**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(CIVIL DIVISION)**

**CIVIL APPEAL NO. 13 OF 2020**

**(ARISING FROM MISC. APPLICATION NO. 170 OF 2019)**

**(ARISING FROM CIVIL SUIT NO. 37 OF 2019)**

**MBABAZI SYLIVIA :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**KAGOYA P. DINAH :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT**

**BEFORE: HON. JUSTICE BONIFACE WAMALA**

**RULING**

**Introduction**

[1] The Appellant being dissatisfied with the ruling and orders of **Her Worship Irene Nambatya**, Magistrate Grade One, delivered on 31st January 2020 at Makindye Chief Magistrates Court, brought this appeal upon grounds set out in the Memorandum of Appeal filed on 14th February 2020.

**Background to the Appeal**

[2] The Respondent filed a summary suit No. 37 of 2019 against the Appellant for recovery of UGX 15,000,000/= and accumulated interest at court rate and costs of the suit. The Appellant applied for unconditional leave to appear and defend the suit vide Miscellaneous Application No. 71 of 2019. Counsel for the Respondent in that application raised a preliminary objection to the effect that the affidavit sworn in support of that application was commissioned by a lawyer who was not a practicing advocate. The court upheld the objection, struck out the affidavit and, consequently, the application and thereby entered a default judgment in favour of the Respondent/ plaintiff. The Appellant then filed Miscellaneous Application No. 170 of 2019 under Order 36 rule 11 of the

CPR seeking orders to set aside the default judgement that had been entered in the main suit, for extension of time within which the Appellant could file another application for leave to appear and defend and for costs of the application. The trial magistrate dismissed the application leading to the present appeal.

**Representation and Hearing**

[3] At the hearing, the Appellant was represented **Mr. Karooro Francis** from M/s JW Advocates while the Respondent was represented by **Mr. Ssegamwenge Hudson** from M/s Luzige, Lubega, Kavuma & Co. Advocates. Counsel agreed to make and file written submissions which were duly filed and have been considered in the determination of this matter.

**Grounds of Appeal**

[4] The Appellant, in her memorandum of Appeal, raised three (3) grounds of appeal, namely;

a) That the learned Trial Magistrate erred in law and fact when she held that the commissioning of a defective affidavit was not a mistake of counsel there by arriving at an erroneous decision.
b) That the learned Trial Magistrate erred in law and fact when she held that the application had been heard inter parties hence causing a miscarriage of justice.
c) That the learned Trial Magistrate erred in law and fact when she dismissed the application to set aside the default judgement thereby occasioning a miscarriage of justice.

[5] The Appellant prayed that the appeal be allowed and the ruling and orders of the trial magistrate be set aside with costs.

**Duty of the Court on Appeal**

[6] The duty of a first appellate court is to scrutinize and re-evaluate the evidence on record and come to its own conclusion and to a fair decision upon the evidence that was adduced in a lower court. See: *Section 80 of the Civil Procedure Act Cap 71*. This position has also been re-stated in a number of decided cases including *Fredrick Zaabwe v Orient Bank Ltd CACA No. 4 of 2006*; *Kifamunte Henry v Uganda SC CR. Appeal No. 10 of 1997*; and *Baguma Fred v Uganda SC Crim. App. No. 7 of 2004*. In the latter case, **Oder, JSC** stated thus:

> *"First, it is trite law that the duty of a first appellate court is to reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor heard the witnesses, to come to its own conclusion on that evidence. Secondly, in so doing it must consider the evidence on any issue in its totality and not any piece in isolation. It is only through such re-evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court".*

**Consideration of the Grounds of Appeal**

**Ground One: That the learned Trial Magistrate erred in law and fact when she held that the commissioning of a defective affidavit was not a mistake of counsel there by arriving at an erroneous decision.**

**Submissions by Counsel for the Appellant**

[7] Counsel for the Appellant referred to page 23 paragraph 13 of the Record of Appeal where the trial magistrate stated that the record did not show involvement of the former advocate in the commissioning of the oath so as to impute mistake on the said advocate. Counsel submitted that the Appellant, as

a business woman, could not have known who a practicing advocate was or not and she was simply taken to the commissioner by her former counsel. Counsel cited the case of *Tropical Africa Bank v Grace Were Muhwana, SC Civil Appeal No. 03 /2012* to the effect that it is wrong for court to visit mistakes, omissions, or failures on an applicant who is only yearning for justice which he can only get by having his appeal heard and determined by the court. Counsel prayed to the Court to find merit in this ground.

