THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 71 OF 2015

1. CHRISTOPHER NSEREKO
2. NAKASUMBA MARY.....APPELLANTS

VERSUS

EDWARD NDAWULA KAWEESI.....RESPONDENT

[Appeal from the Ruling and Order of the High Court of Uganda at Kampala sitting at Nakawa delivered by The Hon. Mr. Justice Wilson Masalu Musene on the 10th day of July 2014 in Miscellaneous Application No. 90 of 2014 arising from Civil Suit No. 276 of 2002]

CORAM: HON. MR. JUSTICE REMMY KASULE, JA
HON. MR. JUSTICE KENNETH KAKURU, JA
HON LADY JUSTICE HELLEN A. OBURA, JA

JUDGMENT OF THE COURT

This is an appeal from the Ruling and order of the High Court of Uganda at Kampala, delivered by The Hon. Mr. Justice Wilson Masalu Musene on 10th July, 2014 in *High Court Miscellaneous Application No. 90 of 2014* arising from High Court *Civil Suit No. 27 of 2002.*

Brief background

The appellants were both tenants in common, on land comprised in leasehold Register Volume 2908, Folio 24, Plot 20 Singo Block 651. On 25th May, 2001 they entered into an agreement of sale of the whole of the said land to the respondent, at a consideration of shs. 11,000,000/= (Eleven million only). The terms of the sale were briefly that:-

Upon the signing of the agreement, the respondent would pay shs.3,000,000/= (Three million shillings only) which he did. The balance of shs. 8,000,000/= (Eight million shillings only) would be paid upon the appellants handing over to him the

title deed, which apparently at that time was still being processed at the Land Registry from an initial term of 5 years.

By 18th April 2002, the respondent had paid further shs. 4,000,000/= (Four million shillings only) in three instalments of shs.300,000/=, (Three hundred thousand shillings only), shs.700,000/= (Seven hundred thousand shillings only) and shs.3,000,000/=(Three million shillings only).

The balance of shs.4,000,000/= (Four million shillings only) was to be paid on 3rd May, 2002 upon the appellants delivering duly signed land transfer forms in respect of the said land in favour of the respondent. The respondent, it appears, subsequently took occupation of the land.

The title was never transferred to him, and he did not pay the shs. 4,000,000/= (Four million shillings only) contending that the appellants had refused to accept the payment.

The respondent instituted a suit against the appellants at the High Court of Uganda at Kampala on 12th November 2002 seeking the following orders;-

a) *The balance of shs. 4,000,000 be deposited in Court.*

b) *The 3rd defendant enters the plaintiff as the registered owner of Singo Block 651 Plot No 20.*

c) *General damages for breach of contract*

d) *Costs of the suit.*

The appellants filed a joint written statement of defence. They admitted that the respondent had paid shs. 8,000,000/= (Eight million shillings only) to them by 18th April 2002 and there remained a balance of shs. 4,000, 000/= (Four million shillings only) which was to be paid on 3rd May, 2002.

However, they contended that the respondent failed to pay the said amount and in the result the contract was repudiated and they went on to sell the same land to a third party one Katerega.

The Chief Registrar of Titles who was jointly sued with the appellants and appears on record as the 3rd defendant, did not file a defence.

On 28th February, 2007 the appellants amended their written statement of defence and included a counter claim. They contended that the remedy of specific performance was no longer available to the respondent since they had already sold off the land to a third party who was by then in possession.

In the alternative, they set out a counter claim of shs. 4,000,000/= (Four million shillings only) being the balance of the purchase price, interest at 30% per annum on the amount, general damages and costs. In his defence to the counter claim the respondent stated that he had at all times been willing and able to pay the said balance of shs. 4,000,000/= (Four million shillings only) to the appellants and when they did not accept it he deposited the said sum into Court. He also stated that the property had been leased to him by the Controlling Authority, as the occupant, as the lease which had been subsisting at the time of sale, had since lapsed and had not been extended.

