THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CIVIL APPEAL NO. 0039 OF 2010

KACWANO STEVEN:: APPELLANT

VERSUS

KYEYAMWA WILLIAM:: RESPONDENT

[Appeal from the Decision of His Worship Kintu Simon Zirintusa in Kamuli Msc. Application No. 014 of 2010

dated the 22nd February 2010]

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

JUDGMENT

The appellant brought this appeal against the ruling and orders of His Worship Kintu Simon Zirintusa sitting as Grade I Magistrate at the Chief Magistrates Court at Kamuli, where he dismissed the appellant's application to set aside the dismissal of his application for leave to appear and defend in C/S No. 004 of 2010. The trial magistrate further affirmed his judgment and orders in the suit which were a declaration that the respondent was the lawful owner of a piece of land at Buwaiswa, that the appellant do pay to the respondent shs 877,500/= being the cost of tree seedlings and shs 1,180,000/=, the cost of hiring private detectives, the costs of the suit, as well as interest on the decretal amount and costs.

The background to the appeal was that on 27/01/2010, the respondent filed C/S No. 004 against the appellant in Kamuli Court under the provisions of Order 36 of the Civil Procedure Rules. He claimed that the appellant sold him a piece of land at Buwaiswa, Kibuye, Balawoli sub-county in Kamuli District. An agreement of sale was attached to the plaint. The specially endorsed plaint was served on the appellant who responded by filing Misc. Application No. 10 of 2010 through his

lawyers, M/s Habakurama & Co. Advocates. The application was filed on 11/02/2010. On the 12/02/2010, the trial magistrate endorsed the application and allotted it the 22/02/2010 as the date for hearing. On 19/02/2010, the respondent filed an affidavit in reply to the application for leave to appear and defend. There is no evidence on record that he was served with the application by M/s Habakurama & Co. Advocates, before he filed his affidavit in reply.

On 22/02/2010, the respondent appeared before the trial magistrate. There was no one in court from M/s Habakurama & Co Advocates who had filed the application on behalf of the appellant (then the applicant). The appellant was also absent. The respondent who appeared *pro se* then applied to have the appellant's application dismissed because in his opinion, the appellant had failed to prosecute it. The trial magistrate dismissed the application and made the orders enumerated above.

On 26/02/2010, the appellant filed Msc. Application No. 014 of 2010 for orders to set aside the dismissal of and for reinstatement of the application for leave to appear and defend, so that it could be heard on its merits, as well as for an order for stay of execution of the decree that arose there from. The court set the 9/03/2010 as the date on which the application would be heard. On 4/03/2010, one Kitawu James, a process server at Kamuli Court, effected service of the application on the respondent at his office in Jinja and swore an affidavit of service on 5/03/2010. The parties and advocates appeared in court on 9/03/2010 but the application did not proceed. It was adjourned to the 20/03/2010. An interim order for stay of execution was granted in favour of the appellant and the application adjourned for hearing on 30/03/2010. The respondent filed an affidavit in reply to the application on 25/03/2010.

On 30/03/2010, both parties and Mr. Habakurama for the appellant were in court. The application was heard and the ruling reserved for 13/04/2010. On that day, the trial magistrate delivered his ruling dismissing the application to set aside his judgment and orders. He reinstated the judgment and orders and set aside the interim order for stay of execution, and hence this appeal.

The memorandum of appeal raised 3 grounds of appeal as follows:

1. The learned trial magistrate erred in law and fact when he came to the conclusion that the appellant and his counsel were aware of the hearing date in the absence of an affidavit of

service or any credible evidence in proof of the fact that either counsel or the appellant was aware of the hearing date thereby reaching a wrong and unjust decision.

2. The learned trial magistrate acted with a lot of bias and failed to judiciously exercise the jurisdiction vested in him when he elected without any justifiable cause to lock out the appellant from taking part in the proceeding thereby going against the constitutional right of fair hearing.

