THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

CIVIL APPEAL NO. 87 OF 2010

ARISING FROM CIVIL APPEAL NO. 23 OF 2009

IN THE HIGH COURT OF NAKAWA

(Originating From Miscellaneous Application No. 44 And 45 Of 2007 Kiboga Magistrate Court)

RWABUGANDA GODFREY…….APPELLANT

-VERSUS-

BITAMISSI NAMUDU……..….RESPONDENT

(Appeal from the Decree Order of the High Court of Uganda at Kampala by Her Lordship Hon. Justice Faith Mwondha Dated 22nd October 2009)

CORAM: HON MR. JUSTICE RICHARD BUTEERA, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

HON. JUSTICE PROF.LILLIAN E.TIBATEMWA, JA

JUDGMENT OF THE COURT

This is a second appeal arising from the decision of Hon. Lady Justice Faith Mwondha J (as she then was) in ***High Court Civil Appeal No. 23 of 2009*** at Nakawa originating from ***Misc. Application No. 44 and 45 of 2007*** Kiboga Magistrate's Court.

At the hearing of this appeal Mr. Yese Mugenyi learned counsel appeared for the appellant. Mr. Abaine Buregyeye counsel for the

respondent was not in Court. The Court record indicated he had been duly served with hearing notices and an affidavit of service was on record. The Court stood over the matter for two hours on that account.

When the Court resumed, Mr. Buregyeya had not appeared. Court noted that on 23-05-2013 when the appeal came for hearing Mr. Buregyeya had applied for an adjournment on account that he was not ready. The appeal was adjourned for the last time in his presence. Accordingly we allowed the appellant to proceed in the absence of the respondent or his counsel, under Rule 100 (3) of the Rules of this Court.

The back ground to this appeal is as follows;-

The respondent on 12th November 2004 filed a claim in respect of the land comprised in Lease Hold Register 645, Folio 9 Singo Block 783, Plot 3 Nakatakuli. His claim was that the said land belonged to her late father, who died in 1985. She had obtained letters of Administration to his estate on 4th February 2004. The land was registered in the appellant's name on 8th August 2002 having been transferred to her by one Andrew Kizito who had been registered as proprietor on 25th May 1974.

Summons to file a defence were issued by Court on 12th November 2004.

On the summons there is a hand written endorsement by Chairman L.C.l Lusengejja to the effect that one Walusimbi Joseph a Court process server had brought summons and a copy of the plaint to be served upon Rwabuganda but they had failed to locate him.

The LC Chairman's endorsement is dated 17th November 2004. There is a stamp on the same copy of the summons of Kiboga District Land Tribunal indicating "Received" dated 04th January 2005.

On 16th of August 2005, the claimant now the respondent wrote to the Chairman Kiboga District Land Tribunal, the letter is signed by another person named Katamba Fred. The letter is to the effect that the respondent had twice failed to serve the appellant with summons and hearing notices and was requesting Court to allow him serve the appellant by way of substituted service. It was received by the Kiboga District Land Tribunal on 17th August 2005 as a rubber stamp thereon indicates.

Earlier on December 27th 2004, the said process server one Joseph Walusimbi had deponed an affidavit of service of summons in this matter. The pertinent part reads as follows;-

1. *That on 18th November 2004, I received from M/s. Semakula, Kiyemba & Matovu Advocates copies of summons and plaint in respect of the above claim of service upon the first respondent herein.*

2. *That on 17th November 2004, I proceeded to Kiboga District and on reaching the L.C of Lusengejja Zone where the respondent was reported to reside.*

3. *That the L.C.l Chairman who I came to learn is known as Juuko Peter informed me that in the whole of his zone there was no body with those names or anybody known to occupy the claimed property.*

4. *The L.C.l Chairman then endorsed on the copy of the summons and returned it to me which copy is herewith returned and marked 'A'.*

The said affidavit bears a Kiboga District Land Tribunal Stamp dated 4th January 2005. The respondent then filed a formal application by Chamber summons at Kiboga District Land Tribunal on 21st June 2005. It was endorsed by the Registrar on and issued on 21st June 2005.

The application for substituted service was heard and allowed by the tribunal. It is not clear when the order was made. The tribunal's order was a follows;-

> *"The claimant should extract the summons to be published in the news paper within 10 days from today"*

August 24th 2005 an advertisement appeared in the New vision News paper titled "**Summons / Hearing Notice"** addressed to the appellant and requiring him to attend hearing of the matter on 14th September 2005, at land tribunal chambers at 9:00 O'clock.

The matter then proceeded *exparte* before the land tribunal and Judgment was delivered on 24th May 2006.

The respondent later applied to the High Court for consequential orders following the Judgment.

