IN THE SUPREME COURT OF UGANDA

AT MENGO

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

CIVIL APPEAL NO. 14 OF 1994

B E T W E E N

Y. MWIMA HYABENE :::::::::::::::::::::::::::: APPELLANT

A N D

1. THE ATTORNEY GENERAL
2. OBBO :::::::::::::::::::::::::::: RESPONDENTS

(Appeal from the Ruling of the High Court at Kampala (Ongom,J.) dated 11.5.1993 in H.C.C.S. NO. 655/88 and the Ruling of Tinyinondi,J. dated in Misc. Civil Application No. 68/93).

JUDGMENT OF ODER, J.S.C.

This case has a long and chequered history, not least because the appellant has been prosecuting the suit in the High Court, and now this appeal, personally. He is a layman, whose zeal and persistence in persuit of his litigation can only be described as remarkable, considering that he is over 70 years old.

The record of appeal was apparently prepared by the appellant. It is not suprising, therefore, that it is a jumble of all sorts of documents: from which the task of sorting out the irrelevant from the relevant has not been an easy one. The background picture which emerges from all this appears to be as follows:

On 1.7.1988 the appellant instituted a suit in the High Court against the Attorney General and one Obbo as co-defendants. It was Civil Suit No. 655 of 1988. The record of appeal does not reveal the nature of the cause of action, nor the remedy or remedies sought by the appellant.

The suit was last heard by Soluade, J. on 4.6.1991, when the parties thereto adduced evidence and closed their respective cases. By consent the suit was then adjourned to 28.6.1991 for submissions. On that occasion only the appellant appeared; the respondents were absent. This happened, apparently, because the suit had been removed off the cause list for that day without all parties being aware. Subsequently, Soluade,J. left Uganda on completion of his assignment as an expariate pusine judge in this Country.

Eventually the Suit, part-heard, went before another judge, Ongom,J. On 11.5.1993. On that occasion, the appellant and the second respondent were present, but the first respondent was not. The appellant did not make his submission as he was expected to do, but instead made an application that the suit should be heard de novo. This is what he said:

> " I pray for a retrial of the case as the proceedings of Saluade J. confirm some irregularities. For instance on page 3 last paragraph I never said anything about "Chief Magistrate." Another error is on page 1 where it is said I said that second defendant checked some files. I said that, but not in that style. I am sorry, I never said that I entered the Registry at the counter and had a confrom (sic) later with D.2.
>
> It is not easy for a successor judge to appreciate the evidence he never saw the witness. Hence my request for a retrial."

That application was objected to by the second respondent on the grounds that it had no merit; that the typing errors were curable irregularities; that the appellant was delaying the disposal of the case; and that it was expensive for the 2nd respondent to travel from Mbale with his lawyer. The 2nd respondent then prayed the learned trial judge to refuse the appellant's application and to dispose of the case by writing judgment.

The learned trial judge up-held the 2nd respondent's objection, dismissing the appellant's application. He then adjourned the suit for delivery of judgment on notice to the parties. This is what he said:

> "Court Upon hearing reason why there should be a retrial. It is in the interests of all parties that the case be disposed of. Since there is no representation from the first defendant, I order that submissions be dispensed with unless the plaintiff has written submissions to file for consideration.
>
> Case is adjourned sine die for judgment to be delivered on notice. I order costs to be in the couse"

The appellant was apparently dissatisfied with the ruling and order of Ongom, J. Consequently he applied for leave to appeal against the ruling and order. The application was made as High Court Miscellaneous Application No. 68 of 1993. A number of grounds of the application were stated in the relevant notice of motion and the supporting affidavit sworn by the appellant.

Paragraph 3 of the Notice of motion stated as follows:

> "..... the Defendants and certain judges of the High Court joined hands to play various tricks so that this case could not take off ....."

Paragraph (f) of the appellant's affidavit alleged-

> "That plaintiff made mention directly to the judge that he was behaving and hearing this case partially in favour of the defendants and therefore the Judge's conduct was a miscarriage of justice."

The application was set down for hearing before Tinyinondi, J. on 5.10.1993. On that occasion the appellant was absent, but the 1st and 2nd respondents were present. At the respondents' instance the application was dismissed with costs for want of prosecution.

Subsequently, the appellant made another application for reinstatement of the dismissed application. That application was heard and granted on 19.10.1993 by Tinyinondi,J. Consequently the appellant's application for leave to appeal was reinstated.

