THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

Civil Appeal No.190 of 2013

(Arising from Miscellaneous Cause No. 024 of 2012 of the High Court of Uganda at Kampala)

KIBALAMA MUGWANYA :: APPELLANT

VERSUS

BUTEBI INVESTMENTS ENTERPRISES LTD:::::::::::::::::::::::::::: RESPONDENT

CORAM

HON. MR. JUSTICE KENNETH KAKURU, JA
HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA
HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF THE COURT

INTRODUCTION

This matter was filed as a second Appeal arising from the decision of His Worship Philip Odoki Chief Magistrate dated 22nd May, 2009 which decision was appealed against to the High Court. The Appeal at the High court was heard and determined by Hon. Lady Justice Elizabeth Musoke on 19th July, 2013.

BACKGROUND

The Respondent sued the Appellant in the Chief Magistrates Court of Mengo vide Civil Suit No. 2997 of 2010 under Summary Procedure where it sought to recover a sum of UGX 40,000,000/= and costs of the suit. Summons to apply for leave to appear and defend were issued but the Appellant never applied

for leave to appear and defend and thus a default Judgment was entered against him. The applicant being dissatisfied with the Judgment filed an application to set aside the default Judgment which was also dismissed. The Appellant then filed an application seeking for an order of revision of the said Judgment. The court up held the Judgment of the magistrate court because there was no material irregularity and injustice. The Appellant being dissatisfied with the Judgment filed this Appeal.

GROUNDS OF APPEAL

1. **The trial Judge erred in law when she decide that Civil suit no.2997 of 2010 of the Chief Magistrates court of Mengo which was brought under Summary Procedure Order 36 of the Civil Procedure Rules and which also included a claim for interest among others was properly before court and had been properly before court and had been properly handled by the trial chief magistrate.**
2. **The trial Judge erred in law when she failed to consider and revise the entire proceeding, rulings and orders of the chief magistrate in civil suit No.2997 of 2010 and therefore came to the wrong conclusion.**
3. **The trial Judge erred in law when she failed to find that the chief magistrate of Mengo acted illegally or with material irregularity or injustice while civil suit No.1997 of 2010.**

However, when the Respondent filed Conferencing notes on 17th September they framed some issues for determination. These were;

1. **Whether the Appeal filed by the Appellant is incompetent and should be struck out for failure to serve the Respondent with the notice of Appeal and the letter requesting for proceeding and for being filed out of time.**
2. **What are the remedies available to the parties?**

There are no conferencing notes on record for the Appellant. The Appellant furthermore did not attend conferencing hearings before the Deputy Registrar of this Court (on the 2nd October 2014 and 4th November 2014) and consequently the appeal was set down for hearing.

DUTY OF THE COURT

This is a second Appeal, and as such is governed by section 72 of the Civil Procedure Act, Cap 71 which provides;

72. Second Appeal

A. Except where otherwise expressly provided in this act or by any other law for the time being in force, an Appeal shall lie to the Court of Appeal from every decree passed in Appeal by the High Court, on any of the following grounds, namely;

a) The decision is contrary to law or to some usage having the force of law.

b) The decision has failed to determine some material issue of law or usage having the force of law.

c) A substantial error or defect in the procedure provided by this Act or by any other law for the time being in force has occurred which may possibly have produced error of defect in the decision of the case upon the merits.

Section 72 is entrenched by Section 74 which provides that no Second Appeal shall lie except on the grounds mentioned in section 72.

As a second Appellate court, we are required to consider errors of law made by the lower court only. Rule 32(2) of the Judicature (Court of Appeal Rules)

Directions SI 13-10 allows this court to in exercise of its jurisdiction as a second Appeal court to appraise the inferences of fact drawn by the trial court.

Rule 32(2) of the Rules of this court provides that:

"On any Second Appeal from the decision of the High Court acting in the exercise of its Appellate jurisdiction, the court shall have the power to appraise the inferences of fact drawn from the trial court ,but shall not have discretion to hear additional evidence...."

In the case of **Kifamunte Henry v Uganda Criminal Appeal No. 10 of 1997** court held that a second Appellate Court, except in the clearest of cases is not required to re-evaluate the evidence like a first Appellate court. However where the first Appellate court has failed to do so or has applied wrong principles the second Appellant court must correct any errors committed.

REPRESENTATION

Due to the Global pandemic of Covid 19, this court issued directions for lawyers of the parties to address it in written submissions and the Judgment would follow thereafter. The memorandum of Appeal was drawn and filed by Kusiima & Co Advocates who represented the Appellant. The conferencing notes of the Respondent was drawn and filed by Messrs. Matsiko and Co. Advocates. As earlier observed, the Appellant did not file conferencing notes and neither did they file submissions for the hearing.

