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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

HCT – 04 – CV CA – 0031/2001

(Original Tororo H.C Civil Appeal No. MT 29 'B' of 1983)

JOHN OLOKA .....APPELLANT

VERSUS

ADRIANO OBBO .....RESPONDENT

BEFORE: THE HO. MR. JUSTICE RUGADYA ATWOKI

JUDGMENET

The respondent sued the appellant in Iyolwa Grade II Court for crossing their common boundary and trespassing on his ½ acre of land. He obtained judgment. The appellant was dissatisfied with that decision and he appealed to the Chief Magistrate Tororo in civil appeal No. MT. 41 of 1982.

Tsekooko & Wekesa Co. advocates represented the appellant, while the respondent appeared in person. Mr. Masalu Musene from that firm appeared for the appellant on appeal.

It is apparent from the record that at a subsequent hearing on the 16th June 1983, appellant's Counsel was absent, and the appellant applied for adjournment for that reason. The appeal was adjourned for hearing to the 19th July 1983 on which date, again the appellants Counsel was absent, and the appeal was dismissed for want of prosecution.

The appellant filed an application for reinstatement of the appeal. The Chief Magistrate dismissed the application for reinstatement but granted leave to appeal to this court against the dismissal order, hence this appeal.

Two grounds were set out in the memorandum of appeal as follows.

1. The Chief Magistrate erred in not admitting the appeal to be heard on the merits because he ought to have held that honestly mishearing a hearing date constitutes sufficient cause for re admitting an appeal for hearing under O.39 r. 16 and especially so when litigants are uneducated.
2. The decision of the Chief Magistrate in refusing to re admit the appeal has occasioned miscarriage of justice.

Learned Counsel for the appellant argued both grounds jointly. I will do the same. The learned Chief magistrate declined to re admit the appeal as he was not satisfied that the appellant was prevented by sufficient cause to appear for the hearing under O.39 r.16 of the Civil Procedure Rules (C.P.R.).

From the affidavit of the appellant in the lower court in support of the application for reinstatement of the appeal, it was deposed that the reason why the appellant or his Counsel were not in court was due to the fact that he misheard the interpreter when the court fixed the hearing date.

Counsel for the appellant submitted that since the appellant was represented by Counsel on appeal, there was no representation of the appellant in court on the 16th June 1983 when the court fixed the appeal for hearing. He cited *Kawoya V. Naava* [1975] HCB 314, in which it was held that where Counsel

represents a party, appearance means appearance his Counsel. That is well and good. But does that mean that the party when in court in absence of his Counsel for whatever reason is not entitled to make representations on his behalf just because his Counsel is absent. Will he keep quiet and watch as his case is thrown out for want of prosecution just because his Counsel on record is absent? What if he has withdrawn instructions from such Counsel, or there are other reasons which only he is aware of.

Where a party is in court and his counsel is not, court is entitled to inquire from him why his Counsel is absent, and subject to the response, the court makes a decision on the way forward. Court will not be held at ransom by absenting Counsel in the knowledge that where their absence will stall matters, and the case will not proceed, even when the parties are all present, and could even possibly want to proceed.

In this case, it was conceded that the appellant's Counsel was aware of the hearing date of the 16th June 1983, but due to his or her own negligence, they did not appear. The appellant however appeared, and applied for an adjournment of the hearing date to enable his Counsel to be present. The court did not at that time dismiss the appeal for want of prosecution as it could well have, but listened to the appellant in person, and granted his application for adjournment. For its fairness and I may say magnanimity, the court is being criticised. I am satisfied that the criticism of the trial court in that regard is not justified.

It is not true that Counsel for the appellant was not aware of the hearing date of the 16th June 1983. Counsel who appeared for the appellant at the hearing

of the application for reinstatement conceded negligence on part of their firm for not being in court on that date. That point was clearly captured by the learned Chief Magistrate in his ruling on page 3 thereof where he stated as follows; 'There was also the admitted negligence in the applicant's advocates' firm which resulted them in not representing the applicant on 16/6/1983 the day the appeal was adjourned to 19/7/1983.'

The case of *Kawoya* (supra) is distinguishable on the facts. It does not assist the appellant in this case.

Counsel for the appellant argued that the appellant being an uneducated person, he ought to be believed when he deposed in his affidavit that he misheard the interpreter. He relied on the case of *Otanga v. Nabunjo* [1965] E.A 384 where it was held that the ignorance of an un-represented defendant constituted sufficient cause.

The appellant in paragraph 7 of his affidavit in support of the application stated as follows,

> '7. That when I attended court on 16th June 1983, perhaps through a mistake in interpretation, I did not hear the interpreter say that either 19th July 1983 or a definite date had been fixed for the hearing the appeal. In fact I verily and honestly believed that since I had an advocate and had informed the court of this fact it would be my advocate to fix a hearing date and let me know of the same.'

