THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

HCT-03-MA-CA-CS-0318-2015

(ARISING FROM CIVIL APPEAL NO. 51 OF 2009)

(ARISING FROM LAND CIVIL SUIT NO.24 OF 2006)

1. **KAAWA STEVEN**
2. **AKURUT ELIVAIDA::APPLICANT**

VERSUS

MAWERERE BENEFANSI:::RESPONDENT

Application for Set Aside the Exparte Judgement of this Honourable Court.

Held: *Application Found to be devoid of Merit and is dismissed with costs to the Respondent.*

BEFORE: HON. JUSTICE DR. WINIFRED N NABISINDE

RULING

This Ruling follows an application filed by the applicants by way of Notice of Motion under **Order 43 Rule 18 and Rule 21 of the Civil Procedure Rules SI No. 71-1)** seeking the following orders: -

1. That the Exparte Judgement of the Honorable Court be set aside and the appeal be reheard interparty on its own merit.
2. That the costs of the application be granted to the applicants.

This grounds upon which this application is premised are as follows:-

a) That the applicants were not served with hearing notices by the respondent and that the 2nd applicant was not aware that the matter was coming up on the 29th day of October 2014 when the respondent's appeal was heard exparte and determined without hearing the applicants.
b) That the affidavit of service in the court record filed on the 29th day of September 2014 is false as the 2nd applicant is an illiterate and cannot write her own name.
c) The applicants were the successful parties in the case in the lower court in **Civil Suit No. 0024/2006**, the 2nd applicant being the widow of the former owner of the suit land.
d) That it is in the interest of justice and equity that this Honorable Court be pleased to set aside the exparte judgement and rehear the appeal interparty

this being a land matter and the 2nd applicant has been dispossessed of the same.

It is also supported by the affidavit of the 2nd applicant which state in further detail the above stated grounds.

In reply to the application, the Respondent deponed an affidavit in opposition and averred that;

1. That the appeal in **Civil Appeal No. 051 of 2009**, only affects the 2nd Applicant because she is the only one who was declared to be the lawful owner of the suit land.
2. That by the time this honorable court reached a decision to allow his counsel argue the appeal exparte, it was following a series of events of serving Elivida Akurut and she failing to come to court; it was not an event of one day.
3. That by reason of the matters stated in paragraph 6 hereof, the court should not look only, at the services of the hearing notice on 20th September 2014 requiring her to be in court on 29th October 2014.
4. That the appeal was filed in court on 20th March 2009.
5. That sometime in 2012, the appeal was fixed for hearing on 7th June 2012 and a process server of this court by the names of Bamulangeyo Kenedy, served her with a hearing notice; she refused to accept service.
6. That on 7th June 2012, the 2nd Applicant/2nd Respondent in the appeal, did not turn up in court and no explanation was given.
7. That on 7th June 2012, the court adjourned the appeal at the request of his counsel in order that the 2nd respondent/ 2nd Applicant is given a second chance to be in court, the appeal was adjourned to 14th September 2012; the Respondent/2nd Applicant was served for that day.
8. That on 14th September 2012, the appeal came up for hearing, and he was in court and Elivida Akurut appeared in court and the trial judge advised her to seek legal services of legal Aid project since she had no counsel and the Appeal was adjourned to 6th December 2012.
9. That on 6th December 2012 appeared in court but the 2nd Respondent/Akurut Elivida did not turn up in court and no explanation was given and the appeal was adjourned to 28th March 2013.
10. That on 6th December 2012 appeared in court but the Respondent/Akurut Elivida did not turn up and no explanation was given and the appeal was adjourned to 28th March 2013.
11. That on 28th March 2013 the Appeal was adjourned to 11th July 2013; the respondent together with his counsel, were in court; Elivida Akurut was absent.