On 12th February, 2010 the hearing of suit proceeded before Hon. Faith Mwondha, J (as she then was). The respondent testified as Pw_1. The examination in chief was not concluded and the hearing was adjourned to 25th March, 2010 in the presence of the respondent, his counsel, the 1st appellant and his counsel.

On 25th March, 2010 the respondent was absent and the appellant's counsel was also absent. The matter was adjourned to 24th June, 2010. On that day the respondent was present but his counsel Mr. Kaweesa was indisposed, the 1st respondent was present. Several adjournments followed.

On 24th January, 2011 when the matter came up for hearing the 1st appellant was present, the plaintiffs' counsel was present and Ms. Sheila Birungi an advocate was holding brief for Mr. Katumba, counsel for the 1st respondent, who was reportedly unwell. The matter was then adjourned to 4th March, 2011. On that day the

respondent was present but none of the appellants were in Court. Their counsel was not in Court either. The respondent's advocate applied to proceed in the absence of the appellants and their counsel. The Court allowed the hearing of the matter to proceed ex-parte. Upon the closure of the plaintiff, now the respondent's case, the Court made an order directing the parties to file written submissions. Judgment was reserved for delivery on 6th July, 2011. On that day Judgment was delivered in favour of the respondent who was then, the plaintiff.

The appellants on 13th February, 2014 filed a notice of motion at the High Court seeking to set aside the *ex-parte* Judgment. The main ground was stated to be, that the applicants had not been served with the hearing notice for the date upon which the order to proceed ex-parte had been made on 4th March 2011. The other ground was that they had a plausible defence to the suit.

The application was heard by Hon. Justice Wilson Masalu Musene, J who dismissed the same on 10th July 2014. The appellants, being aggrieved, filed this appeal on the following grounds:-

1. *The Learned trial Judge erred in law and fact when he ruled that the Appellants and their Advocate were present in Court when the suit was adjourned to 4th March 2011 and that there was no need of service.*

2. *The Learned trial Judge erred in law and fact when he ruled that the Appellants did not demonstrate sufficient cause to set aside the ex-parte judgment.*

When this appeal came up for hearing, learned counsel *Mr. Obiro Ekirapa Isaac* appeared for the appellants while *Mr. Abubakar Kaweesa* appeared for the respondent.

<u>The Appellant's case</u>

It was submitted by Mr. Ekirapa for the appellants that the trial Judge Mwondha, J (as she then was) erred when she held that it was not necessary to serve the appellant with hearing notice, for 4th March 2011 when the matter came up for hearing on 12th December 2010. He contended that the date on which the matter had been adjourned was 24th January, 2011 subsequently the hearing took place on 3rd March, 2011 in the absence of the appellants and their advocate.

Counsel contended that on 24th January, 2011 both appellants were absent and their counsel was also absent.

Counsel further submitted that Sheila Birungi who appeared for the appellant on that day was not on record as counsel for the appellants and thus it was an error to assume that she represented them. She also denied Counsel Katumba having ever represented the appellants at the High Court.

Counsel argued that because neither the appellants nor their counsel were present on 24th January, 2011 when the matter was adjourned to 3rd March 2011, they ought to have been served with fresh hearing notice, which was not done. Further, that the Judge erred when she held that the matter had been adjourned in the presence of the appellant's counsel and thus no hearing notice was required to be served upon them.

Counsel concluded that, as soon as the appellants were aware of the Judgment, they proceeded to file an application to set it aside, which was dismissed. He contended that, the application ought to have been allowed in the interest of justice as sufficient cause for none appearance on 3rd March, 2011 had been established. He prayed this Court to allow the appeal and grant the orders sought.

The Respondent's case

Mr. Kaweesa opposed the appeal and supported the decision of the High Court. He submitted that the appellants had failed to establish sufficient cause to justify the setting aside of the Judgment of the Court. Counsel argued that from 24th June, 2010 until Judgment was delivered on 6th July, 2011 both appellants did not appear in Court.