There is an affidavit of service dated 20th March 2020 by Atuhaire Immaculate a process server of this Honourable court that states that service of hearing notice was effected on counsel for the Appellant M/s Kusiima & Co.

Advocates where she was told that they no longer had instructions to handle this matter.

We shall proceed to address and resolve this Appeal based on the issues raised in the conferencing notes of the Respondent.

Issues for determination

Issue No. 1: Whether the Appeal filed by the Appellant is incompetent and should be struck out for failure to serve the Respondent with the notice of Appeal and the letter requesting for proceeding and for being filed out of time?

Appellants 'submissions

Counsel for the Appellant did file any conferencing notes neither did they file submissions.

Respondents Submissions

Counsel for the Respondent submitted that the Appeal was incompetent because the Appellant failed to take an essential step.

Counsel for the Respondent submitted that the Appellant filed a notice of Appeal on 22nd July 2013 but he did not serve the notice of Appeal on the Respondent.

He submitted that the Appellant even went on to file a record of Appeal on 16th October 2013 and served the Respondent on 29th July 2013 with the memorandum of Appeal.

Counsel for the Respondent submitted that the Respondent was a person directly affected by the Appeal and ought to have been served with the notice of Appeal within seven days after the notice of appeal was lodged in accordance with Rule 79 of the Judicature (Court of Appeal Rules).

He submitted that it was a requirement that the Appellant serve the notice of Appeal and the letter requesting for proceedings upon the Respondent.

Secondly, counsel for the Respondent submitted that the Appeal was filed beyond the required sixty days after lodging the notice of Appeal. He argued that the Appellant did not seek leave to enlarge time.

Counsel for the Respondent cited the case of **Nyendwoha Bigirwa Norah v Returning Officer, Bulissa District and the Electoral commission** Civil Application No.23 of 2011, where the court found the failure by the Respondent to serve the Applicant with a copy of the letter requesting for the proceeding immediately it was written to the court amounted to failure by the Respondent to take an essential step in prosecuting the Appeal and that it was a fatal failure too.

Issue No. 2: What are the remedies available to the parties?

Submissions of Counsel for the Respondent

Counsel for the Respondent submitted that the remedy available was to strike out the notice of Appeal. He also prayed that Respondent be awarded the costs of the suit.

Counsel for the Respondent made an alternative prayer that in accordance with Rule 84(a) of the Judicature (Court of Appeal Rules) Directions, that the

Appellant by failing to institute the Appeal within the prescribed time by law is taken to have withdrawn the Appeal and is liable to pay the costs of the Appeal to the Respondent.

Court's findings and decision on the issues

The facts of this Appeal are that the Respondent sued the Appellant in the Chief Magistrate Court under Summary Procedure seeking to recover 40,000,000/=. The Appellant did not apply for leave to appear and defend and thus a default Judgment was entered against him. He then filed an Application before the High court for Revision under Section 83 of the Civil Procedure Act.

Section 83 of the Civil Procedure Act gives the High Court power to revise the case which has been called for Revision on ground that the court appears to have exercised jurisdiction not in it in law, or failed to exercise jurisdiction so vested; or acted in the exercise of its jurisdiction illegally or with material irregularity or injustice. Upon such revision having taken place, the High court has discretion to make such order as it thinks fit however no such power of Revision shall be exercised unless the parties are given opportunity of being heard unless where from the lapse of time or some other cause the exercise of that power would involve serious hardship to any person.

The file is supposed to be sent back to the trial court with such directions as the court may think just. In this particular case the, the Application for Revision was refused and the order of the magistrate was upheld with costs.

Interestingly enough, the matter before the magistrates' court was a suit by way of Summary Procedure in which a default Judgment had been entered. There are two provisions which we may consider as material. The first is

Order 36 Rule 11 of the Civil Procedure Rules which allows the trial court to set aside a decree entered in default if the court is satisfied that the service of the summons was not effective or for any other good cause which shall be recorded. Where the court refuses to set aside the decree, then the decree stands. The question is whether the refusal to set aside the decree upon an application on the ground of want of service is appealable and the other Applicant in this matter exercised this option.

In our opinion, the default Judgment itself is not appealable because it is not a Judgment on the merits. It can only be set aside. Under Section 2 of the Civil Procedure Act, a decree does not include any adjudication from which an Appeal lies such as an Appeal from an order but not the default Judgment. To us it is an application to set aside the default Judgment and the refusal thereof which is appealable as an appeal from an order but not the default judgment which may be set aside. In any case, a default judgment is entitled upon failure to apply for leave to defend a summary suit and is directed by the Rules.

Under Order 44 of the Civil Procedure Rules an Appeal does not lie as of right from a dismissal of an application to set aside a judgment in default of appearance under Order 36. Order 44 rule 1(2) of the CPR provides that an appeal shall not lie from any other order except with leave of court making the order or of the court to which an appeal would lie if the leave were given. Order 44 Rule 1 (1) lists the orders which are appealable as of right and it does not include an order of dismissal of an application to set aside the default Judgment under Order 36 rule 11 of the Civil Procedure Rules.

