THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: HON. MR. JUSTICE G.M. OKELLO, JA.
HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA.
HON. LADY JUSTICE C.N.B. KITUMBA, JA.

CIVIL APPEAL NO.26 OF 2005

BIZIBU CHARLES :: APPELLANT

VERSUS

NALWOGA JULIET::REPONDENT

[An appeal from the ruling and orders of the High Court of Uganda at Kampala (Okumu- Wengi, J.] dated 9th May 2003 in Civil Application No. 204 of 2002]

JUDGEMENT OF KITUMBA, JA.

This is an appeal from the ruling of the High Court (Okumu-Wengi, J.) whereby the learned trial judge dismissed with costs the appellant's application to set aside an exparte judgement.

The following is the background to this appeal. On 6/8/1997, the respondent, Nalwoga Juliet, hereinafter referred to as the respondent, filed Civil Suit No. *635* of 1997 against the appellant Buzubu Charles, Nsubuga Richard and Kibuuka Geoffrey in the Chief Magistrate's Court at Mengo. She sued the three jointly and severally for special and general damages for injuries she sustained in an accident which was caused by a collision of motor vehicle Registration No. UBA 375 in which she sustained injuries. Service of the summons to enter appearance for Charles Buzubu, hereinafter, to be referred to as the appellant, was on 13/8/1997 effected on one Lusiba Monday at shop L007 Kisekka Market in Kampala City. On September 10th 1997 the

respondent applied for judgement in default against the three and it was granted on 1st October 1997.

The respondent applied, by High Court Miscellaneous Application No. 48 of 1998, to transfer Civil Suit No. 636 of 1997 from the Chief Magistrate's Court to the High Court. In High Court Miscellaneous Application No. 85 of 1999, the respondent applied to serve the hearing notice of Miscellaneous Application No. 48 of 1998 by substituted service. On 17-2-1999 the learned trial judge granted the application and ordered for substituted service in the following manner.

(a) The applicant to cause summons to be published for the hearing of Miscellaneous Application No. 48/1998 in the New Vision Newspaper.

(b) A copy of the above summons to be pinned on the High Court Notice Board.

The judge's order was complied with and the hearing notice was published in the New Vision Newspaper of 17th March 1999. The civil suit, which was transferred from the Chief Magistrate's Court, was heard in the High Court as HCCS No. 768 of 1998. In the High Court the suit was only for formal proof as default judgement had already been entered against the appellant.

On 18th May 2001 the learned trial judge gave judgement against the appellant in favour of the respondent The appellant was decreed to pay to the respondent shillings 832,700/- as special damages, 10,000,000/= as general damages with interest on special damages at 15% per annum from the date of filing the suit until payment in frill. The respondent was awarded costs of the suit.

By Miscellaneous Application No. 546 of 2001 filed on 14th August *5* 2001, the respondent sought from court the change of the appellant's name from Charles Buzubu to Charles Bizibu. The application was granted on 16/11/2001.

On 21st March 2002 a warrant of attachment was issued against the 10 appellant for sale of his movable properties. On 27th March 2002 the court bailiffs went to the appellant's shop at

Semuto, Luwero and tried unsuccessfully to execute the warrant. The appellant resisted the execution. On 5th April the appellant filed Civil Application No. 204 of 2002 under Order 9 rules 9 and 24, Order 48 rule 1 of the Civil Procedure Act and section *35* of the Judicature Act seeking to set aside the decree and to be allowed to file a defence. The main ground of the application was that the decree was passed exparte where there was no due service of court process. The learned judge (Okumu Wengi, J.) heard the application and dismissed it on 9/5/2003. Hence the appeal to this Court on the following grounds:

1. The learned trial judge erred in law and fact when he held that he was able to *say* that the trial court was satisfied that proper service was effected on the Appellant without considering the evidence on record.

2. The learned trial judge erred in law and fact when he failed or refused to consider the Appellant's case on its merit but opted to dismiss the application because he did not want to interfere with the conclusions of the trial court that service was duly effected on the Appellant.

3. The learned trial judge erred in law and fact when he held that the names Buzubu and Bizibu relate to the same person named as the Defendant.

4. The learned trial judge erred in law and fact and occasioned a miscarriage of justice when he failed properly to evaluate the evidence and thereby came to a wrong conclusion that the appellant was properly served and hence occasioned a miscarriage of justice.

