THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(COR: ODOKI, J.S.C., ODER, J.S.C. & TSEKOOKO, J.S.C.)

CIVIL APPEAL 28/1995

UGANDA DEVELOPMENT BANK…….. APPELLANT

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- VERSUS –

NATIONAL INSURANCE CORPORATION…… 1ST RESPONDENT

G.M. COMBINED (U) LTD……. 2ND RESPONDENT

(Appeal from the Decision and order of the High Court at Kampala (Katutsi, J.) dated 8th June 1995.

JUDGEMENT OF TSEKOOKOP J. S. C.

This appeal is against the order of the High Court dismissing the suit because the appellant failed to prosecute the suit when ordered to do so after application for adjournment had been refused.

The Appellant, a Statutory Corporation, instituted a Civil Suit against the respondents in the High Court seeking to recover US **$** 290,600 of which the first respondent was a guarantor and the second respondent was the borrower. Initially the second respondent was not a party to the suit. On 9/5/1995 when the case came up for the first time for hearing, a Mr. Matovu, Counsel for the first respondent made an oral application to have the second respondent joined in the suit as the second defendant. As Mr. Babigumira, who then represented the appellant, and Mr.Kavuma Kabenge who was Counsel for the second respondent raised no

objection, Katusti J. ordered for the 2nd respondent to be joined and with the consent of all three advocates, fixed the suit for hearing on 24/5/1995. This fixture does appear to have anticipated the consequences of joinder of the second respondent. Somehow the suit did not come for hearing on 24/5/1995. Meantime the second respondent filed its defence and counterclaimed praying for approximately nine reliefs from the appellant. Consequently the appellant filed a reply to that defence and the counterclaim. The suit was then refixed for hearing on 7th and 8th June. 1995.

On 7/6/1995 Mr. Babigumira, for the appellant, sought two hours adjournment to enable him file an application for Security for Costs from the second respondent in consequences of the latter's counterclaim. Mr. Kavuma—Kabenge for the second respondent opposed that application for adjournment. Mr. Wanyama apparently appearing for the first respondent joined in opposition to the application for adjournment. Curiously the learned Judge adjourned Ruling to the next day.

The learned Judge delivered his brief Ruling the following day rejecting the application for adjournment. He ordered the appellant to adduce evidence. Meantime Mr. Babigumira had on 7/6/1995 taken opportunity of the adjournment and filed his clients application for security costs from the second respondent.

After the learned Judge had read his ruling refusing the adjournment, Mr. Babigumira made an oral application for leave to appeal to this Court against the ruling which the Judge had just delivered.

Thereafter the record of proceedings in the court runs as follows:
Court: Leave will be granted but hearing will proceed.

Sgd. J.B.A. Katutsi,

Judge

Babigumira:

Our instructions are that until the intended appeal to the Supreme Court is disposed of we don't proceed. I cannot act contrary to the instructions of. our client.

Sgn. J.B.A. Katutsi

Judge

Court:

My order is that the hearing proceeds. Since it is clear that the Plaintiff is not interested in proceeding, this suit is dismissed under 0.14 r. 19 of the Civil Procedure Rules with costs.

Sgn. J.B.A

Judge

8/6/95

The appeal is principally against that order.

There are seven grounds in the memorandum of appeal.

Two objections to the competence of the appeal were raised by Mr. Kavuma—Kabenge and Mr. Wanyama respective Counsel for the two respondents. I deal with the objections first. The objection as to the service of the record was abandoned. The other objection raised by Mr. Kavuma-Kabenge and which has two limbs is about the competence of the appeal. First the complaint is that the appellant cannot be heard on any appeal against the refusal to grant adjournment. Secondly the complaint is that even if leave were granted, the order granting such leave should have been extracted and as none was extracted, that portion of the appeal against refusal of an adjournment is incompetent.

Mr. Babigumira, Counsel for the appellant conceded that he did not extract a separate Order granting leave to appeal against refusal of his application for an adjournment. But he contended that that was not necessary because as the present appeal is against the dismissal of the Suit, the appellant is entitled to argue any ground of appeal relating to the refusal to grant an adjournment.

