THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL COURT]

CIVIL APPEAL No. 22 OF 2013

(ARISING OUT OF MISC. APPL No. 83 OF 2012 ARISING FROM CIVIL SUIT No. 1086 OF 2011 AT MENGO CHIEF MAGISTRATES COURT)

BEMANYISA ADONIJAH :: APPELLANT

VERSUS

BISERE ROBERT :: RESPONDENT

BEFORE HON. JUSTICE B. KAINAMURA

JUDGMENT

This appeal arises out of the ruling and order by His Worship Kagoda Samuel Moses Ntende Magistrate Grade 1, Chief Magistrates Court Mengo (hereinafter referred to as the "trial court") delivered on the 4th day of September 2012 in which the trial court set aside the Judgment and Decree in the main suit, granted unconditional leave to the defendant to appear and defend the suit and stayed the execution of the decree in the main suit.

Background

Bemanyisa Adonijah (herein referred to as "Appellant) who was plaintiff in the trial court, instituted Civil Suit No. 1086 of 2011 on 28th August 2011 under O 36 of CPR against Bisere Robert (herein referred to as Respondent") in the trial court for recovery of money had and received from the respondent who was defendant in the suit. The appellant claimed he had, acting as estate manager of Samona

Products Estate, paid a sum of Shs 6,000,000/= to the respondent to install a new electricity meter at the premises of Samona and that to date the respondent has not done so. The appellant sued for the refund of Shs 6,000,000/= at an interest of 24% to run from date of filing the suit till payment in full. He also prayed for costs of the suit.

On 28th September 2011 the appellant then as plaintiff/applicant filed Misc. Appl. No. 1065 of 2011 by Chamber Summons under O 5 rr 18 and 32 CPR for orders that service of summons upon the defendant/respondent be by way of submitted service and for costs of the application. The matter was heard *ex-parte* in the trial court on the 25th day of November 2011 and court ordered that the service of the Court Summons be through the Daily Monitor and Bukedde Newspapers and that a copy of the Court Summons should be affixed on the Court Notice Board and at the last known place of business of the defendant. The applicant was awarded costs of the application.

On 9th January 2012, Court entered judgment for the plaintiff/applicant and a Decree was extracted the same day. On 20th January 2012 the trial court issued a warrant of arrest in execution under O 22 r 35 CPR. On the same day the parties entered into a "Consent Settlement", before the Registrar Execution Division, under which the respondent surrendered his tille deed comprised in Busiro Block 263 Plot 514 as security for settlement of the decreetal sum.

On 27th March 2012, the respondent then as applicant filed Misc Appl. No 83 of 2012 in the trial court under O 36 rr 4 and 11 CPR and Section 98 CPA for orders to set aside the judgment and decree in CS No 1086 of 2011, to be granted unconditional leave to appear and defend CS No 1086 of 2011, stay of execution of the decree and costs of the application. On the 4th September 2012, the trial court granted the orders sought for and further released Busiro Block 263 Plot 514 from

attachment. The applicant then as respondent applied for leave to appeal the orders of the trial court which leave was denied by the trial court. He subsequently filed Misc Appl. No 700 of 2012 in this court on the 29th August 2013 and on 17th September 2013 court granted the applicant leave to appeal against the ruling of the trial court.

On 25th September 2013, the Appellant filed this appeal. The grounds for the appeal are:-

1. *The Learned trial Magistrate erred in law and fact when he ruled that the respondent was not effectively served summons by substituted service.*
2. *The learned trial magistrate misdirected himself on the duty of the trial court in a summary suit while considering an application to set aside an ex-parte judgment/decree.*
3. *That the learned trial magistrate erred in law when he relied on conjecture of his own without evidence on court record to set aside a decree when he observed that the attached land title was worth Shs 300 million without a valuation report.*
4. *The learned trial magistrate erred in law when he set aside execution decree and granted unconditional leave*

The appellant prayed that the appeal be allowed with costs.

Mr. Bemanyisa Adonijah the appellant represented himself while Mr. G. Himbaza represented the respondent. Both parties addressed court in written submissions.

Appellant's submissions

Mr. Bemanyisa the appellant submitted it was the duty of the first appellate court to rehear the case on appeal by reconsidering all the materials which were before the trial court and make up its own mind and that the parties to the first appeal are entitled to obtain from the appeal court its own decision on issues of fact as well as of law.

On the first ground of appeal, Mr. Bemanyisa submitted that the trial court erred when it held that the respondent was not effectively served. Mr. Bemanyisa submitted that whereas from the record the trial magistrate found that the defendant had been served by substituted service under O 5 r 18(2) CPR he however went ahead to exonerate the defendant by stating that he, like any other human being could have failed to read the summons in the news papers and concluded it was justifiable to hold that he was not effectively served. Mr. Bemayisa urged that the above reasoning had no basis in law.