12. That on 11th July 2013, he was in court and Elivida Akurut was absent and the Appeal was adjourned to 5th December 2013.
13. That on 5th December 2013 the Appeal was adjourned to 3rd April 2014.
14. That by then legal Aid Project was acting for Elvida Akurut and Legal Aid project was served for 3rd April 2014 and they accepted service.
15. That on 3rd April 2014 he was present in court and Elivida Akurut was absent and court ordered that she be served personally and the Appeal was adjourned to 29th October 2014.
16. That on 20th September 2014 a process server of this court served Elivida Akurut for 29th October 2015.
17. That the said process server Florence Namufuta is still in service at the High Court of Uganda – Kampala.
18. That on 29th October 2014, he appeared in court and Elivida Akurut did not turn up in court and court directed that his counsel argues the appeal and judgment was delivered on 20th November 2014.
19. In specific reply to paragraphs 3 & 4 of the said Affidavit; the Deponent has not shown why the process server should have sworn a false affidavit against her; especially in view of her (Deponent) antecedents.
20. That this application was prompted by the execution of the decree; in the appeal, it is inordinately delayed, given application was filed in September 2015.
21. That in an application like this one, it is not open for the Applicant to delve into the merits of the case; but suffice to state that the record clearly shows that he was in possession of the suit land un interrupted from 1970, when he bought the land, till the year 2006, when Elivida Akurut started laying claim over the land.
22. That by reason of the matters averred above, Elvida Akurut has not shown good cause to warrant the appeal being reheard.

REPRESENTATION

When this application was presented before me for hearing, the applicant was represented by learned Counsel Mr. Esarait Robert of M/S. Esarait Adikin & Co Advocates, while the respondent was represented by M/S. Tuyiringire & Co Advocates.

Both parties were directed to file written submissions and they complied. I have carefully analyzed the submissions of both Counsel and I have considered them in this ruling.

THE LAW

Order 43 Rule18 of the Civil Procedure Rules provides as follows:-

"Rehearing on application of respondent against whom ex parte Decree made.

"Where an appeal is heard ex parte and judgment is pronounced against the respondent, he or she may apply to the High Court to rehear the appeal; and if he or she satisfies the court that the notice was not duly served or that he or she was prevented by sufficient cause from appearing when the appeal was called on for hearing, the court shall rehear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him or her."

ISSUES TO BE RESOLVED

Whether there is sufficient cause given by the applicant to allow the grant of this application?.

RESOLUTION OF THE APPLICATION

It was submitted by learned counsel for the applicants that this is an application brought under **Order. 43 Rules 18 & 21 of the Civil Procedure Rules** seeking to have the exparte judgement made by this court set aside and the appeal be heard interparty on its merits and that the costs of the application be awarded to the applicant.

That the grounds of the application are stated in the amended notice of motion and the affidavit in support of the same and they include that; the applicant in particular was not aware that the matter was coming up on the 29th day of October 2014 when the respondent's appeal proceeded exparte and determined without hearing the applicant; the affidavit of service in court record filed on the 29th day of October 2014 is false as the 2nd applicant is an illiterate who cannot write her own name; the applicants were the successful parties in the lower court, the land being part of the estate of the late husband to the 2nd applicant.

That the 2nd applicant in her affidavit states the she was never served with the hearing notice for the 29th day of October 2014 and that the appeal was heard and determined without affording her a hearing. That she further deposed that the affidavit of service deposed by Namafuta Florence is false as nobody ever served her and that she is an illiterate who cannot even write her name, yet in the affidavit of service by writing her name. They cited **Order 43 Rule of the Civil Procedure Rules** provides that: *"Where an appeal is heard exparte and judgement is pronounced against the respondent, he or she may apply to the High*

court to rehear the appeal; and if he or she satisfies the court that the notice was not duly served or that he or she was prevented by sufficient cause from appearing when the appeal was called on for hearing, the court shall rehear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him or her."

They submitted that the rationale for this rule lies largely on the premise that an ex-parte judgment is not a judgement on the merits and where the interest of justice is such that the defaulting party with sound reasons should be heard, then that party should indeed be given a hearing.