The application came for hearing before **His Lordship Justice Opio Aweri (J)** (as he then was) who made the following order;-

1. *The application seeking entries for land as LHR Vol. 645 Folio 9 presently Singo Block 783 Plot 3 Nakatakuli, subsequent to the death of Musawangali be cancelled.*

2. *The applicant herein be entered into the register for land originally known as LHR Vol. 645 Folio 9 presently Singo Plot 3 at Nakatakuli.*

3. *There are no orders as to costs.*

Subsequent to the above order the respondent's name was entered on the register as the registered proprietor.

The respondent at the same time also evicted the appellant from the suit land and took possession.

During this period it appears the District Land Tribunals ceased to operate. The file was transferred to Kiboga Magistrate's Court.

The appellant claims to have become aware of the claim against him by the respondents upon eviction.

He then filed two applications in the Magistrate's Court of Kiboga *vide* ***Civil Application No 44 and 45 both of 2007*** seeking in one to set aside the *exparte* ***Judgment in Tribunal claim No. 23 of 2004*** and in the other to stay execution of the decree and Judgment of the Land Tribunal in the same claim.

Both applications were heard by His Worship Ssekaggya Magistrate Grade 1 who declined to grant the orders sought.

The appellant then appealed to the High Court of Uganda at Nakawa *vide* High Court of Nakawa Civil Appeal No. 23 of 2009, on the following grounds;-

1) *The trial Magistrate erred in law when he refused to set aside the exparte Judgment.*

2) *The trial Magistrate erred in law and in fact when he held that the appellant was served with Court process.*

3) *The trial Magistrate erred in law and in fact when he made simultaneous ruling on the application to set aside exparte Judgment.*

The learned Judge dismissed the appeal, hence this second appeal.

We have heard the submissions of counsel for the appellant and read the authorities cited, we do not need to reproduce them here but we shall refer to them in the resolution of grounds of appeal herein.

The grounds of appeal as set out in the Memorandum of Appeal are as follows;-

1. *The trial Judge erred in law when she refused to set aside the exparte Judgment against the appellant.*
2. *The trial Judge erred in law when she failed to rule that the appellant was never served with Court process.*
3. *The trial Judge erred in law when she held that service of Court summons in New Vision was effective service for an appellant who resided in Kiboga.*
4. *The trial Judge erred in law when she held that the appellant had failed to disclose triable issues and to establish a prima facie.*

We shall resolve all of them together.

Rule 62 of the District Land Tribunal Rules required the tribunal to apply the Civil Procedure Rules (CPR). Service of summons therefore in District Land Tribunal in respect of all claims was required to comply with ***Order 5 Rule 2*** of the Civil Procedure Rules.

It provides as follows;-

"Summons.

(1) When a suit has been duly instituted a summons may be issued to the defendant –

a) ordering him or her to file a defence within a time to be specified in the summons; or

b) ordering him or her to appear and answer the claim on a day to be specified in the summons.

(2) Service of summons issued under sub rule (1) of this rule shall be effected within twenty-one days from the date of issue; except that the time may be extended on application to the court, made within fifteen days after the expiration of the twenty-one days, showing sufficient reasons for the extension."

In this case summons were issued on 12th November 2004. The respondent was required to have served the summons within 21 days from date of issue under ***Order 5 Rule 2***. Therefore the service of summons ought to have been effected by 3rd of December 2004. This was not done. The attempt to serve the respondent on 17th November 2004 failed.

The return of service itself was made on 27th December 2004, well after the 21 days within which service ought to have been effected. The subsequent attempts to serve the appellant were also unsuccessful.

There was no application made by the respondent to extend time within which to serve the summons at all. This ought to have been made within 15 days after the expiration of the 21 days. An applicant in such an application is required to show sufficient cause for extension.

The consequence for non compliance with the provisions of ***Order 5 Rule (2***) is very clear:

Where summons have been issued under this rule and service has not been effected within 21 days from date of issue as it clearly was in this case, and no application for extension of time under ***Sub Rule (2) of Order 5*** has been made or where the application has been made it has been dismissed. The suit shall be dismissed without notice. This is what the Land Tribunal ought to have done.

With all due respect to learned Judge of the High Court (as she then was) and to the learned Magistrate and counsel in this matter, no body addressed this issue.

The Land Tribunal had no jurisdiction to issue fresh summons to a party who had not complied with the provisions of **Order 5 Rule (2)** of the Civil Procedure Rule.

The Land Tribunal acted illegally when they issued summons/

hearing notices in March 2005 without complying with the law.

The Land Tribunal erred when they entertained an application for substituted service and went ahead to order the issuance of fresh summons in contravention of the law, and without jurisdiction.