On the first limb i understand the trial Judge to have granted leave to appeal against his order when he stated -
“Leave will be granted but hearing will proceed”.

As to whether the appellant can argue any ground of appeal related to the refusal by the trial Judge to grant adjournment, I think that Mr. Babigumira's contention is correct. In the appeal before us the order refusing the adjournment and the order dismissing the suit were made on the same day probably separately by a matter of minutes.
Normally a single appeal should spring from a single decree or order. Moreover the copy of the order extracted after the suit was dismissed which I have seen on the record refers to both the refusal of the adjournment and the dismissal of the suit as follows: —

"THIS SUIT COMING before the Honourable
Justice J.B.A. Katutsi for hearing in the presence of Blaze Babigumira Esq., Counsel for the plaintiff and Kavuma-Kabenge Esq., Mbabazj. Esq. Counsel for the 2nd Defendant and Wanyama Esq., Counsel for the 1st defendant;

IT IS HEREBY ORDERED

(a) The application for an adjournment for purposes of prosecuting an application for the 2nd defendant to furnish security for costs is refused.

(b) The application for furnishing security for *costs* by the 2nd defendant to be prosecuted when it comes to prosecuting the counter-claim.

(c) The hearing of the main suit to proceed as scheduled.

(d) Since it is clear that the plaintiff is not interested in proceeding, the Suit is dismissed with costs."

This Order is a correct reflection of the proceedings of 7/6/1995. In my opinion the order was properly extracted and therefore the present appeal is against the decisions made on that day. I therefore think that there is no merit whatsoever in the objection which I would dismiss with costs.

Mr. Babigumira argued the appeal thus: ground 1 and 2 together; 3 and 5 together followed by ground 4 and then grounds 6 and 7.

The complaint in the first ground is that the Trial Judge erred in law and failed to exercise his discretion judicially when he refused an application for an adjournment without giving reasons. The complaint in the second ground is that the Trial Judge erred in law when he failed to find that once the application for an order to furnish security for costs by the 2nd defendant had been filed, the Judges ruling on 8/6/1995 had thereby been over taken by events. I find it convenient to dispose of the second ground first.

We pointed out to Mr. Babigumira that the record did not show that the attention of the Trial Judge had been drawn to the existence of the Chamber application filed on 7/6/1995 and allegedly fixed for hearing before the same Judge on 8/6/1995. Though Counsel for the second respondent conceded he had been served, Mr. Babigumira was unable to satisfy us that the Judge was aware of the presence of the application. Mr. Babigumira argued that as the application had been filed and a date set, the file must have been before the Trial Judge. I am not persuaded by this argument. An application which was only filed on 7/6/1995 after the main case had been adjourned for writing a ruling might in all probability not have come to the attention of the Judge. First because the application could obviously not be cause-listed. Secondly there is nothing on the record to show that the Trial Judge was definitely aware that this particular application bad been filed and had been fixed for hearing before him on 8/6/1995. Considering that our court practice has been that a Trial Judge does not choose cases which should be fixed before him or to be heard by him and that for any case or application to be heard, the practice is for a Court Clerk or an interpreter to call out aloud the particulars of the case or the application and place the file thereof before a Trial Judge, I think that it is incumbent upon an Advocate appearing before a Trial Judge in any case or application to draw the attention of a Trial Judge, at an appropriate moment of the presence or existence of any cause or matter available in the court room or the registry and which is likely to affect the decision of the Judge on the case that he is hearing so that that Judge can take the appropriate action. If the Judge fails to act when he should have done so, then there would be justification for criticizing the particular Judge on appeal from his decision. But not otherwise.

In the circumstances of this case I think that ground two ought to fail. Though ground three was argued separately, the points I have considered here disposes of that ground also.

