THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 42 OF 2013

BULUMELA FARMERS COOPERATIVE SOCIETY:::::::::::::::: APPELLANT

VERSUS

UGANDA DEVELOPMENT BANK:: RESPONDENTS

(An appeal from the ruling of the High Court of Uganda at Kampala (Commercial Division) before Lady Justice Hellen Obura dated the 12th day of December, 2012 in HCMA No 134 of 2012 arising out of HCCS No.621 of 2002.)

CORAM: HON. MR. JUSTICE F.M.S EGONDA -NTENDE, JA

HON. MR. JUSTICE CHEBORION BARISHAKI, JA

HON. MR. JUSTICE MUZAMIRU. M. KIBEEDI, JA

JUDGMENT OF CHEBORION BARISHAKI, JA.

Brief Background

The appellant entered into a loan agreement and obtained a loan of $98,064 US dollars from the respondent in 1990 for the purchase of edible oil extraction machinery and equipment. Subsequently, a Steyr Tractor with equipment and a Tata Lorry were procured and supplied to the appellant whose chairman acknowledged receipt. It would appear that the edible oil extraction machinery and equipment were never procured although steps were taken to do so. By a

letter dated 23rd November 1995, the respondent informed the appellant that an event of default had occurred because the appellant had not paid due installments. The appellant was given time to clear the loan amounting to Shs 899,748,939/= but failed to do so.

It instead filed HCCS No. 391 of 1997 against the respondent which it withdrew. It later filed HCCS No. 621/2002 which was dismissed for want of prosecution. On 20th February 2012, the appellant filed miscellaneous application No. 71 of 2012 seeking to set aside the dismissal of the suit but the same was withdrawn. Again on 21 March, 2012 the appellant filed a new application HCMA No. 134 0f 2012 seeking to set aside the dismissal of HCCS No. 621 of 2002 on two grounds to wit;

(a) that the affidavit of service by Kabanda which led court to dismiss the main suit was forged.

(b) that it is just and equitable to set aside the dismissal of the suit in the interest of administration of justice.

After hearing the application, the High Court found and ordered that;

a) the allegation of forgery was not proved

b) the affidavit of service of Kabanda had no falsehoods in it as alleged by the appellant.

c) the applicant was duly served with a hearing notice through the law firm of its counsel that acknowledged receipt of the hearing notice by endorsing and stamping it.

d) no sufficient cause had been shown to warrant granting of the application.

e) the applicant did not exhibit any diligence in bringing this application just like it had not exhibited any in prosecuting the suit that was eventually dismissed.

f) the application be dismissed with costs.

The trial judge further noted that leave to appeal was applied for but the same was denied.

Being dissatisfied with the ruling of the learned trial judge, the appellant appealed to this court on the following grounds;

1. *The learned High Court trial judge misdirected herself on the facts and law of the evidence on court record thus reaching wrong decision that Emesu & Co Advocates was effectively served with the hearing Notice for 28/10/2004 whereas not.*
2. *The matter between the litigants is of General Public Importance to be disposed off only on procedural ground even if it were true that Emesu & Co. Advocates was effectively served.*
3. *That the learned trial judge erred in fact and law not to strike out and or dismiss the Affidavit in support of the reply to the applicant`s application.*

4. *The learned trial judge occasioned substantial miscarriage of Justice ; and for orders that;*

   (i) The appeal is allowed.

   (ii) The ruling and order of the lower court be set aside and HCCS No. 621 of 2002 be reinstated and tried by another judge.

   (iii) The costs hereof and in the lower court be provided for.

Representation

At the hearing of the appeal, the appellant was not represented by an advocate but Dr Masambu the official representative of appellant represented it. The respondent was represented by learned Counsel Mr. Businge Fred.

The parties adopted their conferencing notes dated 9th January 2017 and 10th February 2010 for the appellant and respondent respectively.

The appellant argued all grounds of appeal together. Mr. Masambu submitted that the respondent fraudulently applied for a hearing notice for HCCS No.621 of 2002 yet it was aware that an amicable settlement had been reached between itself and NPART under a memorandum of understanding. That the hearing notice had not been properly issued.