3. The learned trial magistrate erred in law and fact when he came to the conclusion that the appellant had no defence to the entire suit thereby reaching (an) unjust and wrong decision that occasioned a miscarriage of justice.

The appellant prayed that the order dismissing his application be set aside, the application be reinstated and heard on its merits and that the *ex parte* judgment and the decree, as well as execution thereof be set aside.

At the hearing of the appeal, Mr. Elias Habakurama who represented the appellant argued the first two grounds together and ground three separately. With regard to grounds 1 and 2 he contended that there was no evidence to show that either the appellant or his advocates had notice that the application for leave to defend had been set down for hearing on 22/2/2010. Further that there was no evidence that the affidavit in reply to the application was ever served on the appellant or his advocates. That as a result the trial magistrate erred when he ruled that the appellant and his advocates failed to show that there was sufficient cause to reinstate the application and in the resultant dismissal of the appellant's application.

Turning to the third ground, Mr. Habakurama submitted that the trial magistrate's finding that the appellant had no defence to the suit was premature. In his view, such a finding could have only been in order after the appellant had been heard on the proposed defence.

Though he was represented at the hearing of the appeal by Ms. Leah Kisaalu, she informed court that she was not prepared to make a reply to Mr Habakurama's submissions. She prayed that she be allowed to file written submissions which she did on 24/06/2010.

With regard to the 1st and 2nd grounds of appeal, counsel for the respondent submitted that the trial magistrate's finding that the appellant was aware of the hearing date should be affirmed. The reasons advanced were that the appellant ought to have been aware of the 22/02/2010 as the hearing date because it was he that filed the application. Further that the appellant deposed in his affidavit in support of the application that on the 19/02/2010 his advocate was in court at Kamuli and inquired about the date set for hearing of the application. That as a result, the appellant could not claim that he was not aware that the application was fixed for hearing on 22/02/2010 because his advocate had checked on the file a few days before that date. It was further argued for the respondent that the court had no obligation to serve an applicant with his/her application. That since the applicant and counsel did not appear in court on the 22/02/2010, the trial magistrate was correct when he dismissed the application because Order 9 rule 22 of the CPR empowered him to do so.

Counsel for the respondent further submitted that there was no injustice occasioned and the appellant's right to be heard was not contravened because it was his obligation to follow up the application after it was filed and to obtain a hearing date for it. That since he or his advocates failed to do so, the dismissal of the application could neither be blamed on the respondent nor on the court.

With regard to the 3rd ground of appeal, counsel for the respondent argued that due to the failure of the appellant and his counsel to prosecute the application for leave to defend, the trial magistrate came to the correct decision when he dismissed the application. The he correctly entered a decree under the provisions of Order 36 rule 3 (2) of the CPR. Counsel for the respondent further argued that the appellant was not entitled to an order for stay of execution because execution was over. She submitted that stay of execution pending an appeal could only be granted except where there are special circumstances and good cause to justify such a course. She finally submitted that the appellant was not entitled to costs for this appeal because he had not shown that the respondent was at fault.

The duty of the first appellate court is to rehear the case on appeal by reconsidering all the evidence before the trial court and coming up with its own decision. The parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law [**Father Narsensio Begumisa & Others v. Eric Tibekinga, S/C Civil Appeal No. 17 of 2002 (unreported)**]. I now proceed to re-

evaluate the evidence on record taking into consideration the issues raised in each ground and the submissions made on behalf of the parties. I will address the grounds in the same manner that counsel for both parties addressed them.

Grounds 1 and 2

The appellant's application to set aside the dismissal of his application was brought under the provisions of Order 36 rule 11 CPR and s.98 of the Civil Procedure Act. Order 36 rule 11 provides that

> "After the decree the court may, if satisfied that **the service of the summons was not effective, or for any other good cause,** which shall be recorded, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the court so to do, and on such terms as the court thinks fit."