They prayed that court finds that the applicants were not served with the hearing notice of the 29th day of October 2014. The applicants were not aware that the matter was coming up that day when the exparte proceeding was allowed leading to the exparte decree. That the 2nd applicant in her affidavit in support depose that she was the successful party in the lower court, being that the land belongs to the estate of her late husband. That her late husband Bukone Yokolamu was killed by the respondent while he and the 2nd applicant were in possession of the suit land. That even after the death of her husband, the 2nd applicant continued in occupation of the suit land without interference until 2006 when the respondent started claiming the same.

They further submitted that the respondent had never ever possessed the suit land before until he obtained the exparte judgement before this court and orders to evict the 2nd applicant. That it is clear that the appeal was determined without any input from the side of the defense. That this is contrary to the right of a party in a matter to be heard especially where the person has exercised all due diligence to do so. That the right to be heard is an inherent tenet of a fair trial is enshrined in **Article 28 of the Constitution**.

That **Order 43 Rules 18 & 21 of the Civil Procedure Rules** gives the High Court unfettered discretion to rehear the appeal. In the exercise of the said discretion we invite this court to consider in light of the facts and circumstances both in the lower court and subsequent of the respective merits of the parties, it is only just and reasonable to set aside the exparte decree and have the appeal reheard. That the main concern of court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rule. They prayed that the costs of this application are awarded.

In reply, it was submitted learned counsel for the Respondents that the Applicants filed this application seeking an order of court, vide their Amended Notice of Motion filed on 19th February 2020, the said notice of motion is supported by the Affidavit of Akurut Elivida - 2nd Applicant, sworn at Jinja on

19th February 2020. That the 2nd applicant is the right person to swear the affidavit because she is the party to whom the suit land was decreed on the lower court. That the 1st applicant has not sworn any affidavit and the 2nd applicant has not stated that her affidavit also caters for his interest; as such, he (the 1st applicant) is not challenging the status quo, and as such an application, since it is not supported by an affidavit/evidence, that it be dismissed as a preliminary point of law.

For this proposition of the law, they cited the case of ***Ready Agro Suppliers Ltd & 2 Others vs Uganda Development Bank Ltd, HCT 00.CC- 0379-2005; (Arising from HCT 00 CC-CS-186-2005)*** where the applicants were sued under Summary Procedure and they applied for leave to appear and defend the claim, however the 3rd applicant's application was found by the court not be supported by an affidavit and this application was dismissed.

Further, that the application is opposed by the main affidavit of the respondent, sworn by him on 20th February 20202, it is also supported by a supplementary Affidavit of the said respondent sworn at Jinja on 26th February 2020 and no affidavit in rejoinder was filed by the applicant.

That it is the applicant's case, as can be discerned from her affidavit in support of the application that she was not served for the hearing of then appeal for the 29th October 2014, when the respondent's appeal was heard and determined exparte. That the affidavit of service of Florence Namufuta filed in court on 29th September 2014 is false as nobody has ever served he with any court documents and that she is illiterate that she cannot write her names. That in paragraph 5, she says and the 1st Respondent, were the successful parties in the lower court; and that the 2nd applicant is the widow of the former owner of the suit land; these averments are irrelevant and the correct position is that in the lower court, it is only the 2nd Applicant that was declared the lawful owner of the suit land.

That in paragraph 5 of the said affidavit, the 2nd applicant's averments are quarrelsome, insulting and abusive of the Respondent in half/part of the said affidavit; where she says that her husband was killed by the respondent; these averments should be struck off the record; for being embarrassing and unacceptable under the law relating to affidavit; these are matters for a criminal trial; nonetheless the applicant is appealing to the sentiments and sympathy of court.

In addition, that in the case of ***Nakiridde Namwandu vs Hotel International [1987] HCB 85*** court held thus: *"An affidavit deponing to matters of law,*

irrelevant facts and too long, is oppressive and an abuse of court process it is therefore incompetent. It is also bad for prolixity".