Counsel also submitted that, allowing this appeal would serve no purpose as the claim which the respondent had sought in the original suit no longer subsists, the balance of the purchase price of shs 4,000,000/= (Four million shillings only) having been deposited in Court. He also contended that the respondent had purchased the appellants lease interest in the land which was 5 years which lease had since

expired and the respondent has since been granted a lease in his own name in respect of the same land by the Controlling Authority.

Further, counsel argued that the appellants are no longer in possession of the land and as such it is no longer necessary for Court to compel them to put him in possession of the suit land. The suit, counsel argued, had been overtaken by events and as such there was nothing to restore and there being no valid defence this appeal ought to fail.

Decision of the Court

This being a first appeal we shall re-evaluate the evidence adduced before the trial court and come up with our own inferences on all issues of law and fact as the law requires. *See:* ***Rule 30(1)*** of the Rules of this Court; see also, ***Supreme Court Civil Appeal No. 17 of 2002: Fr. Narcensio Begumisa & 3 Others -vs- Eric Tibebaga.***

The background to this appeal has already been set out earlier in this Judgment and we shall not repeat it.

We find from the record that on 12th February, 2010 the respondent who was the plaintiff testified as Pw_1 in the presence of the 1st defendant and his counsel Mr. Kyalimpa. The respondent's counsel Mr. Kaweesa was present in Court. The examination in chief was not concluded, prompting Mr. Kaweesa to seek an adjournment which was granted and the case was adjourned to 25th March 2010. On that date the respondent was present and so was his counsel Mr. Kaweesa. The 1st appellant was present but the appellant's counsel Mr. Kyalimpa was absent. Mr. Mugarura was holding his brief. The matter was adjourned to 24th June 2010, on that date the respondent was present, his counsel Mr. Kaweesa appears to have been sick, the 1st appellant was present. The matter appears to have been adjourned to 15th November 2010, on that date it was adjourned in the absence of the defendants and their counsel to 2nd December,2010 for mention by a Grade one Magistrate.

There is no record as to what transpired in Court on that day, but the matter came up again before the trial Judge, apparently for hearing on 24th January 2011. On that day the respondent was absent, the appellants were also absent. However,

Mr. Kaweesa counsel for the respondent, was present. Ms. Sheila Birungi presumed to be an advocate appeared in Court holding brief for Mr. Katumba for the 1st appellant. The matter was then adjourned in Court in the presence of Sheila Birungi for the appellants and Mr. Kaweesa for the respondent to 4th March 2011 when it was heard ex-parte in the absence of the appellants.

We find that the appellants on 24th January 2011 were duly represented by Sheila Birungi who was holding a brief for Mr. Katumba their counsel. We do not accept the submissions of Mr. Ekirapa that neither Mr. Katumba nor Ms. Birungi represented the appellants. There is no such evidence on record. The two lawyers did not depone any affidavits to that effect in support of the appellant's application at the High Court.

It is a common and accepted practice for advocates to hold briefs for their learned friends at short notice. There is no requirement for advocates holding such briefs to have been on record before. There is no requirement for them to be on record thereafter. It is also the practice that , instructions are given normally to a law firm and not just to one individual advocate, in which case, any member of a given law firm may appear in Court representing a client, although specific files may be assigned to individual advocates. We have found nothing strange, let alone illegal, about the fact that on 24th January, 2011 Ms. Sheila Birungi who was not previously on record, appeared for the appellants holding a brief for Mr. Katumba. Neither Ms. Sheila Birungi nor Mr. Katumba filed an affidavit denying that this was not the correct position on 24th January 2011.

We are in agreement with the finding of Hon. Justice Mwondha, J (as she then was) that since the parties were all represented on the 24th January 2011 when the matter was adjourned to 4th March 2011 there was no requirement to issue them fresh hearing notices.

We also find that the learned Judge was justified when on 4th March 2011 she made an order allowing the respondent to proceed in the absence of the appellants and their counsel who were all absent, the matter having been adjourned to that date in their presence on 24th January 2011.