The appellant's main reason for not attending the hearing where his application was dismissed was that he was not aware of that date. Neither was his advocate. In arriving at his decision on this issue, the trial magistrate ruled as follows:

> *"In my considered opinion, I find that the applicant and his counsel have not furnished court with sufficient cause for not appearing when the application was dismissed. The applicant's counsel filed Msc. App. No. 10 on 11/02/10 and on 12/02/10 the application was signed and sealed by the magistrate and fixed for 22/02/2010.*
>
> *The applicant claims that his counsel was in court on 19/02/2010 but a court clerk told him that the application was not yet fixed. The applicant does not disclose the name of the clerk from whom his counsel obtained this information which implies total lack of proof of vigilance by the applicant and his counsel.*

> *On that said date of 19/02/10, the respondent though not served filed an affidavit in reply to the application. This shows that the matter was already fixed and counsel was never in court to check on the case on that day.*
>
> *The respondent was more vigilant and equity protects the vigilant and not the indolent. …"*

It is interesting to note that the trial magistrate noted that no service of the application was effected on the respondent. This proved that though the court had allotted the application a date for hearing by 19/02/2010, the applicant's counsel could not have gotten to know about it without looking at the application. In spite of that, in order to justify his finding that both the applicant and his advocate failed to establish that the application had been fixed for hearing on the 22/02/2010 the trial magistrate went on to castigate the appellant for not being interested in the matter. No where did he point out that when counsel for the applicant who filed the application failed to follow it up, notice of the hearing was given to the appellant before court heard and dismissed it. In the circumstance, there is no other way that the appellant could have known about the hearing date without information from his advocates.

Apart from the above, it would appear that the trial magistrate completely misunderstood the appellant's averment in paragraph 7 of his affidavit where he averred that his advocate went to court and a clerk told him that the application had not yet been allocated a date for hearing. The appellant stated that he believed the information from his advocate that when he went to the court on 19/02/2010 he was informed that the file was still before the trial magistrate who was to allot it a hearing date. It was not the appellant's obligation to know the names of clerks in the registry at the court; neither was it expected of him. In spite of that the trial magistrate ruled that he did not believe the appellant's statement because he omitted to state the name of the clerk who gave this information to his advocate. I think the magistrate went too far. The appellant had clearly stated that he did not attend court because he did not know the date when the application had been fixed for hearing. I am of the view that when he stated so, he discharged the burden of proving that he failed to attend court for sufficient cause.

I think the trial magistrate meant to infer from this averment that the advocate lied to his client about the information from the clerk and that the client was perpetuate his advocate's lie in court. He did not believe that the clerk could have misinformed the advocate. The carelessness and/or negligence of clerks in the courts is a fact that judicial officers should be aware of. An advocate who brings this to the notice of court should not be penalised for it; neither should a litigant. This does not mean that advocates are never negligent. I am of the view that when he lumped the appellant together with his advocate as indolent in his ruling, the trial magistrate in effect punished the appellant for his advocate's failure to follow up the matter.

I am aware of the doctrine that a man or woman who empowers an agent to act for him/her is not allowed to plead ignorance of his/her agent's dealings (**Twiga Chemicals v. Viola Bamusedde Bwambale, C/A Civil Appeal No 9 of 2002**). However, in **Captain Philip Ongom v. Catherine Nyero Owota, S/C Civil Appeal No.14 of 2001,** it was held that though it is an elementary principle of our legal system, that the acts and omissions of the advocate in the course of representation bind a litigant who is represented by an advocate, in applying that principle, the court must exercise care to avoid abuse of the system and/or unjust or ridiculous results. It was further held that a proper guide in applying the principle is its premise, namely that the advocate's conduct is in pursuit of and within the scope of what the advocate was engaged to do. In light of that, a litigant ought not to bear the consequences of the advocate's default, unless the litigant is privy to the default, or the default results from failure on the part of the litigant to give to the advocate due instructions.

In conclusion, I find that the appellant cannot be guilty of failing to follow up his application because he had entrusted the matter to an advocate. If the advocate was not vigilant in following up the application, the appellant was not privy to his negligence. The trial magistrate therefore erred when he ruled that the appellant was guilty of indolence and that he had failed to prove that there was sufficient cause for his failure to attend the hearing on the 22/02/2010.