5. The learned trial judge erred in law and fact and occasioned a miscarriage of justice when he held that he was not in position to say that the Appellant had a good defence when the same defence had been highlighted in the pleadings.

The appellant was represented by learned counsel Mr. Byamugisha Kamugisha and learned counsel Mr. Byrd Ssebuliba represented the respondent. Both counsel relied on their arguments as were presented at the scheduling conference apart from minor clarifications which were made at the hearing of the appeal.

I will consider all the five grounds together because they are inter-related.

The complaint by appellant's counsel in all the grounds is that the learned trial judge did not properly evaluate the evidence and consequently came to a wrong conclusion that the appellant was served with summons to enter appearance. By reason of failure to evaluate the evidence, the judge failed to find that the appellant had a defence to the suit.

Appellant's learned counsel contended that the learned trial judge did not at all consider whether the appellant was properly served with summons to enter appearance. He submitted that the judge simply held that he could not interfere with the decision of the judge who tried the case because the trial judge had considered the issue of service of summons and had held that it had been effected. He argued that the trial judge did not consider the issue of summons. The case was transferred to the High Court after default judgement had already been entered. He submitted that the trial judge only dealt with the application for transfer of the case to High Court and that is when he ordered for substituted service for hearing notice of that application. He argued that according to paragraph 2 of the plaint the appellant is a resident of Luwero, Nakaseke, Semuto and according to the pleadings the respondent's counsel undertook to effect service on him at that place. That notwithstanding, paragraphs 2 and 3 of the affidavit of service by Otemeri James indicate that summons to enter appearance were effected on Lusita Monday at shop No. L007 Kisekka Market. On the other hand, the appellant in his affidavit in support of the application depones that he is a resident of Semuto, Luwero and has no shop in Kisekka Market and does not know Richard Nsubuga. Counsel argued further that it was wrong for the learned trial judge to hold that Bizibu Charles was the same person as Buzubu Charles. Counsel submitted further that the leaned trial judge was wrong not to consider the appellant's defence to the suit which was evident in his pleadings.

In reply, Mr. Ssebuliba supported the learned judge's conclusion that the trial judge considered the issue of service of summons. He submitted that the substituted service of the hearing notice, which was duly advertised in the New Vision Newspaper on 17th March 1999, was sufficient notice to the appellant that there was a suit filed against him. Counsel submitted further that at the trial, and at the time of the accident, motor vehicle Reg. No. UBA 375 was registered in the appellant's names. He argued that the name of Bizibu and Buzubu are not very

different. According to counsel, if the appellant had been vigilant and read the hearing notice which was advertised in the New Vision Newspaper, he would have known that a vehicle which was registered in his name had caused the accident for which he was being sued. Counsel submitted that this court should not entertain the appellant's averments in his affidavit in support of the application, which were to the effect that at the time of the accident he had already sold the motor vehicle in issue and it did not belong to him. He argued that according to section 50 of the Traffic and Road Safety Act the appellant was supposed to have the vehicle transferred into the purchaser's names within seven days after the sale and failure to do so was illegal. Counsel contended that the law is that the courts of law do not condon what is illegal. In support of his submission he relied on the following authorities. **Akisoferi M. Ogola vs. Akika Othieno and Another [1997] HCB *53,* Imelda Ndiwalungi Nakadde vs. Roy Busuulwa Nsereko and Another [1995] HCB 73.**

I have carefully perused the record of appeal and the submissions by counsel for both parties. Order 9 rule 24 of the Civil Procedure Rules provides as follows:

"In any case in which a decree is passed ex parte against a defendant he may apply to the court by which the decree was passed for an order to set it aside, and if he satisfies the court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court, or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit."

According to the provisions of the above rule for an exparte judgement to be set aside, one has to prove that either the summons had not been duly served on him or her, or that he/she was prevented by sufficient cause from physically appearing when the case came up for hearing. In the instant appeal the appellant adduced evidence by his affidavit that he was not served with summons. In paragraphs 2 and 7 of his affidavit in support of the application to set aside the exparte judgement, he states that he lives in Nakaseke, Luwero and that he does not own a shop in Kisekka Market. He also averred that he does not know one Monday Lusiba on whom service of summons to enter appearance was effected. The affidavit of service sworn by Otemeri says that it was Monday 10 Lusiba who was served with summons to enter appearance.

