THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 271 OF 2019

ALI MUTEZA..... APPELLANT

VERSUS

1. **JESSICA NAKKU AGANYA**
2. **PATRICK KASUMBA** } **..... RESPONDENTS**

CORAM: HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

HON. LADY JUSTICE MONICA MUGENYI, JA

HON. MR. JUSTICE REMMY KASULE, Ag. JA

JUDGMENT OF HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

Introduction and factual background

This is a second Appeal. The facts of this Appeal are well articulated in the Judgments of my brethren Hon. Lady Justice Monica Mugenyi, JA and Hon Mr. Justice Remmy Kasule, Ag. JA and I shall not, in the interests of brevity, restate the detailed facts in this Judgment as well. Suffice it state however, that this dispute in the courts started at the Chief Magistrates Court of Nabweru wherein the Respondents were sued in Trespass on the land comprised in Kyadondo Block 206 Plot 681 at Namere, Mpererwe (the suit land). That suit ended in an

ex parte Judgment which was eventually set aside on condition that Respondents deposited Ug Shs 15,112,000/= (the value of the ex parte decretal amount and taxed costs). The Respondents then made a further Appeal to the High Court against the decision on service and security for costs. The High Court now, as a first Appellate Court, upheld the Appeal and found that there had been no proper service of Court summons at the trial Court and that it was not proper for an Order for security for costs to have been made.

Appeal to this Court.

The Appellants have now lodged this Appeal proffering the following Grounds namely:

1. The Learned Trial Judge erred in law when she held that the service of summons in the lower court had not been effected on the Respondents.
2. The Learned Trial Judge erred in law when she granted costs of the Appeal to the Respondents.
3. The learned Trial Judge erred in law when she failed to adequately re-evaluate the evidence on record and thus led to a wrong conclusion.

Both parties filed and relied on their written submissions.

Resolution.

The duty of a second Appellate Court was well articulated in the matter of **Baingana John Paul V Uganda** Civil Appeal No. 08 of 2010 where it was held:

"On a second Appeal, this Court is required to determine whether or not the first appellate Court carried out its duty of re-evaluating the evidence. The duty of a Court entertaining a second Appeal was set out in Kifamunte Henry Vs Uganda: Criminal Appeal No. 10 of 1997 when the Supreme Court while discussing this

very issue stated as follows; Once it has been established that there was some competent evidence to support a finding of fact, it is not open, on second Appeal to go into the sufficiency of that evidence or the reasonableness of the finding. Even if a Court of first instance has wrongly directed itself on a point and the court of first appellate Court has wrongly held that the trial Court correctly directed itself yet, if the Court of first Appeal has correctly directed itself on the point, the second appellate Court cannot take a different view; R. Mohamed Ali Hasham vs. R (1941) 8 E.A.C.A. 93. On second Appeal, the Court of Appeal is precluded from questioning the findings of fact of the trial Court, provided that there was evidence to support those findings, though it may think it possible, or even probable, that it would not have itself come to the same conclusion; it can only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law: R. vs. Hassan bin Said (1942) 9 E.A.C.A. 62..."

I have had the opportunity of reading the Judgments in draft of my brethren Lady Justice Monica Mugenyi and Justice Remmy Kasule. On Ground number 1, both Justices disallow the Ground albeit for slightly different reasons. Lady Justice Monica Mugenyi found that the trial Court, using its discretion, made the correct decision to set aside the ex-parte judgment despite the incorrect finding that there had been proper service. On Appeal, the issue of proper service remained in issue and had too, to be determined. She further held that the first appellate Court could not be faulted for having arrived at the decision that there had not been proper service. Justice Remmy Kasule found that the affidavit of service of the Court Summons did not meet the requirements under Order 5 Rule 16 of the Civil Procedure Rules because the said affidavit did not identify by name or otherwise the persons who had been served with

Court Process. He accordingly found that the first and second Defendants at the trial Court level were not properly served.

I am inclined to agree with the finding of Justice Remmy Kasule that more than just the proper exercise of discretion, it is evident that the affidavit of service was far too general to meet the requirements of personal service. I would like to add that the quality of affidavits of service used in the Courts is increasingly falling below required legal standards. Courts should take particular care in accepting affidavits of service especially where it is averred that service has taken place but party so alleged to have been served does not show up. An erroneous reliance on a defective affidavit leads to a miscarriage of justice and an unnecessary lengthening of judicial proceedings to correct the error instead of resolving the underlying dispute in Court. As a general rule, ex-parte and/or default Judgments cannot be regarded in the same way as Judgments on the merits and can be, for just cause, in the interest of justice, set aside. As to the matter of security for costs, I too, like Justice Remmy Kasule, agree with the findings and decision of Lady Justice Monica Mugenyi and have nothing more useful to add.

For the above reasons, I too, disallow ground number 1.

As to Ground number 2, the issue in contention here is whether the appellate Judge was correct to award costs of the Appeal to the Respondents. The first Appellate Court held that costs of the Appeal be awarded to the present Respondents but remained silent on costs at the trial Court.

The general proposition of the law is espoused in Section 27 (2) of the Civil Procedure Act. That is, costs follow the event unless there is good reason to depart from this general rule. In this regard, I again have had the benefit of

looking at my brethren's findings and decision in draft. Lady Justice Monica Mugenyi found that the failure of service at the trial Court was occasioned by a court process server and this was corrected by the Court itself when the *ex-parte* Judgment was set aside and therefore the Appellant should not have been condemned in costs in the trial Court. She found that this is a good reason to depart from the general rule on costs. Justice Remmy Kasule, on the other hand, finds that being the successful party, costs of the first Appeal go to the Appellants that is the Respondents in this matter. He made no further finding.

To my mind, this Ground was premised on the award of costs at first Appeal only. In any event when the *ex-parte* Judgment was set aside at the trial Court it was held that each party bear their own costs and so costs at the trial Court should not really concern this Court.

I too, like Justice Kasule would disallow the Appeal as to costs on first Appeal.

Ground number 3 relates to the evaluation of evidence. I agree with both my brethren that this Ground, which is now becoming very notorious in memoranda of appeals nowadays and a show of poor draftmanship, offends Rule 86 (1) of the Rules of this Court and is accordingly struck out.

Final Result.

All grounds of Appeal fail and I associate myself with the Orders as made by the Hon Justice Remmy Kasule. I also agree that six years of litigating one substantive issue of whether there was proper service instead of dealing with the underlying dispute in the main suit is very unfortunate and is also a denial of justice that should be quickly remedied.