**Submissions by Counsel for the Respondent**

[8] Counsel for the Respondent submitted that the submission by the Appellant's Counsel to the effect that the Appellant did not know who was or was not a practicing advocate and was simply taken by her former lawyer to Augustine Semakula was not backed up by any evidence as it did not form part of the facts deposed by the Appellant in her affidavit in support. Counsel relied on the case of *Mujasi Masaba Bernad Elly v Magombe Vicent and Electoral Commission, CA EPA No. 0027 of 2017* for the submission that parties are bound by their pleadings and any evidence led by any of the parties that is at variance with the averments in the pleadings goes to no issue and must be disregarded by the court. Counsel prayed that the said submission by the Appellant's Counsel should be treated as a submission from the bar and this ground of appeal ought to fail.

[9] Counsel for the Appellant made and filed submissions in rejoinder whose contents I have also taken into consideration.

**Determination by the Court**

[10] The case for the Appellant under this ground of appeal is that it was an error on the part of the trial magistrate to find that the commissioning of the defective affidavit was not a mistake of counsel that could amount to sufficient cause upon which the court could rely to set aside the default judgment. As

shown in the background facts, the application M.A No. 71 of 2019 for leave to appear and defend the summary suit was struck out for having been supported by a defective affidavit. As a consequence, default judgment was entered against the defendant on the summary suit. The defendant (now Appellant) engaged another advocate who filed M.A No. 170 of 2019 seeking, among others, an order setting aside the default judgment upon the ground that the application disclosed good cause as to why the default judgment should be set aside. The Applicant (now Appellant) relied on two matters as evidence of good cause, namely; one that the application for leave to appear and defend was dismissed because of a mistake of her former advocate; and secondly, that the applicant had adduced facts that showed that she has a good defence on the merits.

[11] The trial court rejected the argument that the commissioning of the affidavit by a lawyer who was not a commissioner for oaths amounted to a mistake by the applicant's former advocate, reasoning that the circumstances in which the applicant appeared before the purported commissioner for oaths were unknown and no evidence had been adduced showing that it was the applicant's former advocate who had taken the applicant to the said purported commissioner for oaths. The trial magistrate further held that since affidavit evidence is administered to the deponent, it is the deponent who must have appeared before the purported commissioner and there appeared no involvement of the applicant's former advocate as to impute mistake on the part of the said advocate. The learned magistrate thus came to the conclusion that no mistake of counsel had been established by the applicant as to constitute good cause as required under Order 36 rule 11 of the CPR for the court to set aside the default judgment.

[12] It is clear from the record that the applicant (now Appellant) had duly instructed a firm of advocates to represent her when the first application for

leave to defend was filed, namely, Kakuru & Co. Advocates. In law, once a litigant duly instructs an advocate to represent him or her, the advocate assumes responsibility over the conduct of the matter before court and it is unconventional for a litigant to be expected to conduct parts of the legal process alongside her advocate. Although it is true that a deponent of an affidavit must appear before the commissioner for oaths personally, it is not correct to state that the deponent is the one that identifies and chooses which commissioner to go to. In any case, a lay litigant deposing an affidavit is not expected to know what commissioning is and who a commissioner is. The normal expectation is that the party's advocate takes the deponent before the commissioner for oaths, is asked to sign the affidavit and the commissioner also does his or her part. In my view, there was no need for evidence specifically stating that the applicant was taken to the purported commissioner by his former advocate as such was the obvious and expected fact. In any case, it had been averred by the applicant in paragraph 3 of the affidavit in rejoinder (at page 45 of the Record of Appeal) that the applicant was not aware that Augustine Semakula was not a practicing advocate and that it was not brought to her attention by her former lawyers. I am unable to appreciate what other kind of evidence that the trial court expected from the applicant as to establish that her former advocate was privy to the commissioning of the defective affidavit.