With due respect to the learned judge in his ruling, he simply stated thus:

"Having read the case file as well as the present application and written submissions of counsel, I am able to say that the trial court tried the case after it was satisfied that proper service had been effected on the defendant/applicant. I do not see the reason to doubt or interfere with the conclusion of the judge that service in the manner that satisfied him was duly effected."

I appreciate arguments by learned counsel for the appellant that the trial judge failed to evaluate the evidence of service on record. He relied on the assumption that the judge who heard the suit for formal proof must have been satisfied that summons to enter appearance were duly served on the appellant. From the record it does not show that the issue of service summons to enter appearance was before the learned trial judge who had before him HCCS No. 768/1998 for formal proof.

The argument by the respondent's counsel that the advertisement in the New Vision Newspaper of the hearing notice of Civil Application No. 48/1998 was effective service of Civil Suit No. 768/1998 is not tenable because the two suits are different. Furthermore, the name of Charles Buzubu and the appellant's name Charles Bizibu are different. Even if the appellant had seen the hearing notice in the newspaper, he might not have appreciated that it referred to him. The appellant is a resident of Ssemuto in Luwero District. When time came to execute the decree he was traced there. I am therefore, not convinced that the respondent counsel's clerk failed to trace the appellant there and resorted to serving one Monday Lusiba.

From the evidence on record the appellant had a defence to the suit. He stated in his affidavit that he had already sold the motor vehicle at the time of the accident. The driver one Kiyaga was not known to him and was not his servant. The appellant was not served with the summons and was, therefore, prevented by reasonable cause to appear when the case was called for hearing. The issue of illegality that learned counsel for the appellant is raising now goes to the merits of the main suit. The appellant by this appeal is seeking court's indulgence to have the decree, which was passed exparte, to be set aside so that the case is tried on its merit. I am of the considered view that if the learned trial judge had properly evaluated the evidence, he

would have exercised his discretion in favour of the appellant and set aside the exparte judgement.

For the foregoing reasons I would allow the appeal and order that the exparte judgement in High Court Civil Suit No. 768 of 1998 be set aside with costs to the appellant.

JUDGMENT OF G.M. OKELLO, JA.

I have had the opportunity to read in draft the judgment of Kitumba, JA. I agree, for the reasons she has given, that this appeal must succeed.

The issue raised in the application was whether the applicant (appellant) had been duly served with the summons to enter appearance before the default judgment was entered against him. This issue had only been raised in Misc Application No 204 of 2002. In Misc Application No *85* of 1998, the respondent had sought substituted service for the hearing of the formal proof of this case after the default judgment had been entered against the appellant. The substituted service was granted because the appellant could not be traced for service.

The trial judge needed to seriously consider and satisfy himself that the appellant had been duly served with the summons to enter appearance when the default judgment was entered before dismissing the application. Unfortunately, he did not do that. He merely glossed over the issue when he said:

"I do not see the reason to doubt or interfere with the conclusion of the judge that service in the manner that satisfied him was duly effected."

Yet the substituted service referred to above was not in respect of service of summons to enter appearance. It was in respect of the hearing of the formal proof of the case after the default judgment had been entered against the appellant. The judge who heard the formal proof did not consider whether or not the appellant had been duly served with the summons to enter appearance before the default judgment was entered. The question was not raised before him as the appellant was clearly not aware of the existence of the suit against him.

In the result, I would allow the appeal. As Mpagi-Bahigeine, JA also agrees, the appeal stands allowed on the terms proposed by Kitumba, JA.

JUDGEMENT OF A.E.N. MPAGI-BAHIGEINE, JA.

I have read the judgement of Kitumba JA. I agree the appeal should succeed.

I would only briefly comment on the issue of service of process for emphasis. The learned trial Judge should have scrutinised the affidavit of service to satisfy himself that the process-server had in fact exercised due diligence. The process-server should show that he made efforts to find out when and where the appellant was likely to be found. He must make real and proper inquires and these should appear in the affidavit of service.

The learned Judge should have considered all this before entering default judgement.

Regarding the substituted service in the New Vision Daily, this would equally not be due service considering that the appellant was described as a resident of Semuto, Bulemezi where an English daily can hardly be relied on as a regular Newspaper.

Under such circumstances a vernacular daily in addition would be necessary.

Dated at Kampala this 31st day of August 2005.

C.N.B. KITUMBA
JUSTICE OF APPEAL

G.M. OKELLO
JUSTICE OF APPEAL

A.E.N. MPAGI-BAHIGEINE
JUSTICE OF APPEAL