In his view, the trial court had no basis in law to arrive at a conclusion that the respondent like any other human being could not have read the summons in the news papers. He urged that the reasoning went against the spirit of substituted service as set out under O 5 r 18(2) CPR. He urged that the respondent is presumed to have read the notices and on that basis Mr. Bemanyisa called upon court to find that the trial court misdirected itself on this point.

Mr. Bemanyisa in conclusion, called upon court to resolve the first ground of appeal in his fevour as the trail court was wrong to hold that submitted service on the respondent was ineffective.

The second ground of appeal is that the trial court arred when it held that there was substantive grounds of defence which warranted setting aside the ex parte judgment. Mr. Bemanyisa took issue with the holding of the trial court that the respondent was able to demonstrate that he was the one who had installed a new electricity meter as opposed to Tendo as alleged by the applicant which convinced the trial court that there was a triable issue to determine who indeed installed the meter. Mr. Bemanyisa urged that courts have over time set out the criterion for determining whether the applicant for leave to appear and defend a summary suit

has a good defence (see ***Kanakulya Joseph Vs Africa Polysacks Industries Ltd M A 215 of 2011 and Zola & Another Vs Ralli Brothers Ltd & Another 1969 E A 691).***

He urged that a defendant who wishes to resist entry of a summary judgment should place before court evidence by affidavit showing the reasonable grounds. Mr. Bemanyisa then went on to urge at length how there was no affidavit evidence challenging the evidence also adduced by way of affidavit of the applicant/plaintiff in the main suit.

Ground three of appeal was that the trial court relied on conjecture of its own to set aside the decree when it observed that the attached land was worth Shs 300 million without a valuation report. Mr. Bemanyisa urged that the trial court erred when it adopted submission by counsel for the respondent that the attached land comprised in Busiro Block 263 plot 514 was of very high value worth Shs 300 million compared to the decretal amount of Shs 15,303,000/= and on that basis set aside the attachment. Mr. Bemanyisa urged that this approach was without reason and on no lawful ground. He called upon court to let the sale of the land proceed unless the judgment debtor pays the decreetal amount.

On ground 4 of appeal Mr. Bemanyisa submitted that the trial court erred in law when it unconditionally set aside the execution and decree. He urged that unconditional leave is only granted where it has been established that there is triable bonafide defence on merit. He contended that the appellant had demonstrated that the defence is a sham and that should court be inclined to order for a retrial *denovo* then it should be conditional upon the respondent depositing in court the decretal amount. In conclusion Mr. Bemanyisa called upon court to allow the appeal with costs.

Respondent's submissions

Mr. G. Himbaza Counsel for the respondent agreed with the appellant on the facts of the case and on the duty of the appellate court to re-evaluate evidence on record and come to its own conclusion. On ground of appeal number one, Counsel agreed with the trail courts findings that the respondent could not have read the summons against him in the news papers reasoning that in as far as substituted service is good service it is not absolute. Counsel submitted that contrally to the position of the appellant, even where there has been substituted service, judgment and decree can still be set aside. For this proposition Counsel relied on the case of ***Geoffrey Gatete & Anor Vs William Kyobe SCCA No 7 of 2005 reported in (2007) HCB Vol 11954***

Mr. Himbaza submitted that in that case the Supreme Court stated that "deeming service," in any of the modes provided under O 36 r 3 CPR to be good service, a person must have actually been aware of the existence of the summons. He urged that the respondent stated in para 2 of his affidavit in support of his application for leave to appear and defend that he did not know that the said suit was in existence until 20th February 2012 when Court Bailiffs showed him a warrant of arrest issued by court. On that basis Mr. Himaza asserted that it is probable that the respondent never came across the summons or any knowledge of it. Counsel therefore called upon court to dismiss Ground 1 of appeal.

On Ground 2, Counsel submitted that he is in agreement with the trial magistrate with regard to the controversy as to who fixed the Meter-Tendo or the respondent which in itself raises a triable issue that would not be resolved at the level of an application for setting aside the judgment. According to Mr. Himboza it requires a trial to resolve the issue. Counsel cited the case of ***Kyobe Senyange Vs Nyaks Ltd***

(1980) HCB 30 where it was held that O 33 r 1 empowers court to set aside a decree passed *ex-parte* and if necessary the execution, if it is satisfied that the service of the summons was not effective or for any other good cause which shall be recorded and the court can then grant leave to the defendant to appear and defend the suit. Counsel urged that the respondent had shown triable issues and was granted unconditional leave to appear and defend the suit. Counsel further urged that contrary to the arguments of the appellant, the trial court did not go into the merits of the case. What it did was only to decide that the issues should be determined at a full trial. Further Counsel outlined the events leading to the attachment of the respondent's land and urged that this was unconscionable and will cause hardship to the respondent. Counsel cited the case of ***Kwesigabo, Bamwine & Walubiri Advocates V Nytil Picfare, (1998) KALP*** where it was held that the value of the property to be attached must be commensurate to the amount of the debt and if the debt was disproportionately too small compared to the value of the property then such attachment would be unjust and unconscionable.

