

UGANDA / JUDGMENT

Odaret and Another v Eyagu and
Another (Civil Appeal 65 of 2023)
[2024] UGHC 148 (26 March 2024)
[2024] UGHC 148

COURT
High Court of Uganda

BEFORE
Adonyo, J

CASE / FILE NUMBER
Civil Appeal 65 of 2023

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5	Republic of Uganda
	In The High Court of Uganda Holden at Soroti
	Civil Appeal No. 0065 of 2023
	(Arising from Civil Suit No. 029 of 2022)
10	1. Odaret Naptali 2. Omagor William
	Versus
	1. Eyagu John
15	2. Eletu Michael-----

(An appeal from the ruling and orders of the Chief Magistrates Court of Katakwi holden at Katakwi in Miscellaneous Application No. 03 of 2023 delivered on the 6th of July 2023 by H/W Gumtwero Justine Olal, Chief Magistrate)

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Before: Hon. Justice Dr Henry Peter Adonyo

Judgement on Appeal

1. Background:

The respondents filed Civil Suit No. 18/2016 before the Chief Magistrates Court of Soroti at Amuria on the 17th of August 2016, on the 23rd of January 2017, the file was transferred to the Chief Magistrates Court and registered as Soroti Civil Suit No. 30 of 2017. Upon creation of Katakwi Chief Magistrates Court the same file was transferred and registered there as Katakwi Civil Suit No. 29 of 2022.

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In the course of the proceedings the 1st Respondent withdrew Civil Suit 029/2022 $\mathbf{\$}$ against the 2nd Appellant and the said withdrawal was allowed with Costs awarded to the 2nd Appellant on 10/10/2022.

After judgement had been delivered in Civil Suit No. 29 of 2022 the 1st respondent filed Miscellaneous Application No. 003 of 2023 against the appellants seeking

that Consent withdrawal of the suit entered into between the 1st applicant (Eyagu 10 John) and the 2nd respondent (Omagor William), and the consequent Order of Chief Magistrate Gumtvero Justine Olal, arising therefrom, granting costs to the 2nd respondent in Katakwi Civil Suit No 29 of 2022 be reviewed, set aside and expunged from the record and that Taxation Application Number 1 of 2023, bill of costs and execution be set aside.

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The applicants now respondents raised a number of grounds in support of the application but mainly that the 1st applicant is aggrieved by the term of the consent withdrawal endorsed by court granting costs to the 2nd respondent pursuant to the withdrawal; and as such, the same constitutes error apparent on

the face of record because the said consent withdrawal was mistakenly endorsed on terms contrary to those agreed by the parties, to withdraw without costs. He continued to state that the application is well within the purview of review Orders as envisaged under section 82 of the Civil Procedure Act.

The 2nd appellant herein opposed the application by way of affidavit stating that the application is an afterthought and brought in bad faith to frustrate his enjoyment of the fruit of litigation, further stating that he never entered into any consent whatsoever with the applicant before this court, and that the withdrawal of Civil Suit No 29 Of 2022 against the respondent was on the applicant's own volition and without any duress or coercion whatsoever.

He further averred that upon being awarded costs, he filed bill of costs and the $\mathbf{\$}$ same is awaiting ruling on taxation. He invited this court to dismiss this application with costs.

The trial magistrate in his ruling set aside the Order of costs awarded to the Appellant on the 10/10/2022.

- The Appellant being aggrieved and dissatisfied with the Ruling and Orders of 10 appealed to this court on the following grounds:
- a) That the Trial Magistrate erred in Law and Fact when he failed to award the Appellant costs in Miscellaneous Application 003/2023 without any justification whatsoever.
- b) That the Trial Magistrate erred in Law and Fact when he set aside the costs 15 awarded to the Appellant in Civil Suit 29/2017.
- c) That the decision of the Trial Magistrate has occasioned a miscarriage of justice upon the appellant.
- 2. Duty of the appellate court:
- This Honourable Court is the first appellate court in respect of the dispute 20 between the parties herein and is obligated to re-hear the case which was before the lower trial court by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and to re-appraise the same before coming to its own conclusion as was held in *Father Nanensio Begumisa and Three Others v. Eric Tiberaga* scca 17 of 2000; [2004] KALR 236. 25

The duty of the first appellate court was well stated by the Supreme Court of Uganda in its landmark decision of *Kifamunte Henry Vs Uganda, SC, (Cr) Appeal No. 10 of 2007* where it held that;

"...the first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it"

In rehearing afresh, a case which was before a lower trial court, this appellate court is required to make due allowance for the fact that it has neither seen nor heard the witnesses and where it finds conflicting evidence, then it must weigh such evidence accordingly, draw its inferences and make its own conclusions. See: *Lovinsa Nakya vs. Nsibambi* [1980] HCB 81.