Final Orders.

Based on the above findings I now make the final Orders as follows:

1. The ex-parte proceedings and Judgment in Chief Magistrate's Court, Nabweru Civil Suit No. 098 of 2015 dated 30th May are hereby set aside.
2. The Defendants to Chief Magistrate's Court, Nabweru Civil Suit No. 098 of 2015 are to file and serve the Plaintiff their respective written statements of defence within 30 days from the date of delivery of this Court of Appeal Judgment.
3. The Court file of Chief Magistrate's Court Nabweru Civil Suit No. 098 of 2015 is to be immediately handed over to the Chief Registrar, High Court, who is to ensure that through the Land Division, High Court, the same Court file is placed before another Chief Magistrate other than the one who presided over the proceedings giving rise to this Appeal, to hold a retrial of the case any time after 30 days have expired from the date of delivery of this Court of Appeal Judgment.
4. Costs of this Appeal and of the first Appeal are granted to the Respondents.

It is so Ordered.

Dated at Kampala this 20th day of Dec 2021.

HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT KAMPALA

CORAM: KIRYABWIRE; MUGENYI, JJA AND KASULE, AG. JA

CIVIL APPEAL NO. 271 OF 2019

BETWEEN

ALI MUTEZA ..... APPELLANT

AND

1. **JESSICA NAKKU AGANYA**
2. **PATRICK KASUMBA ..... RESPONDENTS**

(Appeal from the Judgment of the High Court of Uganda at Kampala (Lwanga, J) in Civil Appeal No. 15 of 2018)

JUDGMENT OF MONICA K. MUGENYI, JA

A. Introduction

1. Mr. Ali Muteza ('the Appellant') instituted **Civil Suit No. 98 of 2015** in the Chief Magistrates Court of Nabweru ('the Trial Court) alleging trespass by Ms. Jessica Aganya Nakku and Mr. Patrick Kasumba ('the Respondents') on land comprised in Kyadondo Block 206 Plot 681 at Namere, Mpererwe.

2. Following the Respondent's failure to file a written statement of defence in the matter, an *ex parte* judgment was delivered in favour of the Appellant on 30th May 2017, whereupon the Respondents filed **Miscellaneous Application No. 295 of 2017** by which they successfully set aside the *ex parte* judgment and decree in respect of the head suit. They were, nonetheless, ordered to deposit what is understood to have been security for costs in the sum of Ushs. 15,112,000/= before filing their defence in the matter. That sum of money represented the *ex parte* decretal amount and the taxed costs of the suit.

3. Despite having prevailed in the trial court and set aside the *ex parte* judgment, the Respondents successfully appealed that court's decision on proper service of court process and the security for costs. The Appellant, in turn, lodged this second appeal in this Court challenging the judgment and orders of the High Court in **Civil Appeal No. 58 of 2018**.

4. The Appellant was represented at the hearing by Mr. Anthony Okwenye, while Mr. Andrew Wamina appeared for the Respondents.

B. Factual Background

5. The Respondents' appeal in the High Court faulted the trial court for its finding that they had been served with court summons and hearing notices in **Civil Suit No. 98 of 2015**. It did also challenge the court's order for them to furnish a security deposit of Ushs. 15,112,000/= as a precondition to their filing a written statement of defence and participating in the trial proceedings, yet that sum of money had not been proved before it. They sought the following reliefs:

    I. The setting aside of the order directing them to deposit security for costs.

II. The Appellants be awarded the costs of that appeal and of the application before the lower court.

III. Any other relief as the High Court deemed appropriate.

6. On appeal before the High Court, it was argued for the Respondents that the service of summons fell short of the dictates of Order 5 rule 16 of the Civil Procedure Rules (CPR) in so far as the identity of the persons served with the court process had not been ascertained by the process server. It was further argued that no inquiry had been made of the process server by the Trial Court so as to confirm due service, as is supposedly required by Order 5 rule 17 of the CPR. The foregoing contestations were roundly dismissed by counsel for the Appellant, who urged the court to ignore them on account of the falsehoods contained in the Respondents' affidavits. It was particularly averred that the Respondents had falsely claimed not to have been served with the court process in issue and misrepresented the date they became aware of the *ex parte* judgment against them.

7. The High Court upheld the appeal, agreeing with the Respondents that no proper service had been demonstrated before the trial court given that, although the identity of the persons served had been contested, no affidavit in reply was forthcoming from the process server as proof that the right persons had indeed been served. The learned judge adjudged the Appellant's affidavit in reply in the matter to have been inadequate to prove effective service by the process server, and found the affidavit of service by the process server to have fallen short of the provisions of Order 5 rule 16 of the CPR. In her estimation, the falsehood in the Respondents' affidavit merely pertained to the date of a meeting at which they found out about the *ex parte* judgment, which error was subsequently clarified in an affidavit of rejoinder that confirmed non-service of court process upon them. Having so held, the learned judge found no justification for the precondition of the security deposit ordered by the Trial Court, and condemned the Appellant in costs to the Respondents.

8. Dissatisfied with the High Court's decision, the Appellant lodged this second appeal in this Court, proffering the following grounds of appeal:

I. **The learned Trial Judge erred in law when she held that the service of summons in the lower court had not been effected on the Respondents.**

II. **The learned Trial Judge erred in law when she granted costs of the appeal to the Respondents.**

III. **The learned Trial Judge erred in law when she failed to adequately re-evaluate the evidence on record and thus led to a wrong conclusion.**

9. The Parties elected to rely upon written submissions and/ or conferencing notes filed in the matter and adopted by their advocates at the hearing of the Appeal. The Appeal shall be determined on that basis, and all three grounds of appeal shall be addressed concurrently.

C. **Determination**

10. It is the contention under *Ground 1* that a court process server being a court employee, the Appellant should not have been held responsible for how he conducted his duties or any defects in his affidavit of service. It is argued that since the Respondents' appeal had been premised on purported falsehoods in the process server's affidavit of service, they should have applied to cross examine him under Order 19 rule 2(1) of the CPR, failure of which rendered his evidence untested under oath (and presumably uncontroverted). The learned appellate judge is thus faulted for her finding that in the absence of an affidavit in reply by the process server, the Respondents' contestations with regard to his affidavit of service remained uncontroverted. In Counsel's view, the process server was not a party to **Miscellaneous Application No. 295 of 2017** and therefore had no *locus standi* to respond to the merits of that application. The case of **Kithende Kalibogha & 2 Others v Eleanora Wismer, Civil Appeal No. 34 of 2010** (Court of Appeal) was cited as authority for the proposition that *locus standi* is the right one has to be heard in a court of law or other appropriate proceeding, such right being tied to a party's direct interest in a matter, which in turn bestows eligibility to claim relief in the event that the party's interest is being adversely affected.