Mr. Himbaza called upon court to dismiss the appeal with costs, confirm the orders of the trial court for full trial and order for release from attachment of the matrimonial property comprised in Busiro Block 265 Plot 514 land at Naluvule.

In rejoinder Mr. Bemanyisa disagreed with Counsel for the respondent's reliance on the ***Geoffrey Gatete case*** (supra). To him the ***Geoffrey Gatete case*** (supra) related to peculiar circumstances as exist between partners in a business enterprise where one partner is served to the exclusion of others. Mr. Bemunyisa further urged that the ruling in the ***Geoffrey Gatete Case*** (supra) is not of general application to service of summons under CPR and that the two service regimes i.e

under O 27 r 3 CPR (now O 30) and O 5 r 1 CPR are different and the ***Geoffrey Gatete Case*** (supra) was only in relation to service under the former.

It was Mr. Bemanyisa further submission in rejoinder that there is no automatic leave to defend where the defendant has merely denied the claim as urged by the Counsel for the respondent. Mr. Bemanyisa went on to amplify the grounds under which leave to appear and defend are granted.

Consideration

I will now proceed to handle the grounds of appeal

It is now settled that it is the duty of the first appellate court to rehear the case on appeal by reconsidering all the materials which were before the trial court and make its own conclusions (s***ee Pandya V R (1957) E A 336***). Accordingly I will now proceed to reconsider and re-evaluate the materials that were before the trial court.

From the record, the appellant applied by Chamber Summons under Misc. Appl. No 1065 of 2011 to be allowed to effect service in C.S No. 1086 of 2011 by substituted service. The Chamber Summons was supported by an affidavit deposed by a one Niringiye P a process server working with the appellants Law Firm. The affidavit provided in paragraph three, four and five that;

> 3. *That i proceeded to seek out the defendant at his last known address at Maria's Galleria Level 006 Room 005 to serve him personally with the said summons but was unable to serve him despite several efforts.*
>
> 4. *That despite exercise of due diligence I have failed to trace the defendant in person.*

5. *That with the assistance of the plaintiff I have continued to make necessary inquires about the defendant's whereabouts without any success.*

On the basis of the above affidavit, the trial court issued orders for substituted service and subsequently passed judgment in default under O 36 r 3 (2) CPR.

Upon obtaining judgment in default, the appellant sought to enforce it. The respondent then filed Misc. App. No 83 of 2013 seeking to set aside the judgment and decree in C.S No 1086 of 2011 which the trial court granted hence this appeal. Affidavit in support of Misc. App No 83 of 2012, the applicant/respondent deponed that:-

> *"That the applicant did not know the said suit existed in this honorable until 20th February 2012 when court bailiffs came and showed him a warrant of arrest from the High Court Execution Division."*

All the above beg the question- was the trial court right in reaching the decision it did in Misc. App No. 1065 of 2011 that the applicant had exercised due diligence to affect personal service and failed hence the order for substituted service? Although this was not conversed in this appeal, based on the principle in the ***Pandya case (supra)*** which was recently followed by the Court of Appeal in ***Belex Tours and Travel Ltd Vs Crane Bank Ltd and M/s Fang Min Civil Appeal No. 071 of 2009*** I will now proceed to reappraise all the applications in the lower court antecedent to this application. In adopting this position I am further buttressed by the decision of the Supreme Court in ***Sanyu Lwanga Musoke Vs Sam Galiwango SCCA No 48 of 95*** where the court held that:-

> *Under S. 33 Judicature Act the High Court has un limited jurisdiction to **interalia** take any step to rectify any wrong finding on the face of the record which comes to its attention.……..……”*

What was to be determined by the trial court was a question as to whether there was due and reasonable diligence on the part of the serving officer to effect personal service.