As to whether the trial magistrate was biased against the appellant when he refused to set aside the order dismissing his application, no arguments were advanced by Mr. Habakurama to support the allegation. The contention that he was denied the right to be heard was also not sufficiently canvassed. However, the right to be heard is sacrosanct and constitutionally guaranteed in Articles 28 and 44 of the Constitution of the Republic of Uganda. In **National Enterprises Corporation v.**

Mukisa Foods Ltd; C/A Civil Appeal No. 42 of 1997, it was held that denying a party the opportunity to be heard should be the last resort of a court. Unless and until the court has pronounced a judgment upon the merits of the case or by consent of the parties, it is to have power to revoke the expression of its coercive power where that had only been obtained by failure to follow any of the rules of procedure.

In this case, the application that the appellant sought to have reinstated was only to determine whether he should be allowed to file a defence in the suit because in his view, he had a good defence to the suit. The plaintiff would not have been prejudiced in any way since execution had not issued then. If the appellant had no defence to the suit, that issue should have been decided on hearing the application, perhaps to the satisfaction of both parties. But as it stands, the trial magistrate erred when he refused to grant the appellant the opportunity to be heard on his application and thus occasioned a miscarriage of justice.

Regarding the third and final ground of appeal, it is the case that on an application for leave to appear and defend the court may consider whether the applicant/defendant has a defence to the plaintiff's claim. But the cardinal principle in such applications is for the court to establish whether there are triable issue raised by the grounds stated in the application. In this case the trial magistrate ruled on that issue as follows:

> *"The applicant in other grounds stated that he has a genuine defence to the entire suit and the land is occupied by other occupants who are co-owners. First of all the applicant did not attach a copy of his written statement of defence to his application No. 10/10 as required and secondly the applicant according to the sale agreement attached was the seller and no one else as he claims, came to object to the sale or the judgment. I don't know where the applicant gets authority to talk on behalf of other people who have not objected through affidavit or otherwise to the judgment obtained by the respondent.*
>
> *In the interests of justice I find that the applicant sold the suit land to the respondent and this was in the presence of the applicant's brothers and sisters and relatives and*

now has come forward to object to the sale. Therefore the applicant cannot turn around and claim co-ownership which is not supported by any evidence."

There is no legal requirement that an application for leave to appear and defend should have the proposed defence attached to it. The proposed WSD may be attached but that is only a prudent measure and a rule of practice. In this case, the court was not called upon to decide whether the appellant had a defence to the suit. All that the court had to decide was whether there was good cause for the appellant's failure to attend the hearing of his application for leave to appear and defend which would enable the court to set aside the ex parte judgment in default of leave to appear and defend the suit. However, in his ruling the trial magistrate went on to decide issues that were pertinent to the application that the appellant sought to have reinstated instead of those in the application before him. He also went on to decide the main issue in the suit, i.e. whether the appellant or his brothers and sisters were co-owners of the land in dispute, on the basis of the plaintiff's pleadings alone. This was an error both of law and fact on the part of the trial magistrate, and I find so.

I therefore entirely agree with Mr. Habakurama's submission that his findings were premature. I say so because the trial magistrate relied on an agreement that was annexed to the plaint written in Luganda with no translation into English. Of course no other evidence had been adduced by either party in the suit to support his findings on that agreement so his findings were unsubstantiated. The trial magistrate prejudged a case and appears to have been biased in favour of the respondent. He thus may have occasioned a miscarriage of justice.

In conclusion, this appeal succeeds. The dismissal of the appellant's application for leave to appear and defend is hereby set aside. Any execution of the judgment and orders is also set aside. Further execution of the judgment and orders is also hereby stayed. The case file shall be returned to the lower court to enable Miscellaneous Application No 10 of 2010 to be heard on its merits. The appellant shall have the costs of this appeal and those in the court below.

Irene Mulyagonja Kakooza

JUDGE

21/07/2010