11. With regard to *Ground 2* of the Appeal, it is argued that the trial court acted well within its judicial discretion as provided for under Order 9 rule 27 of the CPR when it ordered for security of costs, and the learned judge's decision to the contrary amounted to an

interference with that judicial discretion. In learned Counsel's view, the Ushs 15,112,000/= supposedly awarded by the Trial Court was fair. Finally, under *Ground 3*, the Appellant prays for the costs of the Appeal, as well as the costs in the lower courts.

12. Conversely, Counsel for the Respondent contends that the learned judge was alive to and complied with her duty as a first appellate court when she duly re-evaluated the evidence on record, subjected it to a retrial and arrived at her own findings and conclusions. Whereas admittedly this Court may interfere with the findings of fact by the courts below in exceptional circumstances, without any elaboration, it was nonetheless opined that such circumstances did not exist in the matter before it presently. On the other hand, again with no substantiation, *Ground 3* is postulated to offend Rule 86(1) of the Judicature (Court of Appeal) Rules. Finally, the Court was urged to remain cognizant of the original dispute, the proposition being that this Appeal is brought in bad faith and with intent to entrench the Appellant's continued occupation of land that he obtained wrongfully.

13. By way of Reply, Counsel for the Appellant took issue with what he perceived to be premature reference to the bona fides of the substantive suit by opposite Counsel, arguing that in so far as the present Appeal was not founded on the merits thereof, such reference was misguided. On the authority of **Behange v School Outfitters (U) Ltd (2001) 1 EA 20**, he maintained that an appellate court was not at liberty to interfere with a trial court's discretionary position on costs unless such discretion had been exercised injudiciously or on wrong principles. This was opined to be the case with the impugned judgment in this appeal, where the Appellant had been unjustly condemned to costs accruing from defective service of court process. Counsel further cited the decision in **Acali Manzi v Nile Bank (1994) KaLR 123** to argue that the Respondents having opted not to attach their written statement of defence to **Miscellaneous Application No. 295 of 2017**, there was no basis for the order to file a defence in the substantive suit as their prospects of success at trial were not readily discernible.

14. It is necessary to briefly retrace the judicial precepts governing the duty of first and second appellate courts in exercise of their judicial function. The duty upon a first appellate court is aptly stated in **Henry Kifamunte v Uganda, Criminal Appeal No. 10 of 1997** (Supreme Court). It can be summed up as follows:

(a) the appellate court is required to subject the evidence and any other materials that were before the trial court to fresh judicial scrutiny then draw its own conclusions therefrom, with appropriate regard for *bona fides* of the judgment appealed from.

(b) Even where the appellate court unearths errors by the trial court, it should only interfere with the trial court's judgment where the errors have occasioned a miscarriage of justice.

(c) Where the cogency of the evidence hinges on the manner and demeanour of a witness(es), deference should be made to the trial judge's impression of the credibility of the witness; otherwise (or where it does not), other factors may be considered to determine the credibility of evidence and warrant a departure from the trial judge's position even on a question of fact arising from evidence the appellate court did not see.

15. In **Banco Arab Espanol v Bank of Uganda, Civil Appeal No. 8 of 1998** (Supreme Court), the foregoing principles were held to be applicable to the re-appraisal of both oral and affidavit evidence save that the trial court's impressions on the demeanour of witnesses would be inapplicable to affidavit evidence. In addition, that case restated the principle advanced in **Henry Kifamunte v Uganda** (supra) that a second appellate court (as is this Court presently) would not be required to re-evaluate the evidence as is the case with a first appellate court, but is restricted to a determination of whether the first appellate court did indeed abide the judicial duty expected of it. It further affirmed the observation in the **Henry Kifamunte** case that a second appellate court would '**consider the facts of the appeal to the extent of considering the relevant point of law or mixed law and fact raised in the appeal, ...** (and) **can interfere with the conclusions of the** (first appellate court) **if it appears that in its consideration of the appeal as a first appellate court, it misapplied or failed to apply the principles as set out.**'

16. I do accordingly commence my interrogation of the present Appeal on that premise. The matter in contention before both the High Court and this Court is the veracity of the court process server's (Mr. Ocen's) averment that he did effect service of court summons upon the Respondents. The High Court rendered itself as follows:

Misc. Application No. 295 of 2017 was challenging the facts in Ocen's affidavit as false. However, the said Ocen never swore an affidavit in reply to show that the averments in his affidavit which were being challenged were truthful, yet the 1st Appellant's affidavit in support of the application alleged that his affidavit was false as it is not true that she was served but declined to acknowledge service. The averments in the Respondent's affidavit in reply which purport to show that Ocen served the Appellants cannot effectively rebut the allegations that the contents of Ocen's affidavit are false, as alleged in this application. The Respondent did not show that he had authority to depone to those facts on behalf of Ocen, nor did he disclose the source of his information rebutting the allegations of a false affidavit. His affidavit did not even confirm the fact that the Respondent did accompany Ocen to effect service as Ocen averred in his affidavit, and it did not show who showed Ocen the residence and identities of the Appellants/ Defendants. I also agree with learned counsel for the Appellants that Ocen's affidavit of service did not satisfy the conditions under Order 5 rule 16 of CPR, and that it fell short of confirming that Ocen served the right people. No name and address of the person who identified the Appellants to Ocen if at all, were mentioned in the affidavit, yet there is no indication that he had previously known them. He only referred to a man and his mother, without indicating the person who identified the said two people to him as the Defendants.

17. Quite clearly the High Court did address itself to the evidence on record in the application to set aside the *ex parte* judgment and drew its own conclusions. Flowing from those conclusions, the court reversed the trial court's finding that the Respondent's had been duly served with court process but chose to ignore it, and allowed the appeal before it with costs to the Respondents. It is the validity of those conclusions that are under challenge presently for being premised on wrong principles. An interrogation of those conclusions against the applicable legal principles is pertinent.

18. The issuance and service of summons is governed by Order 5 rule 1(1) and (2) of the CPR. They provide as follows:

> **(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 subrule (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.

