

UGANDA / JUDGMENT

Ayella Vs Kitgum Local Government & Anor (CIVIL APPEAL No. 0026 OF 2014) [2018] UGHCCD 60 (5 October 2018)

[2018] UGHCCD 60

COURT

HC: Civil Division (Uganda)

BEFORE

Stephen Mubiru, J

CASE / FILE NUMBER

CIVIL APPEAL No. 0026 OF 2014

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT GULU

CIVIL APPEAL No. 0026 OF 2014

(Arising from Kitgum Chief Magistrate's Court Civil Suit No. 0062 of 2011)

AYELLA ODOCH JIMMY JOEL APPELLANT

VERSUS

1. KITGUM DISTRICT LOCAL GOVERNMENT }
2. LAMWO DISTRICT LOCAL GOVERNMENT } RESPONDENTS

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The appellant appeal challenging an order made by the court below when it condemned him to pay the costs of the second respondent following an order striking off the second respondent as a defendant to the suit. His argument was that he did not instruct his advocate to sue the second respondent. Even the notice of intention to sue was served on the first respondent only. He was surprised when his advocate filed pleadings naming the second respondent as a defendant to the suit. When the name of the second respondent was struck off, he was condemned in costs yet it was not his mistake but that of the advocate. He prayed that the appeal be allowed and the order directing him to pay costs be set aside.

In reply, counsel for the respondents Mr. Louis Odong submitted that he had perused the record and found that it is true the statutory notice was only served on the first respondent. He conceded to the appeal but prayed that the second respondent should not meet the costs of the appeal but rather the advocate who made the mistake.

An advocate may be ordered to pay costs where he or she has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence, egregious misconduct or other default that rises to a “rare and exceptional” level (see **Weinberg v. Dickson-Weinberg*, 229 P.3d 1133, 1142 (Haw. 2010*); and **Quebec (Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26*). For example in **Kamurasi Charles v. Accord Properties Ltd. and another*, S. C. Civil Appeal No. 3 of 1996*, the Supreme Court dismissed an appeal against an order 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, to personally pay the costs in the suit. Counsel for the appellant had filed two suits in the High Court, each naming two different sets of defendants. The advocate was found to have indulged in deception and abuse of court process.

However, an advocate should not be condemned to pay costs personally without being given opportunity to be heard (see **Halsbury's Laws of England**, 3rd Edition, Vol.36 page 198; **Abraham v. Justin*, [1963] 2 ALL. E. R.402*, and **J. B. Kohli and others v. Bachulal Popallac* [1964] E. A 219*). Although counsel's conduct in the instant case appears to be blame-worthy, justice demands that he should not have been condemned without being heard.

On the other hand, I have not found any misconduct on the part of the appellant relating to the litigation, or the circumstances leading up to the litigation. I am in agreement with the appellant that he is not blameworthy. He has been a victim of his counsel's blunders. In condemning the appellant to pay the costs of that blunder, the court below practically penalised him for the failure of his counsel yet mistakes, faults, lapses and dilatory conduct of counsel should not be visited on the litigant (see **Andrew Bamanya v. Shamsherali Zaver*, S. C. Civil Appln. No. 70 of 2001*; **Ggoloba Godfrey v. Harriet Kizito* S. C. Civil Appeal No.7 of 2006*; and **Zam Nalumansi v. Sulaiman Bale*, S. C. Civil Application No. 2 of 1999)*.

The ordinary rule is that where a plaintiff has been successful, he ought not to be deprived of his costs, or, at any rate, made to pay the costs of the other side, unless he has been guilty of some sort of misconduct (see **Anglo-Cyprian Trade Agencies Ltd v. Paphos Wine Industries Ltd*, [1951] 1 All ER 873*). However, the fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case. The unsuccessful party faces the task of persuading the court that the particular facts and circumstances before the court warrant the making of an order absolving it of liability to pay the successful party's costs. The special circumstances envisaged ordinarily involve some sort of misconduct on the part of the successful party. "Misconduct" in this context means misconduct relating to the litigation, or the circumstances leading up to the litigation. Such behaviour may be of a procedural or substantive nature. In the final result, the decision of the trial magistrate condemning the appellant to pay costs of the second respondent is set aside with the costs of this appeal being awarded to the appellant.

Dated at Gulu this 5th day of October, 2018

Stephen Mubiru

Judge,

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