The trial Judge had the power to issue the order to proceed in the absence of the appellants who were defendants pursuant to Rule 3 of Order 17 of the Civil Procedure Rules. It states;-

> ***"3. Where, on any day to which the hearing of the suit is adjourned , the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed for that purpose by Order IX of these Rules, or make such other order as it thinks fit."***

We find that, the High Court was justified when it dismissed the appellant's application for setting aside the *ex-parte* judgment as the appellants had failed to satisfy the Court that they were not aware of the hearing date of 4th March 2011.

The second ground of appeal is:- whether or not the appellants demonstrated sufficient cause to set aside the *ex-parte* Judgment.

The Court may, notwithstanding the fact that the defendant was duly served with hearing notice or summons, set aside an *ex-parte* Judgment where sufficient cause is shown. The law does not define sufficient cause and each case has to be decided on its own facts. In this regard Order IX Rule 27 of the Civil Procedure Rules provides as follows;-

> *"Order IX Rule 27. Setting aside decree ex-parte against defendant.*
>
> *In any case in which a decree is passed ex-parte against a defendant, he or she may apply to the court by which the decree was passed for an order to set it aside; and if he or she satisfies the court that the summons was not duly served, or that he or she 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 or her 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; except that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also."*

The principle for setting aside an *ex-parte* Judgment set out in the above rule limits the Courts' discretion, only to be exercised upon the defendant showing sufficient cause. Courts have overtime laid down this principle. In *Nicholas Roussos vs Gulam Hussein Habib Virani and Others Supreme Court Civil Appeal No 25 of 1993,* the Supreme Court observed;-

> ***"As regards the principles upon which the discretion under r. 24 may be exercised, the courts have attempted to lay down some of the grounds or circumstances which may amount to sufficient cause. A mistake by advocate though negligent, may be accepted as a sufficient cause. See; Shabin Din v. Ram Parkash Anard [1955 22 EACA 48. Ignorance of procedure by an unrepresented defendant may amount to sufficient cause Zirabamuzaale v. Correct (1962) E.A 694. Illness by a party may also constitute sufficient cause: Patel v Star Mineral water and Ice Factory {1961] E.A 454. But failure to Instruct an advocate is not sufficient cause: see Mitha v. Ladak (1960) E.A 1054. It was also held in this case that it is not open for the court to consider the merits of the case when considering an application to set aside an ex parte judgment under this rule."***

See also: Patel vs E.A Cargo Handling Services [1974] EA 75 .

In this case no reason was given as to why the appellants did not appear in Court on 4th March 2011. We have found that they were aware of the hearing date their counsel having been present in Court, when the matter was adjourned. We have also found that having been present there was no requirement to issue a hearing notice. In this regard therefore we find that they failed to establish sufficient cause to warrant a grant of the order sought namely, to set aside the *ex-parte* Judgment.

We agree with Masalu Musene, J that non service of the hearing notice for delivery of judgment is not one of the grounds for setting aside an *ex-parte* Judgment. This is so because by the time judgment notice is issued, the trial would have been concluded. It may probably be a ground in an application for extension of time within which to appeal which is not the case here.

It is also evident from the record that the appellants' counsel was served with written submissions in this matter, pending its conclusion. This would have alerted

them that, the trial had proceeded in their absence. Inspite of this, upon receipt of the written submission from the respondent's counsel neither the appellants nor their counsel did anything about it. The application from which this appeal arises was filed in Court three years after the issuance of the order sought to be set aside. This is not just negligence on the part of an advocate, but it amounts to dilatory conduct on the part of the parties themselves as well as their counsel.