19. Meanwhile, Order 5 rule 16 of the CPR that was successfully invoked by the Respondents in the High Court provides as follows:

> **The serving officer shall, in all cases in which the summons has been served under rule 14 of this Order, make or annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which the summons was served, and the name and address of the person, if any, identifying the person served and witnessing the delivery or tender of the summons.**

20. Order 5 rule 14 that is cross-referenced in the foregoing legal provision addresses personal service of court process upon a defendant, enjoining the process server to secure such defendant's acknowledgment of service upon the summons served, but mandates courts to declare the summons duly served if satisfied that the defendant refused to so endorse the summons.

21. In the instant case, Robert Ocan – the process server did on 29th October 2015 depone an affidavit of service whereby he attested to having served the summons in respect of **Civil Suit No. 98 of 2015** upon both Respondents but Ms. Jessica Nakku Aganya (the First Respondent) declined to endorse the summons. The process server attests to having been in the company of the Appellant when he effected service upon the First Respondent. However, he did not indicate whether he had prior knowledge of the Respondents or they were identified to him by the Appellant or indeed any other circumstances surrounding his alleged service of process upon the First Respondent. It is noteworthy that he did not mention whether the person that was in her company was the Second Respondent or any other young man. In any event, the Second Respondent

would have required personal service upon him as stipulated in Order 5 rule 9 of the CPR. Consequently, it seems to me that there was improper service upon the Respondents and cannot fault the first appellate court for arriving at the same conclusion.

22. In the event, the Respondents did not file a defence in the matter and judgment was entered against them by the trial court. Under Order 9 rules 10 and 11(2) of the CPR, failure of a defendant to file a defence would entitle the plaintiff to have the suit heard and determined *ex parte*, but the resulting default judgment may be set aside under Order 9 rule 12 of the CPR. The latter rule reads as follows:

> **Where judgment has been passed pursuant to any of the preceding rules of this Order, ... the court may set aside or vary the judgment upon such terms as may be just.**

23. In this case, although the trial court was not persuaded that there was improper service, it nonetheless set aside its default judgment in respect of the civil proceedings pending before it in exercise of its unfettered discretion and on such terms as it deemed just as ordained by Order 9 rule 12 of the CPR. It is well settled law that an appellate court should not interfere with the exercise of a trial court's unfettered discretion unless it is satisfied that the trial court misdirected itself in some matter and as a result arrived at a wrong decision, or where it is manifestly apparent from the case as a whole that the trial court was clearly wrong in exercise of its discretion and as a result there was a miscarriage of justice. *See* ***Banco Arab Espanol v Bank of Uganda*** *(supra) and* ***Mbogo & Another v Shah (1968) EA 93***. In **Devji v Jinabhai (1934) 1 EACA 89** it was held that where there was no improper exercise of discretion a judge's decision would not normally be upset. Courts unfettered discretion may only be qualified by the duty upon them to exercise it judiciously. Thus, a compelling observation was made in **Remco Ltd v Mistry Jadva Parbat & Co. Ltd & Others (2002) 1 EA 233** (CCK) that in exercise of their discretion courts' focus should be to do justice as between the parties;[1] '**the discretion is intended to avoid injustice or hardship .... but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.**'[2]

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[1] See **Patel v EA Cargo Handling Services Ltd (1975) EA 75**.
[2] See **Shah v Mbogo (1967) EA 116**.

24. In a case such as the present one where, in exercise of its discretion, the trial court arrived at a correct decision to set aside its default judgment despite the incorrect finding that there had been proper service of court process; ordinarily a first appellate court would not interfere with the judicial result. However, *Ground 1* of this appeal takes specific issue with the trial court's finding of due service of process. The first appellate court was therefore obliged to determine the issue. Accordingly, it reversed the trial court's finding of due service of court process upon the Respondents and adjudged its decision on security for costs to have been devoid of justification in the absence of proper service of court process. Having arrived at the same conclusion that there was no proper service, the first appellate court cannot be faulted for the decision it arrived at in that regard. I revert to the costs awarded as a consequence thereof under my consideration of *Ground 2* of this Appeal.

25. I am constrained, however, to address the question of security for costs that was not re-evaluated on its merits by the first appellate court. Although the Respondents had challenged the trial court's order for them to furnish a security deposit, the first appellate court simply adjudged that order to have been devoid of justification in the absence of proper proof of service. With respect, I find this conclusion to be an improper premise for the first appellate court's decision on the issue. There is no nexus between an order for the furnishing of security for costs and improper service of court process. The practice of security for costs for natural persons is governed by Order 26 rule 1 of the CPR. It reads:

> **The court may if it deems fit order a plaintiff in any suit to give security for the payment of all costs incurred by any defendant.**

26. That legal provision (then Order 23 rule 1) was applied in the case of **Anthony Namboro & Another v Henry Kaala (1975) HCB 315**, and the main considerations to be taken into account in applications for security for costs were held to be as follows:

> (a) **Whether the applicant is being put to undue expenses by defending a frivolous and vexatious suit;**
> (b) **That he has a good defence to the suit;**
> (c) **That he is likely to succeed.**
>
> **Only after these factors have been considered would factors like inability to pay come into account.**

MCH.

27. In **GM Combined Ltd v AK Detergents (U) Ltd, (1) Civil Appeal No. 34 of 1995**, acknowledging that the powers granted to courts under Order 26 rule 1 of the CPR are entirely discretionary, it was held (per Oder JSC):

> **In a nut-shell, in my view, the Court must consider the prima facie case of both the plaintiff and the defendant. Since a trial will not yet have taken place at that stage, an assessment of the merit of the respective cases of the parties can only be based on the pleadings, on the affidavits filed in support of or in opposition to the application for s.f.c.** (security for costs) **and any other material available at that stage.**

28. It becomes abundantly clear from the above statutory provision and related case law that applications for security for costs arose from the need for a defendant with an otherwise good defence to protect itself from frivolous and vexatious actions by a plaintiff that might ultimately be unable to meet the cost of the litigation. Accordingly, they are lodged by a defendant and not the plaintiff, as happened before the trial court; and most certainly not for the reasons advanced and in the circumstances that pertained before that court. For instance, whereas as observed in **GM Combined Ltd v AK Detergents (U) Ltd** (supra) the **Anthony Namboro & Another v Henry Kaala** case hinged on the absence of a plausible defence hence the dismissal of the application for security for costs; in the matter before the trial court there was no defence at all. It is manifestly apparent that the trial court misdirected itself as to the law governing security for costs.

29. Be that as it may, given that the express contours of *Ground 1* of this Appeal as framed, it is my finding that in so far as there was improper service of court process that ground of appeal succeeds.