That in the other part of the 5 of the affidavit, she avers that the death of her husband, she continued being in possession of the suit land, without interference, till the year 2006, when the respondent started claiming the land. That in paragraph 7 of the said affidavit, she avers, that the respondent has never had possession of the suit land. That these averments in the paragraphs, do not advance her case, that she was never served for the 29th day of October 2014 or that she was prevented from attending court on the 29th day of October 2014 by sufficient cause, but rather she is going into the merits of the case, which is not allowed by the relevant law; since even counsel for the applicants has addressed court on merits.

That in his affidavits, the respondent has given a background of the case that is, that Elvida Akurut was served several times i.e. on 12th December 2013 when Legal Aid, then counsel on record as her counsel, for 3rd April 2014 per **annexure B1 & B2**. That on the judge ordering that she be served personally and the appeal was fixed for 29th October 2014.

That on 20th September 2014, Elivida Akurut was served for 29th October 2014 and he relies on Annexure C1 & C2. That between paragraphs 5 and 10, he avers as to earlier on, he used to come to court for various proceedings, including for temporary injunction and sometimes Elvida Akurut would be in court or not, till when on 14th September 2012, while Elvida Akurut in court for the hearing of the appeal, the judge advised her to engage legal Aid Project to handle her case.

That in the affidavit of service of Florence Namafuta **Annexure C1**, to the respondent's main affidavit in reply, Namufuafata avers that she is a process server of the High Court of Uganda; and she further avers that on 20th September 2014, she proceeded to Kitaidhuba village, Kidera Sub County, Buyende district, to effect service of the Hearing notice. That she had served her before, she just proceeded to her home and met her, although she refers to her as him; that she accepted service and she signed on the hearing notice, that she has looked at Annexure C2 and there is no traditional signature but the names Alivida Akurut are scribbled on 20th September 2014.

That the judge accepted this affidavit of service and allowed the appeal to proceed exparte. That it is also averred in paragraph 6 of the affidavit in reply, that by the time the court allowed the respondent's counsel to proceed expert, it followed a series of events of serving Elivida Akurut and she failing to come to court, that it was not an event of one day; this averment is not challenged by any affidavit

in rejoinder. That the respondent also avers in paragraph 7 of the said affidavit, that by reason of the matters stated in paragraph 6 hereof, the court should not look at the service of the hearing on 20th September 2014 requiring her to be in court on 29th October 2014.

That in paragraph 8 of the said affidavit the respondent avers that this appeal was filed in court on 20th March 2009. That in 2022, the applicant seeks to take the court in reverse, and seeks to take the court in reverse direction. That in paragraph 9 he aver that in 2012, the appeal was fixed for hearing on 7th June 2012 and the process serve of the court by the names of Kennedy Bamulangeyo served the 2nd applicant with a hearing notice for the said day and she refused to accept service. That this averment is not challenged at all; by an affidavit in rejoinder. That the legal position is that once one swears an affidavit which is not challenged, then those averments are held to be conceded or admitted; for this proposition of the law and cited the case of ***Rwabunyoro Mugume David vs. Kalule .S. Simon King Misc. Cause No. 045 of 2014*** where the Court held that once an affidavit is filed and served on a party and no affidavit in reply is filed, the presumption is that such facts are accepted.

That the only attempt the applicant has made, is to say that Florence Namafuta did not serve her on 20th September 2014 in the affidavit in support of the application, however, she has not denied the fact that Florence Namafuta had served her at her home earlier and that she did not need an escort to take her to her (applicant) home, to identify her to the process server. That she has also not taken any effort to state, as to why Florence Namafuta who had served her earlier, who is a process server of court and therefore who ought to have no interest in the matter, should swear a false affidavit; given the elaborate affidavit in reply of the respondent, if the applicant's application was ever to make sense, then she ought to have sworn an affidavit in rejoinder, to challenge those averments.

