

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(CIVIL DIVISION)**  
**CIVIL APPEAL NO. 0034 OF 2008**  
**(Arising from Luwero Civil Misc. Application No. 035 of 2008)**  
**And**  
**(Original Luwero Civil Suit No. 025 of 2008)**

**GAHIRE DAVID :::APPELLANT**

**VERSUS**

**UWAYEZU IMMACULATE :::RESPONDENT**

**BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE**

**JUDGMENT:**

The appellant herein was aggrieved and dissatisfied with the Judgment and orders passed on 10/07/2008 by His Worship Katorogo, Chief Magistrate, sitting at Luwero court whereby his case was dismissed. The grounds of appeal are contained in the memorandum of appeal. He drafted them himself and they are rather argumentative in nature. It is not necessary to reproduce them here.

Be that as it is, the bone of contention as I see it is whether the learned trial Chief Magistrate was entitled to dismiss the application for setting aside the ex-parte judgment as he did.

The brief facts are that on 3/3/2008 the respondent herein, Owayezu Immaculate, filed a suit against the appellant. Summons to file a defence were issued to the defendant on

6/03/08. The suit was for recovery of Shs.2,400,000/= being value of six cows allegedly stolen by the defendant/applicant, general damages and costs of the suit.

In an affidavit of service dated 01/04/08, one John B. Serwadda states that he was instructed by Kapeka court to go and serve summons to one **Gahira (sic) David** which were originating from Luwero Chief Magistrate's Court. In paragraph 3 he states:

***“3. That on the 15<sup>th</sup> day of March 2008 I reached the home of the defendant on (sic) to presence of his local council chairman of Katale Kamese village and I explained to him the purpose of the visit and read to him the summons.”***

In paragraph 4, he avers that instead of acknowledging receipt of the summons the defendant decided to walk away assuring him (the process server) that he will not sign. On the basis of the said Affidavit, the plaintiff wrote to court praying for an interlocutory Judgment against the defendant and to have the case set down for formal proof. This was on 08/04/2008.

Acting upon the said request, Court entered an interlocutory judgment and set the suit for formal proof on 24/04/08. Judgment in the matter was delivered on 08/05/08.

On 10/06/08, the appellant filed Miscellaneous Application No. 035 of 2008 seeking orders that the ex parte Judgment and orders be set aside and the case fixed for hearing on merit. His major ground was that he came to know of the case on 06/06/08 when his 28 heads of cattle were attached by M/s Impala General Auctioneers and Court Bailiffs, implying that Mr. Serwadda's affidavit of service indicating service on 15/03/08 was false. At the hearing, he told court that he did not know the case against him and that he was not served.

In his ruling dated 10/07/08, the learned trial Chief Magistrate observed that Judgment was entered against the applicant/appellant on 08/05/08 and that the same was not

appealed against in the High Court of Uganda but instead he filed the application to set aside the ex parte decree. There was of course nothing wrong with the procedure adopted by the applicant/appellant, given that according to him he had come to know of the case on 06/06/08 when his cattle were attached in execution of the decree.

The learned Chief Magistrate then observed that before the application was filed, the plaintiff had filed an application for execution of the decree and orders of his court; and that the same had been heard and the necessary orders issued. He then observed:

***“All in all I find that it is a waste of time to order a retrial of the suit when the Judgment and its orders have already been executed, to do so would mean abuse of court process and wasting court’s time.”***

He then dismissed the application for lack of merit at all and ordered the applicant to pay the respondent costs of the application as well. Hence this appeal.

I have very carefully addressed my mind to the grounds of appeal herein and to the arguments of counsel.

The appellant contends that there was no service on him on 15/03/08 since he was out of the country in Tanzania. He has produced a copy of a movement travel permit dated 14/03/08 which indicates that he crossed the Uganda/Tanzania border on that day. The appellant’s argument is that it cannot be true that he refused to acknowledge service on 15/03/08 as Mr. Serwadda appears to suggest in his affidavit of service because by then he was out of the country.

I have found no conclusive proof on this point.

Firstly, while it is true that the appellant filed **Miscellaneous Application No. 035 of 2008** seeking an order to set aside the ex parte decree, he appears to have made no mention of any trip to Tanzania in March 2008. The affidavit in support of the motion is silent on that point.

Secondly, the temporary movement permit presents an incomplete picture. Whereas it shows that he left Uganda for Tanzania on 14<sup>th</sup> March 2008, it does not show when he came back. It only shows Exit from Uganda.