That the respondent was aware that the appellant had engaged new counsel, Prof. Dr Oboth Okumu and it ought to have served him and not its previous counsel Emesu & Co. Advocates and this to him was fraudulent.

That the respondent`s clerk forged the signature and office stamp of Emesu & Co. Advocates on the hearing notice. He contended that the affidavit of service sworn was false and Counsel Emesu George denied service on him of the same. That court received the affidavit of service on record fraudulently while aware that the suit was out of court for amicable settlement.

The appellant submitted that the matter involved colossal amount of foreign money which was a loan to Uganda government to be paid out of public funds which rendered the matter of great public importance.

The appellant further submitted that the affidavit in reply by Priscilla Mugisha was defective because it contained matters of law, falsehoods and did not disclose matters within the deponent`s knowledge and belief.

On ground 4 the appellant submitted that the trial judge occasioned substantial miscarriage of justice when she failed to grant the appellant`s application.

In reply, Counsel for the respondent submitted that the respondent had notified the appellant about the assignment of the loan to Npart on May 2001 and HCCS 621 of 2002 was instituted more than a year after the assignment. That the appellant and NPART did not reach an amicable settlement. The suit had been filed by Emesu & Co. Advocates who were the appellant`s counsel on record at all material time and the same was filed after a period of more than 6 years which was beyond the limitation period. The suit was therefore barred in law.

Counsel further submitted that it was lawful for court to set down HCCS No.621/2002 for hearing under Order 9 Rule 11 and 13 of the civil procedure Rules.

That the appellant`s suit did not raise any matter of general public importance and the cases cited by the appellant were all distinguishable.

He contended that the nonappearance of the appellant at the hearing was characteristic of the evasive and dilatory manner in which it conducted its litigation from 1997 to date. He cited *Twiga Chemical industries vs Viola Bamusedde SCCA 16 of 2014,* where the plaintiff had undertaken to effect service on the defendant and an assertion later by the plaintiff that it had not been served could not amount to a reasonable justification for its absence at the hearing.

Regarding the affidavit in reply sworn by Priscilla Mugisha, counsel submitted that failure to distinguish between matters within deponent`s knowledge and matters true to the best of the deponent`s belief was merely procedural, which occasioned no prejudice and would not invalidate the affidavit.

He submitted that the trial judge correctly directed herself on the law and that order 9 rule 23 of the civil procedure rules required the appellant to satisfy court that there was sufficient cause for its non-appearance. The test was whether the appellant honestly intended to attend the hearing and did its best to do so.

Regarding forgery of documents, Counsel replied that the onus was on the

appellant to prove that the hearing notice was forged and not on the respondent to prove that it was genuine.

He submitted that evidence on record showed that the appellant lacked honest intention to prosecute its suit to wit; multiple amendments of the pleadings in its initial suit; HCCS 391 of 1997, which was ultimately withdrawn, non-attendance of mediation sessions and an almost 8 years delay in applying to set aside the dismissal of the 2004 suit.

The respondent`s Counsel concluded by submitting that the High Court`s discretion was judicially exercised in dismissing HCMA 134 of 2012 and permitting the reinstitution of HCCS 621 of 2004 after all these years would occasion injustice to the respondent.

I have perused the court record, carefully considered the conferencing notes, the law applicable, and the authorities cited and those not cited but relevant to the determination of this appeal. I am alive to the duty of this Court as a first appellate court to reappraise the evidence on record and draw its own inferences. **See: Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions S.I 13-10.**

In Twiga Chemicals Industries vs Viola Bamusedde supra, Byamugisha JA relying on Bank Arabe Espanol v Bank of Uganda SCCA No.8 of 1998 stated that an appellate court will not interfere with the exercise of discretion of the trial judge unless- there had been failure to exercise discretion, failure to take into

account a material consideration, taking into account an immaterial consideration or an error in principle had been made.