[13] It is, therefore, clear to me that it was the responsibility of the Appellant's former advocate to establish that the lawyer that purported to commission the affidavit in issue was a valid commissioner for oaths. As such, if the affidavit ended up being defective, it was the fault of the advocate and not that of the party. The position of the law is that a litigant ought not to bear the consequences of default by an advocate unless the litigant is privy to the default or the default results from the failure on the part of the litigant to give the advocate due instructions. See: *Zam Nalumansi & Anor v Sulaiman Lule*

*SCCA No. 2 of 1992; Mary Kyomulabi v Ahmed Zirondemu CACA No. 41 of 1979* and *Andrew Bamanya v Sham Sherali Zaver CACA No. 70 of 2001;* also for the position that faults, mistakes, lapses and dilatory conduct of counsel should not be visited on the litigant and where there are serious issues to be tried, court ought to grant an application.

[14] In the circumstances, I find that there was sufficient evidence before the trial court capable of establishing that the defect in the affidavit in support that led to the dismissal of the application was occasioned by mistake on the part of her advocate then. It was, therefore, an error on the part of the learned trial magistrate to find that the said facts did not disclose a mistake of counsel capable of constituting good cause in the matter. This ground of appeal accordingly succeeds.

**Ground Two: That the learned Trial Magistrate erred in law and fact when she held that the application had been heard inter parties hence causing a miscarriage of justice.**

**Submissions by Counsel for the Appellant**

[15] Counsel for the Appellant submitted that the application was not heard on its merits but was rather dismissed on a technicality on the ground that the affidavit attached to the application was commissioned by a lawyer who was not a practicing advocate. Counsel argued that there was no analysis of the facts of the application and that the learned trial magistrate erred when she held that the application was heard inter parties and, as such, the Appellant could not file another application for leave to appear and defend in the same court that dismissed the previous application but would rather have appealed.

**Submissions by Counsel for the Respondent**

[16] In reply, Counsel for the Respondent submitted that the record shows that both parties participated in the proceedings of court and that the dismissal of the application on a technicality does not mean that the Appellant was solely excluded from the proceedings. Counsel concluded that the trial magistrate was therefore right to state that the application had been heard inter party before court.

**Determination by the Court**

[17] It is not in dispute that both parties participated in the proceedings that led to the dismissal of the application on a preliminary objection. The real issue, therefore, is not whether the application was or was not heard inter partes; but is whether the application was heard and determined on its merits. I acknowledge that in this ground of appeal, the Appellant presented the issue as being whether the "application was heard inter parties". But it is also clear that this flows from the finding of the trial court. This is manifest in the following passage from the ruling of the trial magistrate;

> "*Before ascertaining whether leave should be granted, it is imperative to resolve the issue of whether rule 11 [of Order 36 CPR] applies to situations where the application for leave to appear and defend has been heard and dismissed by the court inter parties. It appears to me that this rule was intended for an applicant who did not apply for leave to appear and defend a suit within the prescribed period, and upon which a default judgment is entered in accordance with Order 36 rule 3. It is very inconceivable to believe that rule 11 was intended to allow an applicant, whose application for leave to appear and defend was dismissed (having been heard inter-parties) by the court, to re-apply to the same court to set aside the decree and allow the same applicant to apply for leave to appear and defend in the same court. It*

*is settled that where an application for leave to appear and defend has been dismissed, the remedy lies in an appeal and not in setting aside …".*