The contention of Mr. Babigumira on the first ground were half—hearted, he submitted quite correctly that a court has discretion to refuse an application for adjournment but contended

that the refusal should be exercised judicially. He argued in effect that as the Judge had adjourned for a day to write the ruling, the fact that the Judge wrote short ruling shows the Judge did not consider the matter judicially. Counsel contended that the existence of the chamber application for security for Costs had in effect rendered unnecessary the deading of the ruling. I have just considered the relevancy of the Chamber Application. On the exercise of discretion Mr. Babigumira relied **Attorney General Vs. Sengendo *1972* B.A P. Serajevo Vs. Muturi.** These two cases are not relevant on the facts.

Mr. Wanyama for the first respondent submitted that no sufficient cause was given to justify grant of adjournment and that the Judge had exercised his discretion judicially and the exercise of that discretion should not be interfered with. Counsel cited **M.B Patel Vs. R. Gottfried (1953) 20 E.A, H.K**. **Shah Vs. Osman Allu (1947) 14 E.A.C.A. 45**, and this Court's decisions in civ. Appeal No. 16 of 1994 (Famous cycle Agencies & Another Vs. M.R. Kurial (unreported) in support of his arguments Counsel further contended that the appellant should have filed the application for Security for Costs earlier. Mr. Kavuma—Kabenge's main contentions are similar to those of Mr. Wanyama. In point of fact he repeated the argument which he raised in the court below to the effect that the application for Security for Costs was inappropriate because it was only available to a defendant. He argued that the appellant should have proceeded under 0.8, Rule 12 to ask the Judge in effect to stay proceedings on the counter-claim. I think with respect that Mr. Kavuma—Kabenge's last two arguments have no Sound basis. A plaintiff who is served with a defence containing counterclaim becomes a defendant to the counterclaim and is subject to incidents that attach to any other defendant to any claim. Further, exclusion of a counterclaim under 0.8 Rule 12 is not automatic. The appellant need not have adopted that course in this case.

I think that the Learned Judge erred in implying that prosecution of the counterclaim should be done after the main suit.

Moreover it is apparent from what Mr. Kavuma-Kabenge explained before us that the case had had to be fixed especially by the Principal Judge because there were other cases between the Parties which were pending and presumably the disposal of the present case would have had consequences on the other cases. This probably explains why, after the application to join the second respondent was granted, the Suit was fixed for hearing barely three weeks ahead instead of adjourning the Suit sine die so as to allow Parties a reasonable time to consider the

implications of the joinder and to file consequential Pleadings. It is therefore no surprise that the proceedings in the High Court ended the way they did.

Be that as it may, the principles which this court applies when deciding whether to interfere with the exercise of discretion by a Trial Judge are well known and are set out in such decisions as **Mbogo Vs. Shah (1968) E.A.** 93 where, Newbold, P. at page 96, stated the principles to be that—

"……a Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

These principles are referred to in various terms in **Famous Cycle Agencies (supra), and Yahaya Kiriisa (supra). Judicial** discretion must be exercised on fixed principles**: Jetha Vs. Sigh (1931) 13 L.R.K.1. Where there has been no improper** exercise of discretion, the Judges decision cannot normally be upset: Devji Vs. Jinabhai *(19341* **1 E.A.C.A.** 87.

A mere difference of opinion between the appellate court and the lower court as to the proper order to make is no sufficient ground for interfering with a discretion which has been exercised in the Court below. There must be shown to be an unjudicial exercise of the discretion or an exercise of discretion at which no Judge could reasonably arrive whereby injustice has been done to the Party complaining: Shah Vs. Allu (supra).

Though there is a presumption in favour of judicial discretion being rightly exercised, an appellate court may look at the facts to ascertain if such discretion has been rightly exercised: Mot Vs. Chanchalbhai (1915/1916) 6 E.A.L.R.1

.What are the facts in this case? The suit was filed on 12/12/94. By 14/1/1995 pleadings between the only parties to the suit then were closed. So the Suit was fixed for hearing On 9/5/1995. By normal standards the case was moving at fast pace. On 9/5/1995 by consent of Advocates it was agreed that the second respondent be joined in the suit as second defendant. The case was then adjourned to enable consequential pleadings to be filed.