The appellant argued grounds 1, 2 and 3 together and faulted the trial judge for misdirecting herself on the law regarding effectiveness of service. He submitted that both the respondent and court occasioned fraud when he applied for a hearing notice and court granted the same. That it was wrong for court to accept a forged affidavit into its record. That the court and the respondent had acted fraudulently when they allowed a matter which had been referred for amicable settlement to proceed in court.

In **Fredrick J.K Zaabwe vs Orient Bank Ltd and 5 others SCCA No.4 of 2006** the Supreme Court cited with approval the definition of fraud in *Black's Law Dictionary 6th Edition* Page 660, as follows;

> *"An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury.....*
>
> *While "fraudulent"* is defined as*:*
>
> *"To act with "intent to defraud" means to act wilfully, and with the specific intent to deceive or cheat; ordinarily for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself."*

In **Stephen Lubega vs Barclays Bank SCCA No.2 of 1992** court held that *"fraud must not only be pleaded, it must be particularized."*

A party alleging fraud must lay down its particulars in the pleadings so that the opposite party is accorded opportunity to investigate and respond to the same. In the instant case fraud was not pleaded. It was only raised on appeal which would tantamount to an ambush which this court cannot allow. Be that as it may, I have considered the fact that the appellant was not represented by counsel but by its own chairman who is not an advocate and for that reason, I will address the issues as raised.

Regarding the matter of applying for and being issued with a hearing notice, Order 9 rules 11 and 13 provides;

Rule 11. Setting down suit for hearing.

(1) *At any time after the defence or, in a suit in which there is more than one defendant, the last of the defences has been filed, the plaintiff may, upon giving notice to the defendant or defendants, as the case may be, set down the suit for hearing.*

13. Step in suit after defence filed.

Subject to Order XII of these Rules where a defendant has filed a defence under rule 1 of this Order, the court may set down the suit for hearing with notice to the parties.

A suit may be set down for hearing by any of the parties or by court. The respondent applied for a hearing notice and court granted it. Any party to the proceedings can move court to exercise its power, in this case the respondent did. Both the respondent and court acted within the precincts of the law and this did not amount to fraud. I find the appellant`s allegation of fraud farfetched.

The appellant contended that Emesu and Co. Advocates no longer had instructions to represent it .While addressing this claim, the trial judge stated;

> *"First of all, I have not found any notice of change of advocates or notice of withdrawal of instructions on court record to prove that instructions had already been withdrawn from M/S Emesu & Co. Advocates as at the time of service of the hearing notice as he alleged. The firm M/S Emesu & Co. Advocates was still on court record as representing the applicant. I therefore do not agree with that unsubstantiated assertion."*

The record shows that Emesu & Co. Advocates were counsel in conduct of the appellant`s HCCS No. 391 of 1997 and a copy of the notice of withdrawal of the suit dated on 30th October 2002 prepared by Emesu & Co. Advocates is on record. The following day, 31st October 2002, HCCS 621 of 2002 was filed and later, after six years, HCMA No. 134 OF 2012 was also filed. I have failed to find evidence of change of Advocates or Notice of Instructions to Counsel Oboth Okumu. There is also no evidence that the respondent was served of the same if any existed.

It is clear that, HCCS 621 of 2002 was filed by Emesu & Co. Advocates on behalf of the appellant and the assertion by the appellant that it was negligence of counsel was an afterthought. I agree with the learned trial judge`s finding that Emesu & Co. Advocates were the advocates in conduct of the appellant`s suit at all material time.

It was submitted for the appellant that the suit had matters of general public importance and as such ought not to have been disposed of on a procedural ground because it involved a colossal amount of foreign money which was a loan to the Uganda Government to be paid by the Ugandan public hence a matter of public importance. Counsel cited *Attorney General vs Oriental Construction Co. Ltd SCCA No. 19 of 1990* where it was held that the Appeal was of public importance since it involved the payment of an inherited liability of colossal Foreign Exchange by the public.

