THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPEAL 67 OF 1998

DOMINIKO SSALONGO……. APPELLANT

VERSUS

EKOYASI KIWANUKA……. RESPONDENT

Before: The .Honourable Mr. Justice E. S. Lugayizi

JUDGMENT

This is an appeal. The appellant brought it before this Honourable Court under Order 39 of the CPR. The background to it is as follows. The respondent sued the appellant under Mpigi Magistrate's Court Civil Suit No. 26 of 1997. That suit was later heard ex parte; and on 26th February 1998 the respondent obtained judgement against the appellant. Following that event, the appellant applied to the Grade 1 Magistrate of Mpigi by way of Notice of Motion under Order 9 rule 24 of the CPR to have the said judgment set aside and unconditional leave to defend the suit. In his ruling dated 5th August 1998 the said Magistrate dismissed the application on two grounds. Firstly, that its Notice of Motion was incurably bad because it cited grounds which were outside the accepted ones under Order 9 rule 24 of the CPR. Secondly, that the appellant's affidavit failed to show that he was not duly served with summons. The appellant was not satisfied with the learned magistrate's decision. Hence this appeal. The Memorandum of Appeal cited four grounds of appeal, which are as follows,

1. The trial Magistrate erred both in law and fact by upholding that service in the Newspaper was proper when the respondent made no effort to serve the appellant in person or through the members of his family.

2. The trial Magistrate erred in law by basing his decision on procedural technicality contrary to the constitutional provisions.

3. The trial Magistrate misdirected himself and erred both in law and fact by ignoring the appellant's notice of motion and affidavit which clearly affirm that the appellant was never served with Court summons.

4. The trial Magistrate misdirected himself and erred both in law and fact by ignoring the appellant's notice of motion and affidavit which disclose cause for non-appearance.

At the time of hearing the appeal Mr. Arinaitwe represented the appellant and the respondent represented himself. Mr. Arinaitwe abandoned the second ground of appeal. He consolidated the rest of the grounds and argued them under. The first ground of appeal. In essence, he submitted that the learned magistrate erred by upholding that service upon the appellant by way of newspaper was proper when the respondent made no effort to serve the appellant in person or through a member of his family. He pointed out that since in the instant case the appellant and the respondent were neighbours, it was very difficult to justify substituted service. In his view, the appellant was not served. Mr. Arinaitwe relied on **Omuchito v Machiwa (1966) E.A. 229** for that position. He concluded by calling upon Court to allow the appeal and to set aside the magistrate's ruling and the ex parte judgment. He also prayed that the appellant be granted leave to defend Mpigi Civil Suit No. 26 of 1997.

On his part, the respondent submitted that the learned magistrate's ruling was proper because the appellant was duly served through the newspaper.

Be that as it may, since the appellant's advocate abandoned the second ground of appeal, Court would have had no compelling reason to return to it. However, on further reflection Court thinks that the said ground was an important one since it was supposed to address one of the two reasons the learned trial magistrate gave for dismissing the application. Consequently, in the interest of justice, Court will invoke its inherent powers with a view to finding out, first of all, whether the learned magistrate was justified in rejecting the Notice of Motion on the ground that it did not comply with Order 9 rule 24 of the CPR. In deed, Court agrees that the grounds that were cited in the appellant's Notice of Motion (i.e. a good defence for the suit; and the need to

have justice done) are not what Order 9 rule 24 of the CPR specifies in an application of that nature. However, that anomaly on its own was not capable of invalidating the Notice of Motion. This is particularly so, since the affidavit that accompanied the said Notice of Motion cited non-service of the appellant as the ground for the application. In effect, the defect in the Notice of Motion was not …for it was cured by the contents of the appellant's affidavit **(See; Brooke Bond Liebig (T) Ltd v Mallya at the bottom of page 268; and Article 126 (e) of the Constitution).** In the circumstances, Court is of the opinion that the learned magistrate was not justified in rejecting the appellant's Notice of Motion on the ground that it did not comply with the requirements of Order 9 rule 24 of the CPR.

This takes us to the sole ground of appeal that Mr. Arinaitwe relied on during the hearing of the appeal. In that area, the law insists on personal service of the summons upon the party who is supposed to be served. If, that is not possible then service must be effected upon that party's agent or upon a member of that party's family. It is only when all that fails that substituted service may be resorted to and not before. (See **Order 5 rules 1, 2, 11 and 14 of the CPR and Omuchito v Machiwa — supra).** It is important to remember that the learned magistrate in his judgment took note of the fact that the appellant deposed in his affidavit that he was not served with the summons before the ex parte judgment was entered against him. It is also important to keep in mind that the learned magistrate preferred the respondent's evidence to the effect that the appellant was served by way of substituted service through the newspaper. The important question to answer therefore is whether the learned magistrate satisfied himself before rejecting the appellant's evidence and accepting the respondent's evidence that the latter had failed to find the appellant or his agent or a member of his family to serve them? The record does not show that he did so. For that reason, the learned magistrate should not, have found that the appellant was properly served. (See Omuchito v Machiwa -supra). Court therefore agrees with the appellant's advocate that the first ground of appeal must succeed. All in all, this appeal has succeeded; and it is so ordered. In the circumstances, Court hereby makes the following orders,

1. The learned magistrate's ruling dated 5th August 1998 is set aside forthwith.

2. The ex parte judgment dated 26th February 1998 and any decree made thereunder together with the proceedings connected to those orders are also set aside.

3. The appellant is granted leave to file his defence in respect of Mpigi Magistrate's Civil Suit No.26 of 97 within 15 days from the date of this judgment.

4. The costs of this appeal shall abide the outcome of the above civil suit.

E.S LUGAYIZI

JUDGE

24/05/2001