30. *Ground 2* of this second appeal pertains to the costs of the first appeal, the contention being that they were erroneously awarded to the Respondents. To the extent that section 27(2) of the Civil Procedure Act (CPA) provides for costs to follow the event, the Respondents having succeeded in the High Court would have been entitled to the costs of that litigation. However, courts may for good reason depart from the general rule on costs section 27(2) of the CPA. I am alive to the fact that a second appellate court may only interfere with the findings of a first appellate court where the latter court reneges on its duty as espoused in **Henry Kifamunte v Uganda** (supra). In the instant case, the first

appellate court was faulted for condemning the Appellant to costs arising from the actions of a process server that is a member of the court staff. The circumstances of the case are that the lower court had itself set aside the default judgment in issue. Therefore, the improper service of court process notwithstanding, the trial court's decision to set aside the default judgment was neither wrong nor did it occasion a miscarriage of justice so as to warrant interference therewith by the first appellate court. Under those circumstances, the Appellant was liable to suffer the consequences of the improper service in terms of the setting aside of the default judgment (as he did), but should not necessarily have been condemned to costs. That would have been good reason for the High Court to depart from the general rule on costs and order each party to bear its own costs. I am satisfied, therefore, that the first appellate court wrongfully condemned the Appellant to the costs of the first appeal and would, accordingly, resolve *Ground 2* of this Appeal in the affirmative.

31. *Ground 3* of this Appeal faults the learned judge for failing to adequately re-evaluate the evidence on record thus arriving at a wrong conclusion. To the extent that this ground of appeal omits to specify which wrong decision was arrived at, it offends Rule 86(1) of this Court's Rules of Procedure. That Rule requires a Memorandum of Appeal to set forth concisely, under distinct heads without argument or narrative, the ground of objection appealed against, specifying the points considered to have been wrongly decided. Such conciseness was not forthcoming in *Ground 3*. In **Ranchobai Shivabhai Patel Ltd & Another v Henry Wambuga & Another, Civil Appeal No. 6 of 2017**, the Supreme Court adjudged such a ground to be wrong in law and ought to be struck out. The same is accordingly struck out.

Conclusion

32. In the final result, the Appellant having only succeeded in one ground of appeal, the Respondents are the successful party. It is trite law that costs should follow the event unless a court for good reason decides otherwise. Therefore, as the successful party the Respondents would be entitled to the costs of the Appeal. I am aware, however, that neither party was responsible for the mishaps in service of court process that underpinned the lower courts' decisions and should not be penalized for a process that was beyond

their reach. The most pertinent consideration presently is for both parties to expeditiously be heard in **Civil Suit No. 98 of 2015**.

33. The upshot of my judgment is that the Appeal substantially fails with the following orders:

    I. The Respondents are ordered to file their written statement(s) of defence in **Civil Suit No. 98 of 2015** forthwith, with no security for costs.

    II. It is ordered that **Civil Suit No. 98 of 2015** be expeditiously heard *inter partes*.

    III. The Respondents are awarded two-thirds of the costs of this Appeal. Each party to bear its own costs in both lower courts.

It is so ordered.

Dated and delivered at Kampala this 20th **day of** Dec **, 2021.**

M M Mugenyi

Hon. Lady Justice Monica K. Mugenyi
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

Civil Appeal No. 271 of 2019

Ali Muteza :: **Appellant**

Versus

1. Jessica Nakku Aganya
2. Patrick Kasumba :::::::::::::::::::::::::: **Respondents**

Coram: **Hon. Mr Justice Geoffrey Kiryabwire, JA**
Hon. Lady Justice Monica Mugenyi, JA
Hon. Mr. Remmy Kasule, Ag. JA

Judgment of Remmy Kasule, Ag. JA

This Judgment is in respect of a second Appeal.

The Appellant sued the Respondents jointly and severally for a declaration that he was the owner of the suit land and that the Respondents were trespassers thereon in Civil Suit No. 098 of 2015 in the Chief Magistrate's Court of Nabweru. The suit land

was comprised of Kyadondo Block 216 Plot 681 at Nameere LCI, Mpererwe, Kawempe Division, Kampala City.

The hearing of the case proceeded ex-parte on 20th April, 2016 before the Chief Magistrate's Court, Nabweru, on the ground that the Respondents, though duly served with Court summons to file a defence to the suit, both of them had failed to do so within the time prescribed by law. On 30th May, 2017 the Chief Magistrate's Court, Nabweru, delivered Judgment in favour of the Appellant against both Respondents. The Appellant was declared to be owner of the suit land and the Respondents were ordered to give immediate vacant possession of the same to the Appellant. The Court also awarded both special and general damages as well as costs of the suit to the Appellant jointly and severally against the Respondents.

On 14th November, 2017 both Respondents lodged against the Appellant in the same Chief Magistrate's Court, Nabweru, **Miscellaneous Application No. 295 of 2017** whereby they sought to set aside the Judgment and Decree passed against them in **Civil Suit No. 098 of 2015** and prayed that they be allowed to file a defence to the said suit. Both Respondents contended that they were never served with Court Summons to file their defence to the suit and with the subsequent hearing notices when the hearing of the suit proceeded ex-parte. The Respondents maintained that they had a strong defence to the suit.

The Appellant maintained by way of an affidavit in reply dated 8th December, 2017 that the Respondents had been duly served with

Court Summons and prayed for the Application to set aside the Judgment to be dismissed.

Chief Magistrate's Court Nabweru, **Miscellaneous Application No. 295 of 2015** was heard inter-parties and a ruling was delivered by the Chief Magistrate on 2nd February, 2018. The Judgment and the Decree in Chief Magistrate's Court **Civil Suit No. 98 of 2015** was set aside and the Respondents were allowed to file a defence to the Civil Suit, but on condition that they first deposit in Court security of UGX. 15,112,000= not later than the 6th of March, 2018. Each party had to bear their own costs of the Application.