What amounts to “*due and reasonable diligence*” has been considered in a number of cases. In ***Eliakanah Omuchi Vs Agub Machwa [1966] EA 229 (k)*** court quoted a paragraph from *MULLA’S CODE OF CIVIL PROCEDURE* (12th Edn) at pg 566 where the author stated:

> *“To justify such service it must be shown that **proper efforts were made to find the defendant** e.g that the serving officer went to the place or places and at the times where and when it was reasonable to expect to find him. Thus if a serving officer goes to a defendants house but does not find him there and the defendant’s adult son who is in the house refuses to accept service on behalf of the father these facts by themselves do not justify the officer in resorting to the mode of service prescribed by this rule, he must before effecting such service inquire of the son as to where the defendant is and otherwise exercise due and reasonable diligence in finding the defendant”*

In the case of ***Chakubhai V Patel (1948) 6 ULR 211*** court quoted with approval the case of ***Cohen & An Vs Nursing Doss Audly*** *Indian Decisions New Series* (1914) *Calcutta Vol.9 at page 579* where Sir W. Comer Petheram C.J had this to say:-

> *"…… It is true that you may go to a man's house and not find him, but that is not attempting to find him. You should go to his house, make enquires and if necessary follow him. Before service like this can be effected it must be shown that proper efforts have been made to find out when and where the defendant is likely to be found-not---to go to his house in a perfunctory way and because he has not been found there to affix a copy of the summons on the outer door of his house. I think this affidavit is insufficient and it is as well that persons should know that such service is not good service and that suits should not be tried as undefended suits on service such as has been relied on in this case"*

When Misc Appl No. 1065 of 2011 came up for hearing before the trial Magistrate, relying on paragraphs 3,4 and 5 of Niringiyes affidavit (supra) the Learned trial Magistrate had this to say:-

> *"I have heard the submissions of Counsel for the applicant and court is satisfied that the applicant went an extra mile to serve the respondent in the ordinary way but failed"*

With due respect i fail to see how the trial Magistrate reached that conclusion. The affidavit relied on, fell far short of the required standard of having exercised *"due and reasonable diligence"* All the process server said was that he went to certain room to serve the defendant personally and was unable to serve him despite several efforts. The efforts are not mentioned neither does the deponent say how or disclose if he knew the defendant, how he knew where to go and whom he found in Room 005 level 006 Marias Galleria on the several times he went there. In my view the above and the dates when he went there should have been indicated.

Paragraphs 4 and 5 of the same affidavit do not add any value. It is my finding therefore applying the test first set out above, that no proper efforts were made to find the defendant and the trial Magistrate had no basis for arriving at the conclusion she did.

Be the above as it may, I wish to add that the right to a fair hearing under Article 28 (1) of the Constitution is a fundamental right which cannot be derogated from (Art 44) and should be guarded jealously by all courts. It is therefore instructive to look at O 36 r 11 which the trial court relied on to set aside the *ex-parte* decree and the execution. It is my finding that the trial court being cognizant of the respondent's rights reached the conclusion it did properly and granted the applicant an opportunity to be heard. In arriving at this finding, am further persuaded by the holding in ***Henry Kawalya Vs J. Kinyakwazi [1975] HCB 372*** where Ssekandi Ag J (as he then was) had this to say:-

> *"An ex-parte judgment obtained by default of defence is by its nature not a judgment on merit and is only entered because the party concerned failed to comply with certain requirements of the law. The court has power to dissolve such judgment which is not pronounced on the merits of the case or by consent but entered especially on failure to follow procedure requirements of the law".*

In the premises I find that the trial court was right in arriving (thought for different reason) at the findings it did. Accordingly ground one of appeal must fail.

On ground two the appellant urged that there were no substantive grounds of defence warranting setting aside the *ex-parte* judgment and going ahead to grant unconditional leave to appear and defend to the respondent. The test for the grant

of an order for leave to appear and defend is now well settled. The applicant has to show by affidavit or otherwise that there is a triable issue of fact or law for court to inquire into. The defence it's self need not to be a good one but equally it should not be a sham. The threshold is therefore not very high. In this case the issue of who in fact installed the meter has been raised. That in itself is a defence and needs to be ascertained at the trial hence being sufficient to meet the test. At trial it can still be established who between the respondent and Tendo did install the meter. For this reason the trial Magistrate was in order to grant the respondent leave to appear and defend the suit. Consequently ground two of appeal must fail.

On ground three of appeal, I am in agreement with the argument by Learned Counsel for the respondent and in particular on the stance taken by this court in ***Kwesigabo Bamwine & Walubiri Advocates case*** (supra) that the value of the property to be attached must be commensurate to the amount of the debt. It cannot be conjecture as the appellant seems to suggest on the part of the trial court to come to a conclusion that titled land in Naluvule developed with a family house is of a higher value that the decreetal sum of Shs 15,303,000/=.

Accordingly this ground too must fail.

In view of my decision as set out above it is not necessary for me to deal with ground four of appeal.

In the circumstances this appeal is dismissed with costs.

B. Kainamura
Judge
3.04.2014