[18] The above statement by the learned trial magistrate, although partly true, misses a very crucial point of law. When it is stated that "where an application for leave to appear and defend has been dismissed, the remedy lies in an appeal and not in an application to set aside", this position refers to a situation where leave to appear and defend has been denied; and does not include where the application has been dismissed on account of being invalid or defective. The rationale is not difficult to find. It is settled that where an application is fatally defective, it is incompetent before the court, and is null and void. It is struck out for this reason. In law, it is deemed that such an application never existed. Upon being struck out (the same position holds even if the court used the term 'dismissed'), even if the striking out or dismissal occurred in presence of both parties (inter partes), it cannot be said that such dismissal requires the aggrieved party to appeal and not to file another proper application for leave to appear and defend. An application dismissed in such circumstances leaves a defendant in a summary suit in the same position as one that never filed an application at all. The option of such a defendant, therefore, cannot be to appeal as, indeed, there is nothing to appeal against; no application in law was filed and none was heard. The option available to such a defendant is to file a proper application for leave to appear and defend. But because after dismissal of the defective application the court would have entered a default judgment, the proper application to be filed would be seeking the setting aside of the default judgment and grant of leave to defend the suit.

[19] Such is what happened in the present case. The application for leave to appear and defend was supported by an affidavit that had purportedly been commissioned by a lawyer who was not a practicing advocate. The trial court upheld the objection in that regard, struck out the affidavit, consequently

dismissed the application and entered default judgment in the summary suit. In law, the application supported by such an affidavit was no application at all. The position of the applicant after the dismissal of her application was no different from a defendant that had filed no application at all upon being served with summons on a summary plaint. The applicant, therefore, could not appeal. She rightly filed an application seeking to set aside the default judgment. Order 36 rule 11 CPR permits the filing of an omnibus application, seeking the setting aside of a default judgment and at the same time seeking leave to appear and defend. In the application herein in issue, the applicant had sought for extension of time within which to file a proper application for leave to appear and defend. This relief was unnecessary. The correct relief sought would have been the grant of leave to appear and defend the suit upon the court setting aside the default judgment.

[20] That being the case, the learned trial magistrate erred in holding that simply because the application for leave to appear and defend was dismissed, in the circumstances it was, the applicant had no right to file M.A No. 170 of 2019. This was a wrong finding in law and fact. Such a position would have held only if the application had been heard and determined on its merits. It is only then that the trial court would have become *functus officio* as to be unable to entertain any matter in that regard with the only option available to the applicant being to appeal. This ground of the application also succeeds.

**Ground 3: That the learned Trial Magistrate erred in law and fact when she dismissed the application to set aside the default judgement thereby occasioning a miscarriage of justice.**

**Submissions by Counsel for the Appellant**

[21] It was submitted by Counsel for the Appellant that the learned trial magistrate misinterpreted Order 36 rule 11 of the CPR. Counsel referred the

Court to paragraph 1 at page 14 of the Record of Appeal where the trial magistrate stated that the remedy lies in appeal and not setting aside where an application for leave to appear and defend has been dismissed. Counsel cited the Supreme Court case of *Post Bank (U) Ltd v Abdu Ssozi, SC Civil Appeal No. 8 of 2015* to the effect that Order 36 rule 11 gives the court discretionary power to set aside its own decree and stay execution or set aside altogether, and grant leave to appear and defend the suit if court is satisfied that service of summons was not effective or for any other good cause. Counsel submitted that Order 36 rule 11 grants relief to a defendant where a default judgment has been entered if court is satisfied that the service of the summons was not effective or for any other good cause even if his application for leave to appear and defend has been dismissed. Counsel further argued that the trial magistrate did not bother to look at the merits of the application to see whether there was good cause which occasioned a miscarriage of justice and prayed that this grounds of the appeal succeeds.

