

UGANDA / JUDGMENT

Sande v Babumba (Civil Appeal 25 of 2024) [2025] UGHC 227 (25 April 2025)

[2025] UGHC 227

COURT

High Court of Uganda

BEFORE

Godfrey Himbaza, J

CASE / FILE NUMBER

Civil Appeal 25 of 2024

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA**AT LTIWERO****MISC. CIVIL APPEAL NO. 0025 OF 2024 (Artsing from Civil Sult no. 003 of 20191****SANDE GODFREY APPELLANT****VS****BABUMBA GODFREY:.....RESPONDENT****BEFORE HON. JUSTICE GODFREY HIMBAZA****RULING.**

- 1. The Appellant brought this appeal by way of Memorandum of Appeal. According to the Memorandum, the following were the grounds of appeal advanced by the appellant;
- a) The learned trial Magistrate erred in fact and Law when she ordered for a recall of the appellant's witnesses in Land Civil suit no. 003 of 2019 to be cross examined under section 100 of the MCA and O.18 r13 of the Civil Procedure Rules without a formal application by the respondent hereof.
- b) The learned trial magistrate erred in fact and law when she ordered for a recall of the appellants witnesses in Land Civil Suit no. 003 of 2019 to be cross examined under section 100 of the MCA and O.18 r 13 of the CPR without an application by the respondent hereof to set aside the ex parte proceedings.

- cf The learned trial magistrate erred in law and fact when she ordered for a recall of the appellant's witnesses in Land Civil suit no, OO3 of 2019 to be cross examined under section 100 of the MCA and O. 18 Rule 13 CPR without first making an order to set aside the ex parte proceedings.

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- d) The learned trial magistrate erred in fact and law when she ordered for a recall of the appellants' witnesses in Land Civil Suit no. OO3 of 2019 to be cross examined under section 100 of the MCA and O 18 CPR without indicating that court was recalling the witnesses for its purpose of clarifying on certain facts other than recalling them to go through a full cross examination.
- e) The learned trial magistrate did not properly evaluate evidence on court record before allowing the oral application recalling the witnesses.
- \\$. The decision of the learned Magistrate has occasioned ^a miscarriage of Justice to the appellant because court did not consider the issue of costs for recalling witnesses which is injustice and prejudicial to him.
- 2. The appeal sought for orders that;
- a) The order of the trial magistrate recalling the witnesses for further cross examination be set aside.
- b) Costs be provided for.

3. Background

- 4. The background to this appeal is that the appellant who is the administrator of the estate of the late Mweyanwa Peteralina filed Civil suit no. 003 of 2019 seeking amongst other orders, declarations that a kibanja or equitable interest in Land comprised in Bulemezi Block 21 plot 1543 at Busiika falls under the estate of late Mweyanwa Peteralina, that the plaintiff is the lawful occupant of the suit land and that the defendants are trespassers thereon.
- 5. The 1st defendant did not attend court when the plaintiff presented his witnesses for examination in chief and cross examination. On the 26th August 2024, the 1st defendants counsel appeared before HW Kayaga Salima and made a prayer to recall the witnesses of the plaintiff for cross examination since the 1st defendant had not had an opportunity to cross examine them.

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6. The learned trial Magistrate then granted an order to the 1st defendant to recall the plaintiff and his witnesses for cross examination. An order to that effect was extracted on September 2024 and the appellant being aggrieved by the said order appealed to this court by filing a Memorandum of Appeal in this court on 10th October 2024.

7. Legal Representation.

- 8. The Appellant was represented by M/S Wamimbi Jude & Co. Advocates whereas the respondent was represented by Mugeru Robert. The parties filed written submissions which the court has considered in determining this appeal.
- 9. Before delving into the merits of the appeal, it is imperative to determine whether it was rightfully filed before this court. An appeal is a creature of statute. The Magistrates Courts Act Cap 19 provides that an aggrieved party who wishes to appeal against an order of a Magistrate/ Chief Magistrate ought to apply for leave under section 219 of the Magistrates Courts Act Cap 19. Section 219 (1) provides as follows;
 - a. Subject to any written law and except as provided in this section, an appeal shall lie from the decrees or any part of the decrees and from the orders of a Magistrate's Court presided over by a Chief Magistrate or a Magistrate grade 1 in the exercise of its original civil jurisdiction to the high court.
 - b. Under Sub section 4, it is stated that an application for leave to appeal shall in the first instance be made to the chief magistrate within a period of thirty days beginning with the date of the decision sought to be appealed from, and an application to the High court for that leave shall be made within a period of 14 days beginning with the date on which the application is refused by the Chief Magistrate.
- 10. The above provision requires the appellants to have first sought leave to appeal before the Chief Magistrate. If the Chief Magistrate declines to grant the leave, a party is required to seek for leave in this court within 14 days. I have read the record and I do not find any application for leave to appeal.