This was an application to set aside a dismissal order of a civil suit No.321 of 2002 brought under Order 9 Rule 23(1) of the Civil Procedure Rules

In determining the application, Court was not called to adjudicate the main suit but only tasked to exercise its discretion as to whether to set aside the dismissal or not. All that the appellant was expected to do was to show sufficient cause for non-appearance when the suit was called for hearing. The matter had nothing to do with loans to Government involving foreign exchange.

In addition, the learned trial judge considered the nature of the claim and came to the conclusion that it was intended to frustrate the loan recovery process by

the respondent. Determining whether or not to set aside a dismissal cannot be said to be a matter of public matter.

Be that as it may, the question then to answer is whether the appellant showed sufficient cause for non-appearance and if so, whether the trial judge exercised her discretion judiciously in not granting the application to warrant this court to interfere.

The respondent submitted that the appellant failed to show sufficient cause for non-appearance. In ***Nicholas Roussos vs Gulam Hussein Habib Virani & Another, Civil Appeal No.9 of 1993 (SC) (unreported)***, the Supreme Court laid down grounds or circumstances which may amount to sufficient cause. They include mistake by an advocate though negligent, ignorance of procedure by an unrepresented defendant and illness of a party

Order 9 Rule 23 of the Civil Procedure Rules provides;

> *"The main test for reinstatement of a suit was whether the Applicant honestly intended to attend the hearing and did his best to do so. Two other tests were namely the nature of the case and whether there was a prima facie defense to that case...."*

The grounds in the appellant`s application to set aside the dismissal were that;

(a) That the Affidavit of service sworn by Hans Peter Kabanda on the 19th day of October 2004 was forged.

(b) That it is just and equitable to set aside the dismissal of the suit in the interest of administration of justice.

The appellant argued that service was not effective because instructions had been withdrawn from Emesu& Co. Advocates and there was no way they could have been served, that the handwriting, signature, stamp and the affidavit of service of Hans Kabanda had been forged.

The respondent contended that, the non-appearance of the appellant at the hearing was characteristic of the evasive and dilatory manner in which it conducted its litigation from 1997 to date.

While addressing this matter the learned trial judge stated as follows;

"A part from the allegation that no effective service had been made on the applicant, there was no other sufficient cause that prevented the applicant from appearing in court on the date the suit was fixed for hearing. All in all, I agree with the submission of counsel for the respondent that the first ground of this application is not supported by any evidence. It must therefore fail since the allegation of forgery was not proved. This court finds that ineffective service on the applicant has not been proved."

The *trial Court also found that;*

"The applicant had not been vigilant in seeking redress from court after dismissal of the suit. The suit was dismissed on 28th October 2004 and this application was filed on 21st March 2012, after seven and half years.

The history of this case also shows lack of interest by the applicant in prosecuting the suit prior to its dismissal.....Surely, should such a litigant be taken seriously by this court? That is the highest demonstration of lack of diligence by a litigant and his advocate to have his or her case heard and finalized. In my view, the applicant did not come to court to seek justice but to delay it by abusing the process of court. This court cannot condone that practice because justice is not only for one party"

Counsel for the respondent submitted that the procedure bearing on non-appearance of the plaintiff at a scheduled hearing under Order 9 rule 22 required no proof of service.

Rule 22 of the Civil Procedure Rules provides as follows;

Procedure when defendant only appears.

Where the defendant appears, and the plaintiff does not appear, when the suit is called on for hearing, the court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part of it, in which case the court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

Counsel for the respondent submitted that the dismissal of the main suit was entirely due to the appellant`s indolence. In her affidavit in reply Priscilla Mugisha deposed that, the applicant did not take any steps to prosecute its suit, failed to attend all the mediation meetings despite the mediator`s service of

mediation hearing notices, never fixed the suit for hearing for period of two years as such the court dismissed the suit under the civil procedures.

Dr J.K Masambu testified that he and the appellant`s counsel never appeared for mediation and that he filed HCMA No. 134 of 2012 after about seven and half years because he was pursuing the case with NPART. There is no evidence that the trial court was informed of the parallel proceedings in NPART.