No time frame for filing those pleadings was fixed. But the case was fixed for hearing on 24/5/1995. In retrospect I think that giving sixteen days within which to file the necessary Pleadings was imprudent. However, the second respondent filed his Written Statement of Defence and Counterclaim on 11/5/1995 and the appellant filed a reply thereto on 19/5/1995. For some reason the case was refixed for hearing on 7th and 8th June, 1995. Apparently in between the appellant instructed his Counsel, Mr. Babigumira, to seek to obtain Security for Costs in respect of the 2nd respondent arising from the counterclaim. Apparently the application for the purpose could not for reasons given by Mr.Babigumira to the Trial. Judge be ready for filing till the day the suit was due for hearing.

On 7/6/1995 Mr. Babigumira duly applied for a very short adjournment of only two hours to enable him file the said application seeking orders for security from the 2nd respondent. Mr. Babigumira indicated he would be ready to prosecute the application on the same day after filing the application. Not unnaturally Mr. Kavuma—Kabenge for the second respondent opposed that application. He was supported in that opposition by Mr. Wanyama. The Learned Judge adjourned the matter to 8/6/1995 for ruling on the application. The ruling is brief and is in the following words.

"I have given the application for an adjournment for purposes for prosecuting an application for 2nd defendant furnish security for payment incurred by the plaintiff/defendant when it comes to counterclaim pleaded by the 2nd defendant and I am of the view that I proceed with the main suit as scheduled. When it comes
to prosecution of the counterclaim plaintiff may at that stage object and put in his application for security. Hearing will proceed.
I order accordingly."

Mr. Babigumira appears to suggest that because the ruling was brief therefore the Judge did not exercise his discretion judicially. That is by no means a sound test. But with respect to Trial Judge I don't think that he gave due consideration to the application. The application sought adjournment for only two hours. By mere coincidence the Learned Judge in effect granted that adjournment when he reserved his ruling to the following day. The appellant seized on the opportunity thus offered and filed the application. I think that before delivering his ruling the Learned Judge ought to have ascertained whether the application for security had in fact been filed. In that way he would have then considered and decided whether or not

to hear the application for Security for Costs. In the event the Judge appears to have preempted even the application for security when he stated that—

"When it comes to prosecution of the Counter—claim plaintiff may at that stage object and put in his application for security."

This suggests that the main suit and the counterclaim would have to be tried separately which was hardly desirable. Consequently I think that the Judge improperly exercised his discretion when he refused the application for adjournment which in fact had been overtaken by events. Looking at the pleadings as they were on 7/6/1995, Mr. Babigumira's application was not frivolous. I think that the application ought to have been given careful consideration. This is lacking. I think that ground one should succeed. In effect this also means that ground four which has now been covered ought also to succeed. This would dispose of this appeal.

The complaint in ground five is that the Learned Trial Judge erred in law and rendered the leave to appeal to the Supreme Court useless when he decided to proceed with the hearing of the main suit before the intended appeal was disposed of.

The intended appeal against refusal of adjournment would have been an interlocutory appeal. Its success or failure would not have conclusively decided the merits of the suit. There is no rule of law or of practice that i am aware of which would preclude the Trial Judge from proceeding with the hearing of suit just because there was leave to appeal against an interlocutory Order. Therefore his order that the hearing should proceed despite the existence of leave to appeal which he had granted to the appellant was not inherently wrong. I think therefore that ground five has no merit and it must fail.

There remain grounds six and seven which were argued together. By the sixth ground, the appellant complains that the Learned Trial Judge erred in law and fact when he dismissed the suit for want of prosecution. The complaint in the seventh ground is that the Learned Trial Judge erred in law when he dismissed the suit under an inapplicable rule.

It was eventually accepted by all Counsel who appeared before us in these proceedings that the Judge dismissed the suit under 0.14, Rule 19 and not 0.15, Rule 19 which does not exist.