The order of substituted service was thus made without jurisdiction and was a nullity *abnitio* and was absolutely of no effect.

The Land Tribunal was required by law to have dismissed the suit under ***Order 5 Rule (2)*** of the Civil Procedure Rules. It failed to do so.

The *exparte* decree and Judgment of the tribunal that followed the substituted service were therefore also a nullity.

The consequential orders made by the High Court set out above resulting from the decree of the Land Tribunal were also a nullity.

The resultant eviction of the appellant was also illegal.

In the result this appeal is allowed. We make the following orders.

1. The Judgment of the High Court is hereby set aside and substituted with this Judgment dismissing the suit for non compliance with ***Order 5 Rule (2)*** of the Civil Procedure Rules.

2. The consequential orders made by the High Court on 20th September are hereby set aside.

3. The Commissioner for Land Registration is hereby ordered to cancel the respondent's name on L.H.R Volume 645 Folio 9 Singo Block 783 Plot 3 and reinstate thereon the name of the appellant.

4. The respondent is hereby ordered to vacate the suit land described in paragraph 3 above immediately, and to hand over vacant possession to the respondent.

5. The respondent is hereby ordered to pay costs in this appeal, in the High Court, in the Magistrate's Court and in the Land Tribunal.

Before we take leave of this matter, we would like to clarify some important issues that were raised in this appeal but did not form the basis of our decision.

It was held by the Magistrate and the learned Judge that substituted service was good and effective service.

With respect we do not agree whenever Court directs that a party be served with summons by way of substituted services, that service is 'deemed' to be effective if the party does not file a defence.

It remains effective as long as it is not challenged. The moment a party challenges the service and contends that indeed he was not aware, then the presumption of services is rebutted.

A party to a suit cannot be denied his constitutional right to be heard only on account that summons was effected upon him by way of substituted service.

This was the gist of the holding of the Supreme Court in the case of ***Geoffrey Gatete, Angella Maria Nakigonya versus William Kyobe Supreme Court Civil appeal No 7 of 2005*** **(unreported).**

In the above case, **Mulenga JSC** at page 9 of his lead Judgment stated:-

> *"the court may order substituted service by way of publishing the summons in the press. While the publication will constitute lawful service, it will not produce the desired result if it does not come to the defendant's notice. In my considered view, these are examples of service envisaged in O.36 r.11 as "service (that) was not effective."*

Although the service on the agent or the substituted service would be "deemed good service" on the defendant entitling the plaintiff to a decree under O.36 r.3, if it is shown that the service did not lead to the defendant becoming aware of the summons, the service is "not effective" within the meaning of O.36 r.11. (See ***Pirbhai Lalji vs. Hassanali,*** *(1962) EA 306).*

The word "deemed" is commonly used in legislation to create legal or statutory fiction. It is used for the purpose of assuming the existence of a fact that in realty does not exist. In ***St. Aubyn (LM) vs. A.G.*** *(1951) 2 All ER 473, at p.498 Lord Radcliffe describes the various purposes for which the word is used where, he says –*

> ***"The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible."***

In my view, the expression "service that is deemed to be good service" is so broad that it includes service that might not produce the intended result, which therefore is not effective."

In this case therefore although there was 'good service', it was not effective and the appellant's application to set aside *exparte* decree and Judgment ought to have been allowed.

We also find that in this particular case although the Land Tribunal made an order for issuance of fresh summons, what was issued and subsequently advertised were not summons but a hearing notice. Accordingly we would still have held that the substituted service in this case was not good service and was also not effective.

We do not think that a party seeking to set aside an *exparte* decree and Judgment upon failure to file a defence in time is required to prove that he or she has a good defence to the suit. The reason he or she is seeking to file a defence is to show exactly that.

For Court to determine whether or not he has a good defence before he has filed one is to effectively deny him a right to be heard.

We also noted that whereas the respondent claimed to have made all possible efforts to serve the appellant and failed, and had to resort to substituted service, he was very quick to locate him and evict him from the suit land upon being grated an *exparte* decree. It is not believable that the respondent could have failed to find the appellant who occupied and lived on the suit land.

We say so because the appellant was physically evicted from the suit land which is now being occupied by the respondent.

It is our humble view that Courts of law must always insist upon personal service of summons before taking any other steps in order to avoid or at least limit abuse of Court process and the resultant injustice.

Dated at **Kampala** this....**25th** ..... day of...**February**.... **2014**.

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HON MR. JUSTICE RICHARD BUTEERA
JUSTICE OF APPEAL

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HON. MR. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL

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HON. JUSTICE PROF. LILLIAN E.TIBATEMWA
JUSTICE OF APPEAL