In considering this appeal, the above legal provisions are taken into account.

3. Representation: 15

> The appellant was represented by M/s Obore & Co. Advocates while the respondents were represented by M/s Legal Aid project of the ULS.

> This matter proceeded by way of written submissions and the same have been considered in the determination of this appeal.

4. Determination: 20

a) Ground 1:

That the Trial Magistrate erred in Law and Fact when he failed to award the 2nd Appellant costs in Miscellaneous Application 003/2023 without any justification whatsoever.

Counsel for the appellant submitted that the Chief Magistrate at Page 25 of the 25 proceedings on 10/10/2022 allowed the 1st Respondent on his own volition to withdraw Civil Suit 029 of 2022 against the 2nd Appellant.

Subsequent to the withdrawal, Costs were also awarded to the 2nd Appellant.

- The suit then proceeded against the 1st Appellant only and Judgment was \$ \mathsf{S} delivered in favour of the Respondents on 10th February, 2023. However, in a bizarre twist of events the 1st Respondent filed Miscellaneous Application 003/2023 wherein he was seeking to set aside the Costs that the Court had awarded the 2nd Appellant in Civil Suit 029/2022.
- He added that nonetheless the said Miscellaneous Application for review was 10 entertained by the lower court and the order awarding costs to the 2nd Appellant in Civil Suit 029 of 2022 was set aside and the said Miscellaneous Application 003 of 2023 was also dismissed without costs to the 2nd Appellant.

Counsel submitted that there was no justification at all for the 1st Respondent to

file Miscellaneous Application 003 of 2023 as review under S.82 applies to "Any 15 person considering himself or herself aggrieved" but submitted that how could the 1st Respondent be aggrieved by his own withdrawal of Civil Suit 29 of 2022.

It defeats logic and they were puzzled at how the 1st Respondent can allege to be aggrieved by a withdrawal that was done on his own volition in open Court at

Page 25 of the proceedings devoid of coercion, duress or undue influence. 20

Counsel submitted that in the circumstances after dismissing the said application he saw no reason why the said Judicial Officer denied them Costs and yet they had laboured to defend the 2nd Appellant in an application which was baseless before the lower court.

Counsel for the respondent in reply submitted that the award of costs is not 25 simply a matter of determining who has won the case.

That section 27(1) of the Civil Procedure Act recognises this by framing the power to award costs as a discretion.

b) Ground 2:

That the Trial Magistrate erred in Law and Fact when he set aside the costs \$ S awarded to the 2nd Appellant in Civil Suit 29/2017.

Counsel for the applicant submitted that there was no justification at all to review costs which were awarded to the 2nd Appellant pursuant to Civil Suit 029/2022.

That at the time the Ag. Chief Magistrate purported to set aside costs awarded on 10/10/2022 he was functus Officio as far as Civil Suit 029/2022 was concerned and there was already a pending Civil Appeal in the High Court of Soroti vide Civil Appeal 37 of 2023 which was instituted by the 1st Appellant

That the grounds upon which review is provided for under S.82 of the Civil Procedure Act did not apply to the 1st Respondent and it was his considered view

that there's no way the 1st Respondent was aggrieved by the withdrawal of Civil 15 Suit 029/2022 which was instituted on his own volition.

Counsel added that O.25 R.1 provides for withdrawal of a Civil Suit and the Payment of costs subsequent to the withdrawal. The 2nd Appellant has been in Court for 7 years there was no justification for the Ag. Chief Magistrate to deny him costs for all those years he has been inconvenienced by the 1st Respondent.

Counsel added that the purported application for review was baseless in our considered view, the alleged findings of the judicial Officer in the lower Court to justify how the 1st Respondent was an aggrieved party and also his attempt to justify that Civil Suit 29/2022 had already been withdrawn against the 2nd

Appellant with all due respect did not hold water in our opinion. 25

To buttress the foregoing, the 2nd Appellant at Page 23 of the proceedings confirmed to the Lower Court as follows; "I am here in Court today as the 2nd Defendant and not a witness to the 1st Defendant."