Litigants who, having started litigation, elect to allow that litigation to sink into indefinite abeyance, who have had no serious and settled intent to pursue that litigation and who have, in consequence, acted, in respect of that litigation, in knowing disregard of their obligation to the court and to the opposing party, should not be allowed to carry out with litigation conducted in that manner. See: **Solland International Ltd v. Clifford Harris & Co [2015] EWHC 2018**.

The instant case commenced in1997 with the appellant`s unending amendments to its pleadings in HCCS No.391 of 2002, when court refused to grant further leave to amend, the appellant withdrew the suit on 30th October 2002 and filed a fresh one, HCCS N. 621 of 2002 the following day. For two years the appellant did nothing to prosecute his case and did not attend mediation sessions. It took the respondent to set down the suit for hearing. Due to the appellant`s non appearance, the suit was dismissed. It's after seven and half years that the appellant woke up and applied for reinstatement of the HCCS No 621 of 2002 vide HCMA No. 71 of 2012 which it withdrew. After the withdrawal, the appellant filed the application which is the basis of this appeal.

As already determined, the procedure bearing on non-appearance of the plaintiff under Order 9 rule 22 required no proof of service. Furthermore, the dismissal of the main suit was entirely due to the appellant`s indolence. The record shows that the appellant neglected to attend mediation hearings and then, for two years it failed to take any other step to advance its case and later after such a long delay of five and half years, the appellant decided to bring the application for re-instatement. Clearly, there was lack of effort by the appellant to expedite the prosecution of its suit. From the beginning, the appellant only wanted to ensure that it`s matter remains as a pending suit in court record with no intention of prosecuting it. I have found nothing in the appellant's conduct manifesting a clear intention to pursue its suits.

Mr Masabu for the appellant also submitted that in dismissing HCCS No. 621 of 2002, on only a procedural ground yet the substance of the dispute between the parties required an investigation occasioned injustice to the appellant.

Rules of procedure regarding service of court process are important and non-compliance cannot be treated mere procedural technicalities. The rules are intended to regulate the conduct of court`s business and ensure fairness. They touch on the principle of fair hearing embodied in Article 28 of the Constitution and have to be followed.

The learned trial judge is faulted for dismissing the application because the affidavit in reply did not comply with the law.

The appellant contended that Priscilla Mugisha`s affidavit in reply contained matters of law. This is not correct because she deponed on matters of fact. See paragraph 6, 8 and 13 of the affidavit.

In paragraphs 6, 9, 10, 11, 14, 15, 16, 18, 20 and 21 of her affidavit, Ms. Priscilla was merely asserting facts within her knowledge or belief basing on the history and circumstances of the matter. She deponed the affidavit in her capacity as a bank Secretary of the respondent with knowledge of the material facts. Her statement that Emesu & Co. Advocates was served with the hearing notice was based on the copy of the hearing notice with an acknowledgement of receipt and an affidavit of service from the respondent`s counsel process server. These facts were within her knowledge and belief.

I therefore find no defect in the affidavit of Priscilla Mugisha.

The appellant further contended that the affidavit of service of Hans Peter Kabanda was defective because it did not disclose matters based on his knowledge and belief and court ought to have rejected it as evidence of non-service. He cited ***Kabwimukya v Kasigwa (1978) HCB 251.*** He also contended that the affidavit contained falsehoods because he never served counsel for the appellant as alleged.

The trial judge found no falsehood in the affidavit and that the deponent did not forge the signature. Mr. Emesu did not dispute the stamp from his office on the notice.

While addressing this matter the learned trial judge found that effective service on the appellant`s law firm had been proved.

The appellant`s contentions are unsubstantiated, whatever was stated by the process server in the affidavit of service was based on his knowledge and belief of what transpired when he was effecting court process. I find no reason to interfere with the trial judge`s decision on this ground.

Regarding the claim that there were forgeries of Counsel Emesu`s handwriting, signature on the hearing notice, that the process server was entitled to identify the clerk of the firm he served but this was not done, that the signature said to have been forged should have been subjected to examination by a handwriting expert, the trial judge found that the onus was on the appellant to prove that service was not effective. The allegations that the signature and stamp on the hearing notice were forged had not been proved at all for these reasons, she held that there was effective service.