The Respondents were dissatisfied with the ruling of the Chief Magistrate. They on 28th February, 2018, lodged in the High Court at Kampala (Land Division) **Civil Appeal No. 0015 of 2018** challenging the Chief Magistrate's ruling in **Miscellaneous Application No. 295 of 2017.**

The grounds of Appeal in High Court **Civil Appeal No. 0015 of 2015** were, in summary, that the Chief Magistrate erred in holding that the Respondents had been served with Court Summons and Hearing Notices in **Civil Suit No. 0098 of 2015**, that it was an error on the part of the Chief Magistrate to order the Respondents to first deposit in Court security of UGX. 15,112,000= by 6th March, 2018, before they could be permitted to file their written statement of Defence and participate in the proceedings of **Civil Suit No. 0098 of 2015.**

The High Court (Land Division) (Damalie Lwanga, J.) entertained **Civil Appeal No. 0015 of 2018** and delivered Judgment on 12th

July, 2019. The Appeal was allowed by the High Court holding that there was no proper evidence that the Respondents were served with summons to file a defence in **Civil Suit No. 98 of 2015**. The Judgment entered in that suit was set aside and the Respondents allowed to file a defence to the suit without any requirement to first deposit in Court UGX. 15,112,000= security, as ordered by the Chief Magistrate's Court. The Respondents, as Appellants, were awarded the costs of the Appeal in the High Court.

The Appellant dissatisfied with the High Court decision in **Civil Appeal No. 15 of 2018** lodged this Appeal to this Court on 15th July, 2019.

The grounds of Appeal are:

1. ***The learned Judge erred in law when she held that the service of summons in the lower Court had not been effected on the respondents.***
2. ***The learned Judge erred in law when she granted costs of the appeal to the Respondents.***
3. ***The learned Judge erred in law when she failed to adequately re-evaluate the evidence on record and thus led to a wrong decision.***

At the hearing of the Appeal learned Counsel Tonny Okweny appeared for the Appellant while Andrew Owina was for the Respondents. The Appellant and first Respondent were present in person.

I have had the opportunity to go through the lead Judgment by the Honourabel Lady Justice Monica K. Mugenyi, JA. I have come to

different conclusions on some aspects of the Appeal. Hence the necessity on my part to come up with a comprehensive detailed Judgment.

This is a second appeal. The duty of this Court as a second appellate Court is to resolve whether the decision appealed against is contrary to law and/or whether that decision failed to determine some material issue of law. It is also the duty of this Court as a second appellate Court to determine whether or not the first appellate Court committed a substantial error or defect in the procedure provided by the Civil Procedure Act or by any other law in force, which may have produced an error or defect in the decision of the case upon the merits. Accordingly a second appeal is limited to points of law only, not points of fact or of mixed law and fact. See: **Sections 72, 73 and 74 of the Civil Procedure Act, Cap. 71.** See also: **Lubanga Jamada vs Dr. Ddumba Edward [2016] UGCA 11.**

Ground 1:

Ground one is, my considered view, the essence of this Appeal, it is that:

> ***"The learned trial Judge erred in law when she held that the service of summons in the lower Court had not been effected on the Respondents".***

For the Appellant it was submitted that the affidavit of service of summons to file a defence deponed to by Ocan Robert of the Chief Magistrate's Court, Nabweru, who acted as the Process Server, proved in law that the Respondents were served with the said Court Summons to file a defence in **Civil Suit No. 98 of 2015** on

23rd October, 2015 at 10.45 a.m. at the Respondent's home. It is when the Respondents failed to file that defence within the time prescribed by the law that the Chief Magistrate's Court, Nabweru, resolved to proceed with the hearing of **Civil Suit No. 98 of 2015** in the absence of the Respondents.

It was further submitted for the Appellant that the evidence of service of Court summons by Ocan Robert upon the Respondents had not been challenged at all by the Respondents. They even never applied to the trial Court to have him cross-examined on the contents of his Affidavit of service. He carried out his duty of a Court Process Server as an employee of the Judiciary and as such his evidence of service ought to have provided a basis to the first appellate Judge to hold that service was properly effected upon the Respondents. The first appellate Judge therefore erred in law to hold otherwise. Ground one had therefore to be allowed.

For the Respondents, it was submitted that no service of Court Summons to file a defence in **Civil Suit No. 98 of 2015** was effected upon the Respondents in law because the affidavit of service of the same deponed to by Ocan Robert on 29th October, 2015 was itself wrong in law, being contrary to Order 5 and the relevant Rules thereunder, of the Civil Procedure Rules.

Accordingly, it was submitted for the Respondents, the first appellate Judge was right in law to set aside the Judgment entered ex-parte in **Civil Suit No. 98 of 2015** in absence of the Respondents who had never been served with Summons to file a defence in the said suit.

In resolving ground one of the Appeal it is necessary to recall **Article 28(1) of the Constitution**, 1995 that provides:

> ***"28. Right to a Fair Hearing:***
>
> ***(1)In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial Court or tribunal established by law".***

A fundamental principle of justice that arises out of the right to a fair hearing is that one must not be condemned in a cause unheard. Hence one who is made a party as a Defendant to a Civil Case lodged in a Court of law is issued by that Court a Summons informing him or her that a suit has been lodged in Court and ordering him or her to file a Defence, that is his/her answer to the claim in the suit within a specified period and ordering him or her to appear and answer the claim on the day specified in the Court Summons. The Plaint, containing the particulars of the claim lodged in Court, is attached to the Court Summons that are served. **Section 20 of the Civil Procedure Act** and **Order 5** and the Rules under that Order of the Civil Procedure Rules provide for the issue and service of Court Summons in Civil Suits and other related matters. Summons are issued by Court with the signature and seal of the Court being mandatory. See: **EA Plans Ltd vs Roger Allan Bickford [1971] HCB 225.**

The basic requirements for ensuring proper service of Court Summons are that the Process Server must be approved and authorized by the Court to effect service of Court Summons. The Process Server must also disclose in the Affidavit of Service that

he/she personally knew the person to whom the Court Summons were served and how he/she came to know that person. If the Process Server did not know the person to be served, then he/she must explain and state the particulars of the person who knew the person to be served and who accompanied and pointed out to the process server the person to be served. See: **Wasswa vs Ochola [1991] ULSLR 161**. The Process Server must also explain in detail how he/she effected service of the Summons upon the person to be served. A duplicate of the Summons with the Plaint attached must be delivered and tendered to the Defendant personally or to an agent of the Defendant who must be required to endorse the same as acknowledgment of receipt. See: **Balenzi vs Wanderi [1991] HCB 58.** See also: The persuasive High Court decision of **Wadamba David vs Godfrey Mutasa and Others: High Court at Mbale Civil Appeal No. 32 of 2015.**

Where it is proved that there is improper service of Summons to file a Defence contrary Order 5 and the Rules made thereunder of the Civil Procedure Rules, then the resultant ex-parte Judgment is taken as being irregular in law and must be set aside. See: **Remco Ltd vs Mistry Jadbra Ltd [2002] I EA 233**. See also: **Narshidas M. Mehta and Company Ltd vs Baron Verheyen [1956] 2 TLR 300**.