In this matter the Appellant never appealed, he applied for Revision of the decision. Apart from this being an unusual procedure because default

Judgment is entered upon satisfaction that the defendant was served but did not file an application for leave within the period ordered in the summons, an application for revision of the magistrates' order is at the discretion of the High Court. The question has always been what the procedure should be to move the court to revise the record. When you consider Section 83 of the Civil Procedure Act, it envisages the calling of the record by the High court in its supervisory capacity. It does not envisage an application under the Civil Procedure Rules. It only provides that the parties shall first be given an opportunity of being heard when conducting the revisionary exercise. The Application had been brought under Section 83(c) of the Civil Procedure Act as well as order 52 Rules 1 and 2 of Civil Procedure Rules. The supervisory powers of the High Court are found under section 17 of the Judicature Act which provides that:

> *" 17. Supervision of magistrates courts.*
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> *(1) The High court shall exercise general powers supervision over magistrates' courts, the IIigh court shall exercise general powers of the supervision over magistrates' courts.*
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> *(2) With regard to its procedures and those of the magistrates courts, the high court shall exercise its inherent powers to prevent abuse of the process of the court by curtailing delays, the powers to prevent abuse of the process of the court by curtailing delays, including the power to limit and stay delayed prosecutions as may be necessary for achieving the ends of justice..."*

The main remedy that was sought by the applicant in this matter was an order for retrial. The main ground as appears in the Judgment of the High court is

that the Appellant was not satisfied with the manner in which the Chief Magistrate handled the case. Secondly, the defendant applicant claimed to have a counterclaim against the plaintiff. Thirdly, that judgment was entered against him in the summary suit based on a false affidavit of service in which it was claimed that he was served in the presence of the area LC1 General Secretary.

The question is why had the applicant not applied to set aside the default Judgment under Order 36 rule 11 of the civil Procedure Rules? The question of failure to serve is not a matter that goes to the jurisdiction of the Chief Magistrate. In the very least an application to set aside the Judgment and which is refused can be appealed with the leave of court. For emphasis and ease of reference section 83 of the CPA provides as follows:

" 83. Revision.

The High court may call for the record of any case which has been determined under this act by any magistrates court, and if that court appears to have-

(a) Exercised a jurisdiction not vested in it in law;

(b) Failed to exercise a jurisdiction so vested; or

(c) Acted in the exercise of its jurisdiction illegally or with material irregularity or injustice, the High court may revise the case and may make such order in it as it thinks fit; but no such power of revision shall be exercised-

(d) Unless the parties shall first be given the opportunity of being heard; or

(e) Where, from the lapse of time or other cause, the exercise of that power would involve serious hardship to any person..."

Upon the application for revision being refused, the very least that applicant could done is to apply for leave to appeal it. Is there a right of Appeal from such an order? In the very least it has to be with leave of court.

The decree of the court is dated 14th December, 2010. On the 21st January, 2011 the parties executed a consent settlement compromising their rights by consent of the parties. The consent settlement is at page 44 of the record of appeal. In the premises, this is not a second appeal and no appeal lies at all for the reasons given above.

Furthermore, Rule 82 of the Judicature (Court of Appeal Rules) Directions provides that a person on whom a notice of appeal has been served may at any time, either before or after the institution of the appeal, apply to the court to strike out the notice or the Appeal, as the case may be, on the grounds that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

In the case of **Kasirye Byaruhanga & Co Advocates v Uganda Development Bank CA** No. 2 of 1997 the Supreme Court struck out the Appeal because a letter alleged to have requested for proceeding before the Principal Judge was not served upon the Respondent.

In coming up with this decision court reasoned that,

"it is prudent and a matter of good practice for advocates being candid to each other prior to hearing of Appeals (or cases) so that questioned aspects of any Appeal can be thrashed out between the advocates before the hearing date to minimize delays and costs."

We are satisfied that the Appellant failed to take essential steps in prosecuting the Appeal when he failed to serve a notice of Appeal upon the Respondent as required by the law. He further failed to serve the record of appeal within the time stipulated under the Rules of this court. The requirements are not merely procedural. They are mandatory and ought to have been complied with.

We find merit in the objections raised by the Respondent and we uphold them. We therefore find that there is no appeal that lies to this court.

We accordingly dismiss this Appeal with costs to the Respondent.

Dated at Kampala this 11th day of Feb 2021

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HON. MR. JUSTICE KENNETH KAKURU, JA

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HON.MR. JUSTICE GEOFFREY KIRYABWIRE, JA

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HON.MR. JUSTICE CHRISTOPHER MADRAMA, JA