Given that the issue of travel to Tanzania appears not to have been raised as reason for his failure to file a defence in **Civil Suit No. 25 of 2008**, one cannot conclude with any degree of certainty that this is proof on a balance of probabilities or at all. It is in my view of no evidential value, and I would, therefore, attach no weight to the same.

Having said so, however, the appellant did state in his application, **Miscellaneous Application No. 035 of 2008**, that he came to know of the case on 06/06/08 when his 28 heads of cattle were attached in execution, thereby indirectly putting Mr. Serwadda's affidavit of service in issue.

Order 9 rule 27 of the Civil Procedure Rules lays down the procedure for setting aside decree ex parte against the defendant. It reads:

***“27. In any case in which a decree is passed ex parte against a defendant, he or she may apply to the court by which the decree was passed for an order to set aside; and if he or she satisfied the court that the summons was not duly served, or that he or she was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree against him or her upon such terms as to costs.....”***

Clearly, a court handling an application for setting aside a decree obtained ex parte is duty bound to investigate and make a finding as to whether summons was or was not duly served. It is not enough that there is an affidavit of service on record because such an affidavit could be false.

What then was the trial court's finding on this point?

From the record of proceedings, the parties appeared before him on 03/04/08. I am a bit apprehensive about this date because it is out of depth with the sequence of events in this case. I am saying so because according to available records, the suit itself was filed in March 2008, service was purportedly effected on 15/03/08, and the plaintiff wrote to court on 8/04/08 praying for an interlocutory judgment. It was entered on 9/04/08 and the suit set down for formal proof on 22/04/08. The application to set aside the ex parte decree is dated 10/06/08. I have therefore failed to understand how an application filed on or about 10/06/08 could have been heard on 03/04/08, two months before it was filed. This is simply illogical and I would hesitate to attribute it to a clerical error on the part of the learned Chief Magistrate. Be that as it may, the record reads as follows:

***“3/04/08, Parties present. Applicant: I apply that we have the ex parte judgment set aside and orders past (sic).***

- ***I did not know of the case against me.***
- ***I was not served.***

***Respondent:***

**I object to this the summons were sent to him by the court of Kapeeka, when the Chairman LC was there.**

***Court:***

**Ruling on 8/07/08 at 11.30 a.m.”**

From this record, it is very clear to me that the issue of service or lack of it was never investigated by court.

The learned Chief Magistrate merely dismissed the application on account of execution having been carried out. This was a misdirection on his part.

For as long as it is still within the power of the court to declare a sale invalid, as for instance where any of the requirements in the rules of court or parties for the time being in force have not been complied with, the execution process cannot be said to be 100% safe or at all. After the decree, the court may, if satisfied that the service of the summons was not effective or for any other good cause, set aside the decree, and if necessary stay or set aside the execution: O.36 r.11 of the Civil Procedure Rules.

In the instant matter, there is no application for stay of execution or setting aside of the same. In light of the background to the case, I consider it just, fair and equitable not to set aside the execution.

For the reasons stated above, I find merit in the appellant's contention that the ruling of the learned Chief Magistrate disallowing the application to set aside the ex-parte judgment occasioned a miscarriage of justice. I therefore allow the appeal. To avoid a multiplicity of proceedings, and in the spirit of Section 98 of the Civil Procedure Act, the impugned ex-parte judgment and decree shall and are hereby set aside. The appellant/defendant shall file the intended defence in the main suit here at the High Court of Uganda within two (2) weeks from the date of this order and thereafter the file shall be forwarded to the Chief Magistrate's Court at Luwero for the Chief Magistrate's re-allocation to another Magistrate with competent jurisdiction or his/her determination of the claim on merits, whichever the said Chief Magistrate shall find more convenient. In view of the doubts expressed on the appellant's purported travel to Tanzania at the time of the impugned service of summons on 15/03/08, the appellant shall meet the costs of and incidental to his appeal and Miscellaneous Application No. 035 of 2008. He is at liberty to seek appropriate remedies regarding the fate of the cows attached and sold under the impugned decree in a counter-claim. Costs of the main suit shall abide the outcome thereof. Appellant shall meet own costs herein.

Orders accordingly.

**Yorokamu Bamwine**

**JUDGE**

**30/03/09**

**30/03/09:**

Appellant's representative, Francis Lugwe present.

Jolly Kauma – Clerk, in attendance.

**Court:**

Judgment delivered.

**Yorokamu Bamwine**

**JUDGE**

**30/03/2009**