The High Court appellate Judge re-appraised and reviewed the affidavit of Service by Ocan Robert in **Civil Suit No. 98 of 2015**. The Judge concluded that the said Affidavit did not comply with the law and as such the setting aside of the ex-parte Judgment in **Civil Suit No. 98 of 2015** was proper and justified. The learned

Judge thus allowed **Civil Appeal No. 15 of 2018** arising from Chief Magistrate's Court, Nabweru **Miscellaneous Application No. 295 of 2017.**

Resolution of Ground one of this Appeal requires this Court to resolve whether or not, as a matter of law, the High Court appellate Judge, arrived at the right decision as regards the Affidavit of Service. It is appropriate to reproduce the said Affidavit of Service. It states (pages 15-16 of the Record of Appeal):

"Affidavit of Service

1. ***That I am adult male Ugandan of sane mind, Ass. Records Officer of Courts of Judicature attached to the above captioned Court hence competent to effect Court process in High Court and all Courts subordinate thereto.***
2. ***That on 23rd October, 2015, I received two (2) copies of Summons and Plaints issued by this Honourable Court through the Plaintiff, one for which is to be served upon Defendant and the other for acknowledgement purposes.***
3. ***That on the above date at 10.45 a.m. I proceeded to the Defendant's place of residence located at Namere, Mpelerwe Kawempe II Kawempe Division Kampala District, together with the Plaintiff to serve the Defendants.***
4. ***That upon reaching at the place, I found a man standing on the compound, I greeted him, and he informed me that he is a son to the first Defendant. He then entered***

the house to call the mother, when the mother came out, I introduced myself and the purpose of my visit.

5. ***That I tendered the Summons and Plaints to her, she received, perused through, but declined to acknowledge on the Court's copy. The copy is hereto attached and marked "A" for ease of Court reference.***
6. ***That I swear this Affidavit in proof that the Defendants were duly served with the Summons and Plaints as required.***
7. ***That whatever I have stated herein above is true and correct to the best of my knowledge and belief".***

The Process Server does not claim in the Affidavit of Service that he knew before the Defendants. He does not also assert in the Affidavit that it was the Plaintiff who pointed out to him the Defendants upon whom service of the Summons was to be effected. The Plaintiff himself made no Affidavit that he is the one who pointed out the Defendants to the Process Server. **Order 5 Rule 16** was, as a matter of law, not complied with.

In paragraph 4 of the Affidavit of Service, the identity of the man standing in the compound who claimed to be a son to the first Defendant is not disclosed by the Process Server either by name or otherwise. The Process Server does not claim in any way whether he found out whether this man, who claimed to be son to the first Defendant, was in actual fact the 2nd Defendant, Kasamba Patrick. Even "the mother" when she came out of the house, the Process Server, did not find out from her what her actual names were and whether or not she was the first Defendant to **Civil Suit No. 98** of

2015. Thus the Process Server never ascertained that the person served with the Court Summons was the first Defendant. This was contrary to **Order 5 Rule 10**.

Service of the Court Summons ought to have been effected by delivering a duplicate of the Summons with the Plaint attached thereon to the Defendant personally and then requiring that particular Defendant to endorse an acknowledgement of the receipt of the same on the original Summons. The Process Server did not claim to have done this. Paragraph 5 of the Affidavit of Service is to the effect that the Process Server tendered "the Summons and the Plaints to her". She received, perused through and denied to acknowledge receipt. Order 5 Rule 14 was, as a matter of law, not complied with.

It is also, as a matter of law, of crucial importance to note that Chief Magistrate's Court Nabweru **Civil Suit No. 98 of 2015** was instituted by the Appellant as Plaintiff (Muteza Ali) against two Respondents as Defendants (Nakku Jessica Aganya and Kasumba Patrick). Each Defendant to that suit was thus entitled to be served with Court Summons with a Plaint attached issued by Court in that suit pursuant to **Order 5 Rule 9 of the Civil Procedure Rules.**

Paragraph 5 of the Affidavit of Service is to the effect that the Court Process Server tendered the Summons and Plaints to only the lady who came out of the house. It was only this lady who was asked to acknowledge receipt of the Court Summons and she refused. The Court Process Server does not assert anywhere that he ever served any Court Summons with the Plaint attached in Chief

Magistrate's Court, Nabweru, **Civil Suit No. 98 of 2015** to the second Defendant, Kasumba Patrick.

The High Court appellate Judge held, for the reasons of law already stated, that the said Process Server's Affidavit of Service did not satisfy the conditions under **Order 5 Rule 16 of the Civil Procedure Rules.**

Further, as a matter of law, I find that it was a gross error of law for the Chief Magistrate Nabweru, to proceed to hear and pass Judgment in **Civil Suit No. 98 of 2015** against the second Respondent, as second Defendant in that suit, on the basis of an Affidavit of Service that did not in any way establish that Summons to file a Defence had been served upon that second Defendant.

I, with respect, differ from the holding of Honourable Justice Monica Mugenyi in her lead Judgment that there was proper service of Court Summons in **Civil Suit No. 98 of 2015** upon the first Defendant. For the reasons I have already set out I too come to the same conclusion that the first appellate High Court Judge came to in **Civil Appeal No. 15 of 2018** that, as a matter of law, there was no proper service of Court Summons to file a defence upon the first Defendant in **Civil Suit No. 98 of 2015**. I therefore uphold the decision of the Honourable High Court Judge allowing **Civil Appeal No. 15 of 2018** on the ground that both the first and second Defendants in **Civil Suit No. 98 of 2015** were never properly served with Court Summons to file Defences in that Civil Suit. I find no merit in ground one of this Appeal. I disallow the same.

Having resolved ground one of the Appeal as above, it follows that the Order for the Respondents to deposit UGX. 15,112,000= as security also stands set aside as it is part and parcel of the set aside Chief Magistrate's Court, Nabweru Judgment in **Civil Suit No. 98 of 2015.**

I too agree, and I am grateful to Hon. Lady Justice Monica Mugenyi for her observations in her lead Judgment about the subject of security for costs. I have nothing useful to add on the very issue.

Ground 2:

In ground two the learned High Court Judge is faulted for having erred in law when she granted costs of the Appeal i.e. **Civil Appeal No. 15 of 2018** to the Respondents.