That in paragraph 23, the respondent avers that he believes, that this application was prompted by the execution of the decree in the appeal, a copy of the return of the warrant after execution dated 4th September 2015 is on the court file however, for ease of reference.

That the respondent has averred in paragraph 24 of his affidavit, while denying paragraph 6 of the applicant's affidavit that it is not open for the applicant, to delve in the merits of the case; all she has to prove is lack of service and / or being prevented by sufficient case.

That indeed even counsel for the applicant has delved in the merits of the case; in an application to set aside an exparte judgement like this one, it is not open to delve in the merits of the case as per the case of ***Shamsudin Jiwan Mitha vs Abdulaziz Ali Lalak [1960] EA 1054-1057 at pages 1055 and 1057***; indeed **Order XLIII Rule 18 of the Civil Procedure Rules** under which this application is brought, provides that:- *"Where an appeal is heard exparte, and the judgement is pronounced against the respondent, he or she may apply to the High Court, to rehear the appeal and if he or she satisfies the court that the notice was not duly or that he or she was prevented by sufficient cause from appearing when the appeal was called on the hearing, the court shall rehear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him or her".*

They further argued that nonetheless, in case he is overruled on the point, the respondent has averred in paragraph 24 of the said affidavit that the court record reveals that he has been in possession of the suit land, uninterrupted from 1970, till the year 2006, when Alivida started laying claims over the suit land. That the applicant has failed to prove that she was not served with the hearing notice for the 29th October 2014; she has also failed to prove that she was prevented by sufficient cause to be in court on the said date.

They also relied on the case of ***Kiige Fred & 7 Others vs Kaluya Yonasani – Civil Appeal No. 019 of 2018 at the High Court of Uganda at Jinja***; in that case, the Defendants/Appellants were served with summons to file a defense together with a plaint, they filed no written statement of defense, nonetheless the dispute being land dispute, court ordered that they be served with a hearing notice, to wake them up; in fact they were served with several times, till finally the trial court proceeded exparte, and judgement was entered in favor of the plaintiff; at the level of execution of the decree, the Defendants filed **Misc. Application No. 41 of 2017**, asking court to set aside the exparte judgement on the ground that they were never served with summons and or hearing notices and that they had a defense on the merit of the case; the trial magistrate dismissed the application and they appealed to the High Court against that Ruling; Justice Michael Elubu dismissed the appeal, he agreed with the trial Magistrate, that they were served, but shut themselves out of court.

He further held that for those reasons, the appellants cannot even invoke **Article 126(2) (e) of the Constitution**, which is only open, to litigants, who have submitted to law and further held, that for the same reasons, it would not be useful to consider whether they have a defense on merits.

They then submitted that the original suit in this case, was filed in Kamuli Courts as **Civil Suit No. 24 of 2009**, it was concluded at Kamuli on 3rd February

2009; the appeal was filed in this court on 20th March 2009; and the judgement on appeal was delivered on 20th November 2014; execution of the decree was effected on or about the 24th August 2015; the return of warrant though dated 4th September 2015 does not state the date of execution.

That the application to set aside the exparte judgement was filed in September 2018 i.e. 3 years after the date of execution of the Decree and 3 years and 10 months, after the date of judgement, it is the law, that an application to set aside an exparte judgement must be filed within reasonable time. That the case of ***Lucas Marisa vs Uganda Breweries Ltd HCCS No. 9 of 1986 [1986-90] HCB 131 -132***; the Applicant had taken a period of one year and some months, to file an application to set aside an order dismissing his suit. That ordinarily, this kind of application; given its nature and the conduct of the applicant ought ordinarily to *"shock the conscience of court"* she is the applicant telling the truth? Or she is playing games in court.

They submitted that she is not telling the truth and that this application be dismissed with costs.

