awarded, I would venture to suggest, to vindicate a party's right action in going to court. It would not have been proper to deprive the applicant of all of her costs in the lower court. Nor would it have been proper to leave her with the full award. In the circumstances, the proper course was to order that half of the applicant's costs in the lower courts should be paid by the respondent. No good reason was given by the Supreme Court for failing to make such an order.

Learned counsel for the applicant referred to **pioneer Garage Ltd V Barclays Bank D.C.O.** Civil APP. No.46 of 1968 and National Pharmacy Ltd. V k.C.C (1980) H.C. B.51. The latter case is worthy of being cited in some detail. It was brought before the then court of Appeal under Rule 34 (2) (c) (similar to our present Rule) as the parties failed to agree on the form of the final order.

The appellant had sued the respondent for recovery of Shs. Shs. 3,200,081/01 out of which the trial judge disallowed shs. 1,580,759/80. The appellant was therefore awarded shs. 1,619, 311/30 with interest at 6% per annum. The Judge also ordered the appellant receive half of the taxed costs.

The appellant's appeal against the decree and order of the High Court was allowed by the Court of appeal which enhanced the sum of Shs. 1,619,311/30 to Shs. 3,195, 071/90 plus full costs in

both courts. The Appeal never ordered any to be paid on the sum awarded. It was held , **inter alia** that the absence of an order by court of Appeal , confirming the order for interest made by the High Court, in no way disturbed the trial court's order for interest.

Learned Counsel referred to the Memorandum of appeal in the instant case and to Rule 84 of this Court's Rules, according to which the grounds of objection to the decision appealed against have to set out, specifying the points which are alleged to have been wrongly decided, and the nature of the order which the court was to be asked to make.

In the Memorandum of appeal, it is true that the appellant did not object specifically that the trial Court's order for costs had been wrongly decided. She could not very well have so alleged because the order for costs followed the event of the respondent's victory. The appellant did, however, specify in the nature of the order which it was proposed to ask this Court to make, that she wanted a reversal of the trial court's order as to costs.

I do not believe that the instant case is on all fours with the National Pharmacy case (above cited) although the latter case is of some help. The absence of an order confirming the order for costs made by the High court could mean, according to learned counsel for the respondent that by implication the award of the High Court was maintained.

He submitted that this was the proper inference to be drawn because the issue of costs was not before the Supreme Court: it was not embodied in the Memorandum of Appeal nor did learned Counsel for the appellant address this Court on this point.

Hence he urged that the High Court's order for costs should remain. He prayed that if I were inclined to make a specific order as to costs, it should confirm the order of the lower court; alternatively, it should order that the draft order before this court should be amended to reflect that the appellant pays the costs of the lower court; alternatively, it should order that the draft order before this court should be amended to reflect that the appellant pays the costs of the lower court.

Counsel for the appellant submitted that once an appeal is lodged in the High court, the issue of costs becomes a subject of the appeal. Ultimately it depends on the final outcome of the appeal upon which party shall have costs and how much in accordance with Section 27 of the Civil Procedure Act.

Counsel urged that the means of the appellant, which are part of the record of the trial proceedings, should be taken into consideration. He is a man of low means, just a senior Cooperative Officer. On these grounds , he prayed for an order expressly providing that the order of the High court giving costs to the respondent be set aside and there should be substituted on order that each party bear his own costs , both of the appeal and of the High court.

I initially felt some hesitation about my powers on this application. I questioned whether I had power , if I were of the view as expressed above , to amend the High court's order given on 30<sup>th</sup> August , 1990. Wew my powers not limited to clarifying , if necessary , and implementing this court's order of 19<sup>th</sup> April , 1991 ?

I was assured, however, by counsel for both parties that Rule 34 (2) (c) is wide enough to enable a necessary order to be made either confirming or modifying the order of the lower court. In the circumstances, therefore. I believe the form of the order under Rule 33 (1) should be as set out in the draft order prepared by advocates for the respondent in the appeal save that there should be added at the end or foot thereof, instead of the words:

“AND IT IS HEREBY ORDERED THAT no order be made as to costs of the appeal and that each party do bear his/ her own costs of the lower court.

E.E SEATON  
**JUSTICE OF THE SUPREME COURT**

**IN THE SUPREME COURT OF UGANDA**

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(CORAM: MANYIDO, D.C.J, ODER, J.S.C, SEATON, J.S.C)

BETWEEN

LAWRENCE MUSIITWA KYAZZE ..... APPELLANT

AND

EUNICE BUSINGYE .....

RESPONDENT

(Appeal from a Judgement/Decree of the H/C of Uganda  
(Mrs. Justice Byamugisha ) dated the 30<sup>th</sup> day of August, 1990)

IN

**CIVIL SUIT NO. 898 OF 1988**

**JUDGEMENT OF ODER, J.S.C**

I have had the benefit of reading the Judgment of Seaton, J. S.C. and have nothing useful to add.

I agree with him that the appeal should be allowed in part, and that the order for vacant possession should be set aside. I also agree with the other orders proposed by him.

DATED AT MENGO THIS 19<sup>th</sup> DAY OF April 1991.

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...

A.H.O. ODER

**JUSTICE OF THE SUPREME COURT**

**IN THE SUPREME COURT OF UGANDA**

**AT MENGO**

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(Mrs. Justice C.K. Byamugisha ) dated the 30<sup>th</sup> day of August, 1990)

**JUDGEMENT OF MANYIDO- D.C.J:**

I read the judgment of Seaton JSC, jus delivered and I agree with it and the orders proposed therein, and as Oder JSC, also agrees there will be judgment in the terms proposed in the judgment of Seaton J.S.C.

DATED at Mengo this: 18th Day of April 1991

S.T. MANYIDO  
**DEPUTY CHIEF JUSTICE**