No evidence was led by the appellant to prove the allegation of forgery of Counsel Emesu`s handwriting, signature and the office stamp. The assertion that the appellant ought to have called in an expert witness to prove these allegations is untenable as the onus was on the appellant to prove its allegation.

The issue of identity of the clerk, was not canvassed during the trial and cannot be raised at this stage.

I find that, service on Emesu & Co. Advocates was made to the clerk of the firm who transmitted the same to Counsel for his signature and the same was

returned signed, written on and stamped with an office stamp. The non-inclusion of the name of the clerk in my view, does not affect the truthfulness of Hans Peter Kabanda`s affidavit of service. His affidavit clearly gives a genuine picture of how he effected court process on Emesu & Co. Advocates even though the name/identity of the clerk was not included.

The contention that the respondent ought to have obtained corroborative affidavit from the clerk is untenable. The learned trial judge considered and relied on the evidence before court and found it sufficient to conclude that service was effective. It was not imperative that she had to obtain corroborative evidence before reading her decision.

The submission that the respondent failed to adduce evidence of Hans Kabanda to rebut their evidence is superfluous. The appellant if he so wished had an opportunity to seek court`s leave to cross examine Hans Kabanda on his affidavit of service which was not done.

I agree with the learned trial judge that service on the appellant was effective service. Further that the appellant showed no sufficient cause for its non-appearance. The learned trial judge exercised her discretion judiciously in dismissing HCMA No.134 of 2012.

On ground 4 the learned trial judge is faulted for having occasioned substantial miscarriage of justice. The appellant cited **Bugisu Cooperative Union Limited vs Lawrence Kitts CACA No.50 of 2001** Lead Judgment of Byamugisha, JA at page 17 wherein she held that; substantial miscarriage of justice is said to occur

where there has been misdirection by the trial court on matters of fact relating to evidence given or where there has been unfairness in the conduct of the trial.

I have found that the trial judge did not misdirect herself in resolving the issues in this appeal. This ground therefore fails.

In light of the above findings, I find no reason to interfere with the decision of the learned trial judge. It is hereby upheld. This appeal is dismissed with costs in this court and the court below.

I so order.

Dated this 18th day of Aug 2020

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CHEBORION BARISHAKI

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO.42 OF 2013

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VERSUS

UGANDA DEVELOPMENT BANK::RESPONDENTS

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CORAM: HON.MR.JUSTICE F.M.S EGONDA –NTENDE, JA

HON.MR.JUSTICE CHEBORION BARISHAKI, JA

HON.MR.JUSTICE MUZAMIRU KIBEEDI, JA

JUDGEMENT OF MUZAMIRU KIBEEDI, JA.

I have had the benefit of reading in draft the judgment in this appeal prepared by my learned brother Barishaki Cheborion, JA and I agree that this appeal should be dismissed with costs.

Dated at Kampala this 18th day of Aug 2020

MUZAMIRU KIBEEDI

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[*Coram: Egonda-Ntende, Barishaki Cheborion, Kibeedi, JJA*]

Civil Appeal No. 42 of 2013

(Arising from High Court (Commercial Court Division) Miscellaneous Application No. 134 of 2012)

BETWEEN

Bulumela Farmers Cooperative Society==========Appellant

AND

Uganda Development Bank==========Respondent

(*On appeal from a ruling of the High Court of Uganda (Obura, J.,) delivered on the 12th day of December 2012*)

Judgment of Fredrick Egonda-Ntende, JA

[1] I have had the opportunity of reading in draft the judgment of my brother, Barishaki Cheborion, JA. I agree with it and have nothing useful to add.

[2] As my brother, Muzamiru Kibeedi, JA, also agrees this appeal is dismissed with costs here and below.

Signed, dated and delivered at Kampala this 18th day of Aug 2020

Fredrick Egonda-Ntende,
Justice of Appeal