THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPEAL No. 01 OF 2004

(Appeal from ruling of the Chief Magistrate's Court Mengo delivered by Her Worship Baine-Omugisha Catherine on 26/11/2003 in Misc. Application No. 335 of 2003)

FRED KYEWALABYE ::::::::::::::::::::::::::::::::::::APPELLANT

- VERSUS -

1. RICHARD SSEVUME }
2. MILTON EGAYU }::::::::::::::::RESPONDENTS
3. NANKABIRWA }

BEFORE: HON. MR JUSTICE RUBBY AWERI OPIO

J U D G M E N T:-

This is an appeal against the ruling of Her Worship Baine-Omugisha Catherine Magistrate Grade 1 delivered on 26th November 2003 in Miscellaneous Application No.335 of 2003.

The background facts giving rise to this appeal are that the appellant/plaintiff instituted Civil Suit No. 705 of 2002 against the respondents/defendants on 20th December 2002. When the suit was called for hearing on 11th September 2003 at 10.00a.m., the plaintiff and his counsel were absent. The learned trial magistrate proceeded to dismiss the suit for failure of counsel and the plaintiff to attend court at the stipulated time and venue. Thereafter, the plaintiff/appellant filed Miscellaneous Application No.335 of 2003 seeking to reinstate the dismissed suit. The said application was also dismissed on the grounds that there was no sufficient cause shown for failure of counsel and the plaintiff/applicant to attend Civil Suit No. 705 of 2002 when it was called for hearing on 11th September 2003 at 10.00a.m. Hence this appeal.

This appeal was based on the following grounds that:-

(1) The Learned Magistrate substantially misdirected herself in law and fact by ignoring the applicant's affidavit in support of the application and therefore came to wrong conclusions;

(2) The Learned Magistrate misdirected herself in law and evidence in holding that the information the applicant's/appellant's counsel gave the applicant on the date and time of the next hearing was contradictory of what the applicant's counsel stated and therefore came to a wrong decision;

(3) The Learned Magistrate substantially misdirected herself in law and fact and did not exercise her discretion judicially when she found that no sufficient cause had been shown to set aside the dismissal for non appearance on the law and evidence before her;

(4) It is in the interest of justice that the dismissal for want of appearance is set aside having regard to the merits of the applicant's suit and the suit determined on its merits;

(5) The Learned Magistrate substantially misdirected herself in law and fact when she ignored the fact that the appellant could rely on counsel for guidance.

(6) The Learned Magistrate ought to have found as a fact that;

(a) The applicant's affidavits were particularly based on information which information portrayed the truthfulness of the facts deponed upon;

(b) In former counsel's affidavit there was a clerical mistake on the date;

(c) The applicant sought a judicious remedy against the injustice occasioned on him;

(d) As a court of justice the error/negligence of counsel in drafting his affidavit by stating the wrong date, and recording the wrong time in his diary should not be blamed on the applicant to the extent of denying him a remedy at law when the first defendant had acknowledged that they had never compensated him for his interest on the suit land.

Both counsel filed written submissions in support of their positions. This being a first appellate court the law is that it is under a duty to subject the entire evidence on record to exhaustive scrutiny and to re-evaluate and make its own conclusion, while bearing in mind the fact that the court never observed the witnesses under cross-examination so as to test their veracity: See **Pandya Vs R [1957] EA 336.**

In the instant case, evidence was based on affidavits deponed upon by parties. According to the learned trial Magistrate, the evidence on record did not show sufficient cause for failure of

counsel and applicant to attend the hearing. The gist of the appellant's affidavits was that counsel and applicant arrived in court a few minutes after the suit had been dismissed.

In the application before the trial magistrate what was required was whether the applicant had shown whether the applicant had honestly intended to attend the hearing and did his best to do so. Secondly the court was required to consider the nature of the plaintiff's case to justify reinstatement. The evidence on record clearly showed that the applicant and counsel went to court a few minutes after the suit had been dismissed for want of appearance due to confusion which arose because counsel had put in his diary a wrong time for the hearing of the matter. The fact that the applicant and counsel went to court albeit late, should have convinced the learned trial magistrate that the applicant and counsel had honestly intended to attend the hearing on the material date and time: See **National Insurance Corperation Vs Mugenyi & Co. Advocates [1987] HCB 28.**

It is also trite law that mistake of counsel should not be visited on the litigants. The mistake was that counsel had entered a wrong time for the hearing of the case in his diary. That was why the two went to court late. Such negligence should not have been visited on an innocent litigant.

It is also trite law that even where no sufficient cause is shown court can still set aside the dismissal by invoking its inherent powers: See **Girado Vs Alam & Sons [1971] EA 4.** The main reason for invoking the above powers was recently expressed by Justice Mulenga in **Ismail Serugo Vs Kampala City Counsel and Another,** Constitutional Appeal No. 2 of 1998 where he held that a litigant must not be turned away from the seat of justice before his case is heard on merit except in plain and obvious cases. If I may express the same view in the language of Hon. Lady Justice Kitumba, administration of justice requires that all disputes be investigated and decided according to their merits. **Yona Kanyomozi Vs motor Mart Civil Appeal No. 6 of 1999.**

Relating the above principles to the grounds of appeal, I find that the learned trial Magistrate was in error for dismissing the application without properly considering the relevant evidence before her whereas there was sufficient ground shown that the applicant and counsel had honestly

intended to attend the hearing. Moreover the nature of the dispute did require that the applicant should not be shut out of justice before his case was heard on merit. This was a land dispute where the applicant was claiming interest in a disputed properly. This was a matter which demanded hearing on merit. For the above reasons I find that all the grounds of appeal must succeed as the dismissal of the application was done perfunctorily.

This appeal is accordingly allowed with costs and it is ordered that the main suit be reinstated and placed preferably, before another magistrate with parallel jurisdiction. I so order.

RUBBY AWERI OPIO
JUDGE
4/4/2006.

4/4/2006:-
Appellant in court.
Respondent absent with counsel.
Representative of appellant's Law Firm present.

RUBBY AWERI OPIO
JUDGE
4/4/2006.