- Counsel further submitted that the ruling by the Chief Magistrate that the 1st \$ S Respondent had wished to withdraw the Suit against the 2nd Appellant since 2017 has no iota of truth whatsoever because the said position was never actualised i.e. prior to 10/10/2022 there's no consent or withdrawal order against the 2nd Appellant which was sanctioned by Court.
- Counsel for the respondent in reply submitted that a successful party may be denied costs where he or she is guilty of some sort of misconduct relating to the litigation or circumstances leading up to the litigation. She relied on Cyprian Trade Agencies Ltds v Paphos Wine Industries Ltd, [1951] 1 All ER 873 and Colgate-Palmolive Co v. Cussons Pty Ltd (1993) 46 FCR 225

- Having keenly looked at the circumstances at hand, on the 10/10/2022 when 15 court ordered for the withdrawal of the case against the 2nd Appellant 2nd defendant by then, he had had already participated in illegal actions by introducing a new written statement of defence without the leave of court.

Even if the withdrawal was done by the Respondents there was consent that was endorsed before court to have the same effective.

Counsel submitted that considering that costs orders are indemnities for costs incurred and not penalties against the unsuccessful party, a court may order each party to bear their own costs where in its view the legal merits are fairly evenly balanced and for obvious public policy reasons, the practice that each party bear

its own costs. 25

c) Court's analysis:

I have perused both the record in Civil Suit No 29 of 2022 and Misc. Appln. No. 03 of 2023. I have further read the ruling in Misc. Appln. 03 of 2023 and I find thus.

- The Civil suit between the parties was filed in 2016, the 2nd appellant together \$ \mathsf{S} with Odaret who is not subject of this appeal, filed their written statement of defence on the 31st of August 2016 and therein the 2nd appellant stated that he would raise a PO that the suit was wrongly filed against him as he has no interest in the suit land.
- On the 27th of June 2017 counsel Erabu for the defendants, now appellants stated 10 that the second defendant was dropped out of the case and sought an adjournment to serve the plaintiffs.

Thereafter, the suit herein commenced on the 7th of November 2017 after several adjournments which were largely due to the trial magistrate being

indisposed, the last witness PW3 for the respondents was heard on the 25th of 15 February 2020 and during cross-examination of this witness it was brought to the attention of court that indeed the suit had been withdrawn against the 2nd appellant.

The plaintiffs' case was closed, on the 21/12/2021 the matter came up for defence hearing, counsel Erabu for the defendants stated that; 20

> "I appear for the 1st defendant, defendant is in court, plaintiffs are in court, I am ready to proceed with the hearing, otherwise the second defendant is here today as a witness because the case was struck out against the second defendant."

The 1st plaintiff, the 1st respondent in reply stated; 25

> "That is not true, a settlement was broken between me and the 1st defendant by ICU elders and we reached an understanding whereby he took 7 acres of land but he failed to appear in court to execute a consent

withdrawal. So according to me our case against the second defendant still stands."

\$2nd\$ defendant who is the \$2nd\$ appellant herein then stated;

"... yes, he is in possession of 7 acres but this is our clan land so 1st plaintiff can't claim to have given me what already belongs to me. I am here in court today as 2nd defendant and not a witness to the 1st defendant."

The 1st plaintiff agreed that this was the position and the 2nd defendant is still in court. Counsel for the defendant then prayed for an adjournment to sort out the mess.

On the 31st of January 2022 Counsel Erabu stated that he had since learned that the 2nd defendant did not file his defence or witness statement, he also spoke of 15 trying to represent the 2nd defendant and sought a three-day adjournment to reach a consensus with him.

Before the matter was transferred to Katakwi Chief Magistrates Court on the 30th of August 2022, the 2nd defendant filed his new written statement of defence on the 29th of June 2022 without leave of court.

On the 10/10/2022, Counsel David Obore for the 2nd defendant submitted that the matter was for mention having been transferred from Soroti. He added that the plaintiffs had indicated before the court in Soroti that they intend to drop the 2nd defendant and sought to hear from them on that issue. The 1st plaintiff Eyagu

replied that the 2nd defendant should be struck off the suit. 25

Counsel Obore then stated that the law is clear that costs follow the events and prayed for costs.

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Court noted that since the 1st plaintiff has indicated that he is withdrawing the \$\mathsf{S}\$ matter the same was withdrawn against the second defendant and the costs awarded to the defendant.