Order 14, Rule 19 states—
"Where any party to a suit present in court refuses, without lawful excuse, when required by

the court, to give evidence or to produce any document then and there in his possession or power, the court may pronounce judgment against him or make such Order in relation to the suit as it thinks fit"

The rule gives court discretionary power to do either of two alternatives. The court can give judgment against the party who though present in court refuse to give evidence or the court can make any other Order as the court thinks fit.

Mr. Babigumira submitted that dismissal was unjustified. Mr. Wanyama and Mr. Kavuma-Kabenge contended that there was lack of interest in the case by the appellant and therefore dismissal of the case was justified.

Order 14 is basically concerned with the summoning and the attendance in court of witnesses. Judging from the wording or rule 20 which follows immediately after rule 19 of 0.14, and bearing in mind the guiding principles on the exercise of discretion I think that dismissal of a suit where and advocate fails to call evidence on behalf of the plaintiff should be resorted to sparingly. It should normally be the last alternative especially where the party is not personally involved in the refusal. It would be proper to ask a party if he should conduct his case. I should have expected the Learned Judge to find out from officials of the appellant, if present in court, whether they wished to proceed or not. I say this because I find it inconceivable that the appellant could have anticipated an unfavourable ruling from the Judge so as to instruct Mr. Babigumira in advance to seek leave to appeal and even go so far as to give further instructions to him not to prosecute the suit until the appeal had been heard. That would be too unrealistic. I think that practical wisdom would have required that rather than dismiss the suit, the suit should have been adjourned, say for 14 days with costs to the respondents in any event. Order 14, Rule 19 gives the Trial Judge wide discretionary powers. And since dismissal of the suit was the severest of the alternatives, there were no sound reasons for opting for it first. It is probable that the Learned Judge was piqued by the way Mr. Babigumira conducted himself. What ever the case, I think that it was wrong to dismiss the suit which to all intents and purposes had come up for hearing for the first time after the 2nd respondent had been joined as a party. There was no lack of interest in the case by the appellant. Moreover in this case, Public tunas to the tune of Units of account (UA) 290,600 were at stake. Prima facie such a case should be decided on its merits unless there are compelling considerations to justify any other course such as the one taken in the court below. In my view there are no such compelling consideration shown on the record.

Consequently ground six must succeed. Ground seven is irrelevant now. The conclusions reached on grounds one and six mean that the appeal succeeds. I would allow the appeal, set aside the Order dismissing the suit and substitute therefore an Order adjourning the Suit. I would remit this suit to the High court for hearing by another Judge. I trust the hearing will be expedited.

Mr. Kavuma-Kabenge made the submission on costs for this appeal. One of his alternative suggestions was that there should be no order as to cost. I think this alternative is reasonable on the facts of these proceedings. I would make no order as to Costs.

Delivered at Mengo this . .29th.... day of June, 1996.

J.W.N.TSEKOOKO

JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS A TRUE
COPY OF THE ORIGINAL.

E.K.E. TURYAMUBONA,

REGISTRAR, THE SUPREME COURT

JUDGEMENT OF 0D0KI. J.S .C.

I have had the benefit of reading in draft the Judgment of Tsekooko, J.S.C., and I agree with it and the Orders proposed by him. As Oder, J.S.C.., also agrees, there will be an Order in the terms proposed by Tsekooko, J.S.C.

Delivered at Mengo this . . .29th. .day of June, 1996.

B.J ODOKI,

JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS A

TRUE COPY OF THE ORIGINAL

E.K.E TURYAMUBONA,

REGISTRAR,

THE SUPREME COURT.

JUDGMENT OF ODER J.S.C.

I have had the benefit of reading in draft the Judgment of Tsekooko, J.S.C., and I agree with him that the appeal should succeed. I have nothing useful to add.

Dated at Mengo this .. .29th .. day of June, 1996.

A.H.O. ODER,

JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS A TRUE
COPY OF THE ORIGINAL.

REGISTRAR, THE SUPREME COURT.