On 30.11.1993 that application for leave came for hearing before the same judge. On that occasion the appellant applied to have Tinyinondi,J. disqualify himself from hearing the case. The appellant said this:

> "I requested the Chief Registrar that you step down from hearing this case. I also complained to the Director of Civil Affairs and Mins. Public Service. The complaint to the Chief Registrar is dated 19/10/93 (seen on file). The Min. of Public Service replied by sending my compaint to the Commission of Inquiry (Mismanagement of Crim. case) (letter dated 24/9/93 ref. CM/7/18 received.) The Commissioner of Inquiry has referred me to the A.G. (letter dated 1/11/93 ref. M.C..)
>
> It is therefore another judge who will decide this case. I want to add that all my complaints are on the Court record.
>
> <u>The Grounds are</u>
> 1. Interest of justice
> on 19/10/93 I was with 2nd defendant in Court No. 2. He left me at about 9.10 or 9.15 a.m. another judge Ouma, took over the Court room. I did not have a cause list. I suspected the three Court peronnel - the Court clerk, the state Attorney for A.G., Miss Arach and 2nd defendant. I suspect the Court clerk told the judge (Tinyinondi,J.) that was in Court No. 2. I was confused by the State Attorney and the 2nd defendant who knew I was ready on 5/10/93 to now involve me in the same application I framed un opinion that these three collided to leave me in Court No. 2 and come chambers these(sic) I had never met you until 5/10/93. I have no grude against you. It was because the happenings on 19/10/93 that I formed an opinion to have a change of judge."

The learned judge then gave the following ruling:

"Court: I have listened carefully to the statement of the applicant. His only reason to have me disist from hearing his application is because I dismissed his application on 5/10/93 in his absence He claims he was seated in Court No. 2 where Court clerk, the 2nd defendant and the State Attorney were with him. He claims the trio colluded to let him hand in that Court room and for them to come down to these (my) chambers when they eventually had his application dismissed by me. He states that from these events he formed an opinion that I would not be a proper person to entertain his application. He conceded he did not know me before the 5/10/93 and therefore has no grude against me. The Court record to date shows that the application was reinstated on 9/10/93 by this Court consequently the next becomes interesting only in the matter of the reasons why of the reasons why I should step down from hearing the application. I have heard it from the horse's mouth. The applicant did not know me before 5/10/93. He has no grude against me. I am not persuaded that I should step down. What I did on 5/10/93 was a proper performance of the Court duties in the given circumstances. It discloses no bias or under treatment of the applicant. The application to have me step down is accordingly dismissed."

On 19/4/1994 the matter again came before Tinyinondi,J., when the following transpired:

"19/4/94: plaintiff in Court
2nd Defendant in Court.
Mr. Mulindwa Court clerk.

Plaintiff: I want to tender my submission that I want another judge. The reasons cannot be summarised. Court has to read them. (Documents handed in Court). I want to serve the parties at a later stage. I will afford another adjournment. Case can remain even if document if justice has to be done.

Sgd. G. TINYINONDI,
JUDGE.

19/4/94

...../6

2nd Defendant: My advocate is engaged in a High Court session at Jinja. I pray that Court disperses with my lawyer. Case is in Court for 7 years now. Most adjournments are at the instance of the plaintiff. He has no interest in the

Sgd. G. TINYINONDI,
JUDGE.
19/4/94

Court: The document served in Court on the 2nd defendant. I have perused it. The thirust of it is that the Applicant wants me to step down from hearing his case despite my order to the contrary dated 30/11/93. The applicant prefers (para 8) to his letter to the Hon. C.J. where he wrote appealing that I should step down.

It is my firm view that I have jurisdiction to entertain has not been appealed or to the Hon. C.J. does not affect the legal position: As has already been pointed out by the 2nd Defendant the plaintiff has contributed the very lengthy delay of this case.

I direct that he now proceeds with his application or indicates to this Court his intention to appeal or reply for review of my said order of 30/11/93.

Sgd. G. TINYINONDI,
JUDGE.
19/4/94

Plaintiff: I wish to lodge an appeal against the judges order of 30/11/93

Sgd. G. TINYINONDI,
JUDGE.
19/4/94

Court: You are at liberty to do so.

Sgd. G. TINYINONDI,
JUDGE.
19/4/94."