It is this order that the respondents sought to have reviewed in MA 03/2023 and though court found that the parties were aggrieved persons, it found that the

consent referred to by applicants/respondents herein was not a consent within 10 the meaning of Order 25 rule 6 of the Civil procedure Rules and that the court did not endorse any compromise between the parties as the record of 10/10/2022 does not allude to any compromise but that the 1st applicant simply withdrew his suit against the 2nd respondent and court allowed the withdrawal

with costs. 15

On the face of the record there is nothing wrong with the order granted on the 10/10/2022 and the same was valid not warranting review.

In that respect I agree with the trial magistrate that when the order of withdrawal was made on the 10/10/2022 it was based on the act of withdrawal done by the 1st respondent.

No consent order to withdraw or compromise was presented to the court so that it could then endorse it for if this had been the case and there was the provision that the 2nd appellant be struck off without costs then review would be warranted as a remedy.

The issue that arises hereafter is that the trial magistrate having perused the 25 entire record found that there were illegalities on the part of the 2nd appellant herein including the fact that the 2nd appellant had been long withdrawn from the matter on the 27/06/2017 when the matter had just been filed.

He also noted that after this withdrawal, the appellant still appeared in court and $\$S$ even filed a new WSD without leave of court which acts constituted errors apparent on the face of the record.

The trial magistrate found that on the 10/10/2022 when the withdrawal order with costs was made, the 2nd appellant had indulged in illegal action of filing a new WSD without leave of court and he had been withdrawn from the matter in 2017 though court did not endorse the same which act he attributed to the fact that the plaintiffs were not represented in the lower court and did not

The trial magistrate then found that the order of costs was given on an erroneous premise that the 2nd defendant, herein the 2nd appellant, was still a party to the 15 case whereas not. He proceeded to set aside the order and replace it with an order confirming the withdrawal of the suit as at 27th June 2017.

understand the procedure surrounding withdrawal of suits.

Given the facts of this matter as seen in the parts of the record reproduced herein, I find that the trial magistrate did not err in law or fact to set aside the order for costs.

The record clearly shows that the 2nd appellant herein was withdrawn from the suit on the 27th of June 2017 and the record thereafter does not indicate him appearing as a party. The proper fact is that on 27th of June 2017 it was counsel for the defendant that informed court of this withdrawal and that indeed the plaintiffs now respondents had indeed agreed to withdraw the same.

I also note that the respondents were not represented in the lower court and had no legal understanding on the proper process regarding withdrawal of the suits and that could be why the same was not endorsed by court.

- However, this notwithstanding the 2nd appellant had clearly been withdrawn \$ \mathsf{S} from the suit and this is what both parties to the suit believed with any subsequent appearance by him as a party to the suit including the filing of new WSD being illegal as he even had access to an advocate who should have been explained to him.
- Instead what is on record is that his advocate appeared in court on the 10/10/2022 speaking of a consent with a view to get costs.

Furthermore, given that the 1st respondent withdrew the suit as against the 2nd appellant in 2017, it would thus mean a compromise had been reached between the two yet by 2022 the 2nd appellant was still claiming to be a party and filing a new WSD in which he reiterated that he was not on the land and evidently 15 frustrating whatever consent had been entered in 2017.

Given the conduct of the 2nd appellant in the course of Civil Suit No. 29 of 2022, I find that the trial magistrate was right to set aside the order as to costs given on the 10/10/2022 and he was also right not to grant costs in MA 03/2023 because

the same would equal to the 2nd appellant benefitting from an illegality as even a 20 successful party may be denied costs where he or she has been guilty of some misconduct relating to the litigation or the circumstances leading up to the litigation.

Regarding the question of functus officio, I find that the trial magistrate was not functus officio when he handled MA 03/2023 despite the presence of CA 25 0037/2023 before this court.

This is for the sole reason that the 2nd appellant was neither party to the suit from which CA 0037/2023 arose nor the appeal.

Secondly MA 03/2023 between the 2nd appellant and respondents regarded the \$ \mathsf{S} review on the issue of costs granted on the 10/10/2022 which was not subject of the appeal in Civil Appeal No. 0037 of 2022.

In conclusion I find that this appeal lacks merit and is accordingly dismissed with each party to bear its costs. The ruling and orders of the lower court are accordingly upheld.

I so order.

Hon. Justice Dr Henry Peter Adonyo

Judge

26th March 2024

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