The parties were under a duty to find out from Court and or their counsel the progress of the suit against them, the hearing of which had commenced in their presence. They ought to have been interested in listening to the evidence that was being adduced. Instead they both chose to sit back and wait for three years. While dealing with a similar matter, albeit in an election petition, this court in ***Kirya Grace Wanzala -vs- Daudi Migereko and Another (Election Ref. Application No 39 of 2012)*** held and observed as follows:-

> *"I do not take this simply as the mistake or tardiness of the counsel but, I must say that the applicant himself contributed to this mistake and he was negligent, not serious and is therefore guilty of dilatory conduct. You cannot sit on your rights even when you see a real threat at your nose. I see no where in his affidavit where he put pressure on his counsel upon learning of the striking out application or even the conferencing directions for striking out his application if he never got to know about them, then surely he was negligent and he slept and was leaving everything to his counsel. He has not demonstrated that he was on toe with his advocate in ensuring that everything was being done diligently. I shall therefore want to distinguish this applicant from one who is vigilant."*

In this case we find that the appellants were guilty of dilatory conduct and as such the trial Judge was justified when he declined to grant the orders sought in their application.

Furthermore, there appear to be other factors outside the provisions of Order 9 Rule 27 of the Civil Procedure Rules which would have vitiated the appellant's application for setting aside the *ex-parte* Judgment.

Although in *Nicholas Roussos (supra)* the Supreme Court held that in an application of this nature it is not open to Court to consider the merits of the case from which it arises at that stage, subsequent authorities suggest that peculiar circumstances may require court to do so. In ***Capt. Philip Ongom vs Catherine Nyero Owota, Supreme Court Civil Appeal No 14 of 2001.*** The Supreme Court (per Mulenga JSC) held as follows;-

> *"Notwithstanding the principle enunciated in* ***Mitha vs Ladak (supra)*** *and reiterated by this Court in* ***Nicholas Roussos' case (supra),*** *that in an application under Rule 24, it is not open to the court to consider the merits of the case, I think those circumstances make it necessary, to consider at least the extent of the dispute in order that technicality may not unduly obscure substantive justice. I would summarise the pertinent peculiar circumstances of the case as follows –*
>
> *On the one hand,*
>
> *The appellant did not dispute the principal claim of £ 13,000; instead, when sued, he made payment into court thus admitting his liability to repay. The trial court, holding that the appellant* should be taken to have admitted liability, *gave judgment to the respondent for the principal claim, plus -*
>
> 1. *the profit claimed;*
> 2. *special damages; and*
> 3. *general damages.*
>
> *The respondent, in or about September 1999, recovered a substantial part of the decretal amount through execution proceedings:-*
>
> *On the other hand,*
>
> *on the face of it, the appellant's admission of liability did not extend to the "the profit" and damages, because upon becoming aware of the* ex-parte *judgment, he promptly sought to defend, and* inter alia *expressly denied any agreement on profit;*
>
> *the assessment of special damages appears to have been done on a wrong principle.*
>
> *It appears to me that despite his persistence, the appellant would have very little to defend in the suit even if he was given another chance to do so."*

In this case it appears clearly to us, that there exist no claim by the respondent against the appellants to defend. The order of specific performance was overtaken by events when the appellant occupied the property. The order to have the balance

on the purchase price of shs.4,000,000/= (Four million shillings only)paid to the appellants was also overtaken by events after the same had been deposited in Court by the respondent.

In addition to the above, we find no merit in the counter claim. This is because the claim is for payment of the shs. 4,000,000/= (Four million shillings only) being the balance on the purchase price, with interest and damages. This amount claimed in the counter claim had already been deposited in court in favour of the appellants at the time the counter claim was filed , making it superfluous and untenable.

Furthermore, the fact that the appellants had attempted to defraud the respondent by selling off the same land to a third party without disclosing the interest of the respondent who had already paid a substantive part of the purchase price, would also vitiate their application. Courts of law cannot be used as a vehicle for perpetuating fraud.

We therefore find no merit in this appeal which is hereby dismissed with costs.

Dated at Kampala this 14th day of Sept 2017.

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HON. JUSTICE REMMY KASULE
JUSTICE OF APPEAL

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HON. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL

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HON. LADY JUSTICE HELLEN A. OBURA
JUSTICE OF APPEAL

14/9/2017
Sekyanzi Lawrence for Appellants
Kaweesa Abubakar for Respondent
Appellants present.
Respondent absent
Ct: Judgment read in Court Allah -