It is in those circumstances that this appeal was brought. For all intents and purposes the memorundum of appeal and the appellant's written submission indicate that the appeal is against the order of Ongom, J. refusing to hear the suit de novo; and the order of Tinyinondi, J., refusing the appellant's application that the learned judge should step down from hearing his application for leave to appeal. That is what I understand this appeal to be about.

There appears to be no doubt that these are orders in respect of which leave to appeal is required under Order 42, rule (2) of the Civil Procedure Rules. Leave to appeal was given only in respect of one, and not in respect of the other. It also appears that the appellant, being a layman who conducted the proceedings in person, understood that the leave to appeal granted by Tinyinondi, J. on 19.4.1995 applied to both orders. Even so, I think that the procedure adopted by the appellant of appealing against two separate orders by on-e appeal, and of appealing against an order without leave where leave is required is an irregularity. Howeve, because of the special circumstances of this case and the absence of objection by the respondents, (which was not raised) I think that such an irregularity is not fatal to the competence of the appeal. Moreover, these appear to be circumstances in which this Court may exercise its inherent powers to allow an appeal to proceed, as it did this one, to meet the ends of justice, under rule 1 (3) of the Rules of this Court.

The memorandum of appeal is a three-page document, in which the appellant traces the long history of the case, beginning with the original suit, namely H.C.C.S. No. 655/88; to the Miscellaneous Application No. 68/93, and the events immediately preceding the filing of the appeal. The following paragraphs of the memorundum appear to contain the essence of the grounds and prayers of the appeal:

"12 That it was the Administration of the High Court who released Mr. Justice Soluade to leave for good before the completion of this case. To a layman's contantions the Administration, through the Court, were the organs to get leave for a retrial which was to be ordered on earlier dates than 11.5.1993, when my request was dismissed unreasonable, and so imposed on applications which seem to be unfairly conducted. That is therefore, a wasting of the Hon. Supreme Court of Uganda, to be entertained in settling a simple problem, which arose in a manner as narrated herein the appellant's memorandum of appeal.

13. That in these circumstances of matters as seen having been done or mismanaged by the Court below appellant prays for:
(a) That order required in the sense of this appeal to have the said Hon. learned Judge step in hearing the said application for leave to appeal be allowed yet in the same time this Hon. Court order for a retrial of the original suit.
(b) That the hearing of the original application by another High Court Judge may take a further year or so to reach a conclusion.
(c) That the hearing of the original main suit to take another year or so.
(d) That hence if appropriate, may the Hon. Supreme Court make orders in reliefs and adjustments of matters that have gone wrong under another theme of a requisite matter for employing on the whole and in this case a "judges Discretion" and so on. That this appeal is allowed at the same time a retrial ordered by the Supreme Court."

As I see it, two main grounds of appeal seem to emerge from all this. The first critises the learned trial Judge, Ongom,J. for having refused to order a trial of the suit de nove, and the second ground criticises Tinyinondi, J. for having refused to step down from hearing the appellants application for leave to appeal.

The appellant's written submission is equally a long narrative of the case; allegetions of tricks by the High Court Registry and various High Court judges to cause in justice to the appellant: and some explanation of the appellants reason for appeling.

So far as it is possible to make any sense out of it, the appellant's written submission and the verbal explanation, which he made with leave of the Court at the hearing of the appeal, appear to make the following points: First, a trial de novo of the suit is necessary becoause a judgment written by another judge based on the evidence recorded by Soluade,J. would be done by a judge who has not seen the demeanour of witnesses. Secondly, part of the typed record of proceedings appears to be missing. Thirdly: the suit should be heard de novo by another judge other than Tinyinondi,J. Fourthly, hearing and disposal of the application for leave to appeal against Ongom,J.'s order would unnecessarily delay the eventual disposal of the main suit.

Mr. Adoma, Senior State Attorney, who represented the first respondent, made a brief submission in reply. He contended, without elaboration, that the appeal lacks merit and should be dismissed. He also said that retrial of a suit which the original trial judge was unable to complete is permissable by law; but the learned Senior State Attorney did not say which low.

As far as my research was able to find, the only express statutory provisions relevant to the situation at hand are made in Order 16 of the C.P.R. Rule 10 (1) of the Order states:

"Where a judge is prevented by death, transfer, or other cause from concluding the trial of a suit, his successor may deal with any evidence taken down under the foregoing rules of this order as if such evidence had been taken down by him or under his direction under the said rules, and may proceed with the suit from the stage at which his predecessor left."