11. I find that

by the appellant. In *LUZII DA GEORGE VS EDWARD WASSWA, HCT LAND DIVISION CIVIL APPEAL NO. 39 OF 2009*, Justice Murangira dismissed a similar appeal which had been filed without the parties first seeking for leave to appeal.

This appeal is therefore incompetent before this court and I hereby strike it out.

- 11. Having found as above, I therefore find no need to address the grounds of appeal. However, I would address the issue of recalling a witness for further cross-examination since it featured prominently in the memorandum of appeal.

- 12. According to the proceedings of the lower court, the 1st defendant made an oral application to recall the plaintiff and all his witnesses for cross examination. The application was made orally under 100 of the Magistrate's Courts Act, and O. 18 r ¹³CPR. The ground of the application was that the plaintiff and his witnesses testified in the absence of the 1st defendant which denied him a chance to cross examine them.
- 13. The trial Magistrate relied on section 100 MCA and O.18 r3 CPR to make her ruling as follows;

"I however find in the instant case, that claiming this matter by recalling the Plaintiff and his witnesses, for cross examination is essential for the just determination of the case. I therefore find that this is a proper case to allow the application to have the plaintiff and his witnesses recalled to be cross examined by the 1st defendant who was neither present nor represented by counsel when they testified. This will help court in reaching a just decision"

- 14. Section 100 of the MCA provides that any magistrate may at any stage of the proceedings summon or call any person as a witness or examine any person in attendance though not summoned as a witness or recall and reexamine any such person already examined and the court shall summon and examine or recall and re-examine any such person if that person's evidence appears to it essential to the just decision of the case...and the

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Court shall adjourn the case for such time, if any, as it thinks necessary to enable that cross examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of any such person as a witness.

- 15. O. 18 r 13 CPR provides that 'Court may at any stage of the suit, recall any witness who has been examined and may, subject to the loss of evidence for the time being in force, put such questions to him or her as the court thinks fit'. The appellant's complaint is that the Trial Magistrate recalled him and his witnesses for cross examination by the first defendant without a formal application being filed first. I do not see any requirement in the law that an order to recall witnesses for cross examination must be preceded with a formal application as counsel for the appellants avers. In fact the law provides that court may on its own motion whether with or without the application of counsel, order for recall of witness(es) for cross examination.
- 16. In the case of Archie Fernandes Vs A. F. E. A Itononha EACA Civil Appeal no. 52 of 1968, DUFFUS V. P held as follows;

"O. 17 r 2CPR permits the Court to at any stage of the suit, recall and examine any witness. I am of the view that the judge could have allowed the witness to be recalled, for cross examination but this was a matter within his discretion and it should only be exercised in exceptional cases where an injustice might otherwise result. In this case, both the plaintiff and defendant's case had been closed"

17. In the instant case, drawing from the decision of Atchie Fernandes (op cit), , I find that the Trial Magistrate exercised her discretion judiciously because, the 1st defendant had missed the opportunity to cross-examine the plaintiff and his witnesses. The justice of the case only demanded that the 1st defendant be given an opportunity to cross-examine the plaintiffs and his witnesses for the ends of justice to be met. This can be sensed from part of the trial magistrate's ruling that "...I therefore find that this is ^a proper case to allow the application to have the Plaintiff and his witnesses

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recalled to be cross examined by the 1st defendant who was neither present nor represented by counsel when they testified. This will also help court reach a just decision". Moreover, the appellant has not demonstrated in any way that he is likely to suffer any injustice, by merely allowing the 1st defendant to cross examine him and his witnesses.

18. The above position was also adopted by the Court of Appeal in Bishop Balagadde Ssekadde & ors vs Moses Wamala & ors Court of Civil Appeal n.o, OO27 of 2011 where Justice Egonda Ntende stated as follows;

"O. 18 provides the procedure to be used in the conduct and hearing of ^a civil case including the taking of evidence, and rule 13 provides that the Court may at any stage of the suit recall any witness who has been examined and may subject to the law of evidence for the time being in force, put such questions to him or her as the court may think fit"

Looking at the record, I do not find reason to interfere with the finding of the Trial Magistrate as she exercised her discretion judiciously. For the reasons stated above, I find no merit in this appeal.

19. In conclusion.

- ^I. The appeal is struck out for appellant's failure to seek Leave to appeal
- 2. The case file is hereby forwarded back to the Trial Magistrate to proceed with the hearing of the suit.
- 3. No order is made as to costs

I so order

Dated at Luwero this . 2nd day of ... A. QL+-2025

e.- GODFREY

JUDGE

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