**Submissions by Counsel for the Respondent**

[22] In reply, Counsel for the Respondent submitted that the trial Magistrate while dismissing Misc. Applic. No. 170 of 2019 explained what amounts to good cause and rightly concluded that there was no good cause to grant the orders that had been sought by the applicant. Counsel further submitted that the applicant had based her allegation on mistake of counsel which was considered by the trial Magistrate and dismissed for lack of merit. Counsel prayed that this ground is held in the negative.

**Determination by the Court**

[23] As I have already stated herein above, the provision under Order 36 rule 11 CPR gives the court discretionary powers to set aside a default judgment and decree, stay or set aside execution, and at the same time grant leave to the defendant to appear and defend the summary suit where the court is satisfied

that the service of summons was not effective or for any other good cause. I have already come to the conclusion that, in the present case, the trial magistrate misconstrued the law and the facts. The trial magistrate having dismissed the first application filed by the defendant (now Appellant) for being incompetent, and having entered default judgment and decree, she should have come to the conclusion that the defendant had properly filed M.A No. 170 of 2019 seeking the setting aside of the default judgment. Since the law allows the applicant to seek leave to appear and defend in the same application, the trial magistrate ought to have invoked the court's inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court in accordance with Section 98 of the CPA. In so doing, the trial court ought to have considered whether the applicant had established good cause as to enable the setting aside of the default judgment and grant of leave to appear and defend the summary suit.

[24] However, what the trial court did was that upon discounting the ground of mistake of counsel, and finding that the option available to the applicant was to appeal, the court did not consider the other leg of the application, that is, whether the application disclosed triable issues of fact or law capable of establishing a good defence on the merits. Where the latter ground is established, it may constitute good cause within the meaning of rule 11 of Order 36 CPR. In the present case, it was shown by the applicant (now appellant) in M.A No. 170 of 2019, in both the affidavit in support and the affidavit in rejoinder, that despite an agreement that the respondent would borrow a sum of UGX 30,000,000/= of which each party would pay back half of the said sum with the accrued interest, there was no evidence as to how the said sum was applied in business; on the other hand, there was evidence that the respondent had withdrawn from the business sums amounting to UGX 30,000,000/=; and there was further evidence that upon closure of the business, the applicant had invited the respondent for a meeting to reconcile

the accounts of the business and the respondent had shunned the invitation. This evidence was not controverted by the respondent.

[25] In my view, the above facts pointed to a need for investigation of the dispute and hearing of the parties on the merits. Had the trial magistrate evaluated the facts as set out above along the said parameters, she would have established that there was a dispute that required investigation and a decision by the court on the merits. Such would constitute existence of a bona fide triable issue of fact or law. See: *Maluku Interglobal Trade Agency v Bank of Uganda [1985] HCB 65*. My finding, therefore, is that on account of existence of triable issues of fact and or law, the applicant (now Appellant) had established good cause, sufficient to lead the court to set aside the default judgment and granting her leave to appear and defend the summary suit. Since I have also come to the conclusion that the ground of mistake of counsel was wrongly discounted by the trial court, the overall finding is that the applicant in M.A No. 170 of 2019 had established good cause as to why the default judgment ought to have been set aside and leave granted to her to appear and defend the summary suit. The learned trial magistrate therefore erred in law and fact when she dismissed the application and thereby occasioned a miscarriage of justice.

**Decision of the Court**

[26] In the premises, the Appellant has succeeded on all the three grounds of the appeal. The appeal accordingly succeeds and is allowed with orders that;

a) The ruling and orders of the learned trial magistrate of 31st January 2020 in M.A No. 170 of 2019 are set aside.

b) The default judgment and decree entered in Civil Suit No. 37 of 2019 are set side.

c) The Appellant (defendant in the summary suit) is granted unconditional leave to appear and defend the suit and is directed to file her Written Statement of Defence within 15 days from the date of this ruling.

d) The costs of the appeal and of the lower court's proceedings shall abide the outcome of the suit.

It is so ordered.

***Dated, signed and delivered by email this 18th day of January, 2024.***

**Boniface Wamala**

**JUDGE**