This date of 16th June 1983 when the matters herein are said to have happened was the at least third appearance by the parties in the application

for reinstatement. Each time there was always an Adhola interpreter, as both parties understood that language. There was no complaint previously that there was wrong interpretation. The appellant does not depose that there was wrong interpretation. He only surmises that 'perhaps' there was a mistake. Obviously he realises this is an inaccurate statement. A mistake in interpretation would not make one to fail to hear. Failure to hear could be caused by the inaudibility of the interpreter, a lot of external noise, or hearing impairment of the listener, or some other such cause. It could not be caused by mistake or error in interpretation, which is stating a different thing altogether from what the magistrate stated.

The deponent added in the second part of the paragraph that he verily believed that it would be his advocate to fix hearing date. That is unbelievable. The matter had been fixed for hearing in court. His Counsel was, due to the negligence in that firm absent. He sought to salvage the situation by seeking an adjournment. How then did Counsel get into the fixing of the case?

The appellant did not state in his affidavit that he went and informed his Counsel what transpired after the adjourned court hearing. It was only on 2nd August 1983 that Counsel happened to discover that the suit had been dismissed. I cannot help but agree with the learned Chief Magistrate that there was negligence or lack of seriousness on part of the appellant in prosecuting his claim.

Counsel for the appellant argued that there was no affidavit in reply, so the application was not opposed. It therefore ought to have been granted. The

applicant had to satisfy the court that he was prevented from appearing when the case was called for hearing by sufficient cause. The application was obviously opposed. If the respondent was not opposed to the application he would have said as much, and in that case court would have granted the same by consent of the parties. When it was not, the court had to be satisfied that there was sufficient cause in terms of O.39 r.16 of the C.P.R, before a decision was made.

I did not find that there was ignorance on part of the appellant, which prevented him from appearing in court when required. He had been in court many times before in this case when it was before the Grade II magistrate. He was sued and he lost in the lower court, but he later obtained a stay of execution. It is possible that he was comfortable with the status quo, hence his lack of seriousness to prosecute his appeal. From the facts of this case, the holding in the case of *Otanga* (supra) does not assist the appellant.

Counsel for the appellant cited many authorities in support of the appeal. The case of *Shabir Din V. Ram Parkash Anand* (1955) 22 EACA 48 was about a mistake by Counsel, which though negligent, was held to be sufficient cause. The appellant in this case did not allude to negligence of his Counsel in the application nor in this appeal in regard to Counsel's non-appearance in court on 19/7/1983.

The case of *Administrator General V. Jiwani* M.B. No. 14 of 1959 was in respect of a mistake by the defendant. There was no mistake on part of the defendant deposed to in the affidavit of the appellant. In *Nakiridde V. Hotel International* [1978] HCB 85, it was held that consideration should be had of

the fact that the applicant honestly intended to appear at the hearing, and that he did his best to do so. In the present case, there was no evidence of this. Once the appellant obtained the adjournment he sought, he apparently went and relaxed, or most probably forgot about the case.

There was no confusion about hearing dates in the diary of Counsel, and so *Zironandamu V. Kyamulabi* [1975] HCB 337 cited by Counsel is not applicable to the facts of this case.

Finally Counsel cited *Nsubuga V. Kamya* [1985] HCB 04 in which it was held that consideration should also be made of the merits of the case. It was submitted that the court did not consider the merits of the intended appeal, and especially the argument that the case could call for a re-trial.

I considered the argument in the lower court on this matter. I perused the record in the trial court. The trial magistrate visited the locus. At the locus each party claimed that they shared their boundary with one Obarai Abyazali who was present. The magistrate called him as a witness citing as authority S. 98 (now S.100) of the Magistrates Courts Act. After swearing him in, he allowed him to testify. At the end of his testimony in chief, the plaintiff declined to cross examine him, while the defendant and later court cross examined him. That was the procedure upon which the appellant in the lower court insisted would call for a retrial.

First of all, I do not think that there was any error in procedure in summoning a relevant witness to testify as would call for a retrial.

Secondly, even if there was such an error, I do not believe that on its own, that error would vitiate proceedings. The magistrate called this witness to confirm the allegations of the parties. But as I am not dealing with the appeal, and I will not say more lest I go to the merits, which is not my business at his stage.

Each of the parties sought to rely on the evidence of this witness. So his evidence was material to the case as far as each of the parties was concerned. This witness had not been called to testify by either side up to this point. When he testified under oath, each side was given an opportunity to cross examine the witness after his testimony. The plaintiff declined, while the defendant did so. In my view, that procedure was fair to both parties, and it met the ends of justice. There was no miscarriage of justice from the procedure, which the trial magistrate adopted. It would not call for a retrial. I would not base my decision whether or not to allow this appeal on that ground.

In the event I have not found that there was any sufficient cause and I would agree with the decision of the lower court in dismissing the application. I would dismiss this appeal with costs, and it is so ordered.

RUGADYA ATWOKI

JUDGE

6/06/2005.

Court: The Deputy Registrar of the court shall deliver this judgement to the parties.

RUGADYA ATWOKI

JUDGE

6/06/2005.