The rule, thus, confers discretionary powers on a judge to take over the trial of a suit from the stage where his predecessior has left. Neither this rule, nor any other, appear expressly to allow a judge to try afresh a suit uncompleted by his predecessor (popularly known as a "part-heard"suit).

My view, however, is that a retrial (or trial de novo) of a suit the hearing of which is uncompleted by one judge of the High Court can be done by another Judge under the Court's inherent powers, provided for by the Judicature Act, 1967 and the Civil Procedure Act (cap.65).

Section 3(2) (c) of the former states:

"3(2) subject to the provisions of of the constitution and of this Act. the jurisdiction of the High Court shall be exercised.

(a) .....

(b) .....

(c) where no express law or rule is applicable to any matter in issue before the High Court, in conformity with the principles of justice equity and good conscience."

Section 101 of the latter states:

"101Nothing in this Act shall be deemed to limit or other wise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

Whether an order should be made for a suit to be tried de nove depends, in my view, on the circumstances of each case. In the instant case, all the evidence had been heard by Soluade, J. who was unable to hear submissions (if any) by the parties and to write the judgment in the suit. Under the Provisions of Order 16 already referred to, another judge taking over the case had a discretion to hear the suit from where Soluade,J. had left it. That is what Ongom,J. apparently did when he refused the appellant's application for a retrial. In my view the circumstancies of the case justified a retrial. That ground of appeal must, therefore, succeed.

Next, the issue of whether Tinyinondi,J. should have stepped down from hearing the application, the only reason given was that the learned judge had dismissed the appellant's application for leave to appeal when the former had not appeared in Court.

It is not said that the learned judge was baised. On the contrary, it was said by the appellant that he did not know the learned judge before 5.10.1993; nor had a grudge against him. In the circumstances, I think that no satisfactory reason existed to disqualify Tinyinondi,J. from hearing the appellant's application. This ground of appeal must therefore, fail.

In the result I would allow this appeal in part, set aside the order of Ongom,J., and order that the appellant's suit in the High Court should be tried de novo, by any judge of the High Court. I would make no order for costs.

Dated at Mengo this day 4th of March, 1996.

A.H.O. ODER,
JUSTICE OF THE SUPREME COURT.

7.3.96. Appellant before court.

Resp — absent.

Mr Emma Manano court clerk present

Judgment read and delivered.

Ag Registrar

7/3/96

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI, J.S.C., ODER, J.S.C., TSEKOOKO, J.S.C.)

CIVIL APPEAL NO. 14 OF 94

B E T W E E N

Y. MWIMA HYABENE ... ... APPELLANT

A N D

ATTORNEY GENERAL ... ... RESPONDENT

(Appeal from the Ruling of the High Court at Kampala (L.Ongom, J.) dated 11/5/1993 in H.C.C. No.655 1988 and the Ruling of Tinyinondi, J. dated 19/4/1994 in Misc. Application No. 68 of 1993 arising from the said Suit No. 655 of 1988)

JUDGMENT OF TSEKOOKO, J.S.C.

I have had the advantage of reading in draft the judgment prepared by Oder, J.S.C., and agree with him that this appeal ought to be allowed.

From the volume of correspondence on the record before us, it is apparent that despite his claim to long experience in court matters, the appellant is suspicious of any steps taken by both judicial officials and non-judicial officials of the court. This has contributed to the delay in the disposal of his case. I hope that when the case goes back to the High Court, the appellant will not unnecessarily contribute to further delay. If he does, it may be necessary for the High Court to review the leave granted to him to prosecute his case as a pauper.

Delivered at Mengo this 7th day of March, 1996.

J.W.N. Tsekooko,
Justice of the Supreme Court.

IN THE SUPREME COURT OF UGANDA
AT MENGO

CORAM: ODOKI JSC, ODER JSC, & TSEKOOKO JSC

CIVIL APPEAL NO. 14 OF 1994

BETWEEN

Y MWINA HYABENE ..... APPELLANT

AND

ATTORNEY GENERAL ..... RESPONDENT

Appeal from Ruling and Order of the High Court of Uganda (Tinyindondi J) dated 19th April, 1994 in Mescellaneous Application No. 655 of 1988)

JUDGMENT OF ODOKI JSC

I have had the benefit of reading in draft the judgment of Oder JSC and I agree with it and the order proposed by him. As Tsekooko JSC also agrees there will be an order in the terms proposed by Oder JSC.

Delivered at Mengo this 7th day of March 1996

B. J. Odoki
JUSTICE OF THE SUPREME COURT.