For the Appellant, it was submitted that the award of costs being a matter of the exercise of Court's judicial discretion, costs of the **High Court Civil Appeal No. 15 of 2018** and those in the Chief Magistrate's Court below ought to have been awarded to him, the Appellant.

The Respondents contended in response that, as a matter of law, costs follow the event under **Section 27 of the Civil Procedure Act**. They thus maintained that the learned High Court appellate Judge was right to award them as the successful party, the costs of **Civil Appeal No. 15 of 2018**.

In resolving this ground as to costs, the law is that the award of costs of and incident to all suits is within the discretion of the Court, subject to the overall principle that costs shall follow the event unless the Court, for good reason, orders otherwise.

A successful party may only be deprived of costs if it is shown that the conduct of that successful party either prior to or during the course of the proceedings, led to litigation which might have been avoided, but for such a conduct of the successful party. An appellate Court would interfere with the discretion of a trial Court as to the award of costs where the discretion has been exercised injudiciously or on wrong principles or where the reasons given are not good reasons within the meaning of **Section 27 of the Civil Procedure Act.** See: **Behange vs School Outfitters (U) Ltd [2000] 1 EA 20.**

The Court Proceedings so far resulting in this Appeal were prompted by the Affidavit of Service by the Process Server, Ocan Robert, Assistant Records Officer, Courts of Judicature, posted at the material time to the Chief Magistrate's Court, Nabweru. He is the one who purported to effect service of the Court Summons upon the Defendants in Chief Magistrate's Court, Nabweru **Civil Suit No. 98 of 2015.**

The learned first appellate High Court Judge in **Civil Appeal No. 15 of 2018,** apart from setting aside the Order of the Chief Magistrate's Court requiring the Respondents to this Appeal to deposit security of UGX. 15,112,000=, did not make any Orders as to who was to pay the costs in Chief Magistrate's Court **Civil Suit No. 98 of 2015** and **Miscellaneous Application No. 295 of 2017** that gave rise to High Court **Civil Appeal No. 15 of 2018**.

Appreciating the above stated situation necessitated by the Court processes and Court officials, including the Process Server, over which the parties to the Civil Suit had minimal control, I would

order that the parties bear their own costs, so far incurred as at the date of delivery of this Judgment, of the Court proceedings of the trial Chief Magistrate's Court, Nabweru **Civil Suit No. 98 of 2015** and of Chief Magistrate's Court, Nabweru **Miscellaneous Application No. 295 of 2017.**

When it comes to who is liable to pay the costs of the High Court at Kampala (Land Division) **Civil Appeal No. 15 of 2018**, which is ground two of this Appeal, Appellant's Counsel prayed that let the Appellant be awarded the costs of the Appeal. The Respondents on their part argued that they were the successful party in the Appeal in the High Court and as such they were rightly awarded the costs of the Appeal in the Court below as costs follow the event.

In resolving this ground I note that it is the respective parties who respectively made the choice to prosecute and/or to defend the Appeal. It is only fair that the costs of the Appeal go to the successful party in the Appeal. Accordingly I would leave undisturbed the order of costs that the same go to the Appellants, that is the Respondents in this Appeal in the Court of Appeal, made by the High Court first appellate Judge in High Court (Land Division) **Civil Appeal No. 15 of 2018**. Ground two thus fails.

Ground 3:

This ground is that the learned Judge erred in law when she failed to adequately re-evaluate the evidence on record and thus led to a wrong decision.

This ground offends **Rule 86(1)** of the Rules of this Court. The Rule mandatorily requires a Memorandum of Appeal to set forth concisely, under distinct heads, without argument or narrative the

ground of objection appealed against, specifying the points alleged to have been wrongfully decided and the nature of the order that is being proposed for the Court to make.

The ground under consideration alleges that the Judge failed to properly re-evaluate all the evidence on record and thus led to a wrong decision, without specifying which wrong decision.

The Supreme Court has held in **Ranchobhai Shivabhai Patel Ltd and Another vs Henry Wambuga and Another: Civil Appeal No. 06 of 2017,** that such a ground is wrong in law and ought to be struck out. The same is accordingly struck out.

All the grounds of Appeal having failed, this Appeal stands dismissed. The Judgment of the High Court of Uganda at Kampala (Land Division) in **Civil Appeal No. 15 of 2018** is hereby upheld. For clarity the following orders are made:

1. The ex-parte proceedings and Judgment in Chief Magistrate's Court, Nabweru **Civil Suit No. 098 of 2015** dated 30th May, 2017 are hereby set aside.
2. The Defendants to Chief Magistrate's Court, Nabweru **Civil Suit No. 098 of 2015** are to file and serve the Plaintiff their respective written statements of defence within 30 days from the date of delivery of this Court of Appeal Judgment.
3. The Court file of Chief Magistrate's Court Nabweru **Civil Suit No. 098 of 2015** is to be immediately handed over to the Chief Registrar, High Court, who is to ensure that through the Land Division, High Court, the same Court file is placed before another Chief Magistrate at Nabweru, other than Her Worship Nasambu Esther Rebecca, who presided over the

proceedings giving rise to this Appeal, to hold a retrial of the case any time after 30 days have expired from the date of delivery of this Court of Appeal Judgment.

As to costs as already held, each party is to bear its own costs of the Court proceedings up to the date of delivery of this Judgment as regards the Chief Magistrate's Court Nabweru **Civil Suit No. 98 of 2015** and Chief Magistrate's Court, Nabweru **Miscellaneous Application No. 295 of 2017**. The successful Appellants, now the Respondents in this Appeal, are to have the costs as against the Respondent, now the Appellant, in High Court at Kampala (Land Division) **Civil Appeal No. 0015 of 2018**.

The Respondents, having been the successful party in resisting the grounds of the appeal, are awarded as against the Appellant, the costs of this Appeal, that is **Civil Appeal No. 271 of 2019.**

Before taking leave of this Appeal, I point out that the parties to these proceedings have now spent almost six years litigating, substantially on only one issue, namely whether or not, there was proper service of Court Summons in **Civil Suit No. 98 of 2015** by the Plaintiff, now Appellant, upon the Defendants, now Respondents, to that suit. The main issue of the dispute between the parties that Court must resolve of the ownership and/or trespass to the suit land has remained unaddressed and unresolved.

It is hoped and prayed that the parties and their respective Counsel will hence forth focus on having the trial Court resolve the real substantive issue of the dispute.

Dated at Kampala this 20th day of Dec **2021**.

460

Remmy Kasule
Ag. Justice of Appeal
21/07/2021