In rejoinder, learned counsel for the applicants submitted that the submission by the respondent's counsel that the 1st applicant ought to file an affidavit in support of the application and or should have given authority to the 2nd applicant to depose on his behalf is bad law. That the application is duly supported and rely on the case of ***Namutebi Matilda vs. Ssemanda Simon & 2 others, Misc. Application No. 430 of 2021,*** Justice Stephen Mubiru held that; *"I have considered the available decision posting the principle that a person is not to swear an affidavit I a representative capacity unless he or she is an advocate or holder of power of attorney or duly authorized;* and relied on ***Kaingana Joy per Kaingana John vs. BouBon Dabo [1986] HCB 59; Makerere University vs. St. Mark Education Institute and others, H.C. Civil Suit No. 378 of 1993***; ***Taremwa Kamishani and others vs. Attorney General, H. C. Misc. Application No. 38 of 2012; 30 Edrisa Mutaasa and other vs. IGG, Lyantonde District Administration and another, H.C. Misc. 7 Cause No. 06 of 2010; Kaheru Yasin and another vs. Zinorumuri David, H.C. Misc. Application No 82 of 2017 and Ssenymba Vincet and two others vs. Birikade Peter and another, H.C. Misc. Application No. 378 of 2018***).

They submitted that those decisions posit the view that where there is no written authority to swear on behalf of the others, the affidavit is defective. That they have not found any basis for that principle in the rules of evidence nor those of procedure. The principle appears to have developed from the analog of representative suits, which analogy he finds to be misplaced. That in ***Taremwa***

Kamishani and others vs. Attorney General, H.C Misc. Application No. 38 of 2012 the court expressed the view that; "where the party obtains a representation order it is sufficient authority to represent himself/herself and others in the same interest and he or she 10 can swear an affidavit on his or her own behalf and on behalf of the others represented.

Conversely, that where a party swears an affidavit on his or her own behalf and on behalf of the others without the others' authority when it is not a representative suit, the affidavit becomes defective for want of authority." In ***Ssenyimba Vincent and two other vs. Birikade Peter and another, H.C. Misc. Application No. 378 of 2018*** the court expressed the view that *"the law [is] that save in 15 representative suits where the party who obtains the order to file the suit can swear affidavits binding on others on whose behalf the suit is brought, where an affidavit is sworn on one's behalf and on behalf of others there is need to prove that the others authorized the deponent to swear on their behalf."*

That the appeal to misconceived analogy can lead to really wrongful and serious harm in the name of the law. That analogical arguments always involve a comparison of two more selected items. That what is important in an analogy is that the two scenarios which are matched are both instances of a more general rule or principle from which the desired conclusion in both instances can be derived. Analogical argument serves the purpose of enabling the court to discern whether the possession of 25 some characteristics known to be shared by the source and the target rationally warrant the inference the target also possesses the inferred characteristic that the source known to have. That filing a suit is not relevantly similar to adducing evidence in the suit. Analogical arguments always involve picking shared characteristics in the source(s) and the target that are judged to be rationally relevant to possession of the inferred characteristics.

That while filing a suit has aspects of locus stand, adducing evidence is all about competence. That what representative suits arise from rules of convenience prescribing conditions upon which persons who have the same actual and existing interest in the subject matter of the intended suit, although not named as parties to a suit, may still be bound by the proceedings therein, the rules of evidence on the other hand confer discretion on the court to control repetitive evidence; a judicial safety 5 valve by which a party's attempt to adduce excessive evidence in support of the same proposition can be cut short.

That an affidavit should not be filed when it adds very little to the probative force of the other evidence in the case; therefore, when the relevant facts are within the common knowledge of parties having the same interest in the litigation, an affidavit by one of them will suffice. That whereas initiating a suit in another's

name clearly require authorization since it raises 10 issues of autonomy of the individual, adducing evidence of facts that have a bearing on another's case already before court does not.

That the basic pattern of analogical reasoning is always this: on the basis of some shared relevant characteristics, one infers that the "target" item has an additional characteristics the source 15 items is known to have. That for this to be a sound analogy, representative suits must have some shared relevant characteristics with affidavit evidence. That analogical arguments cannot be rationally compelling unless there is some explanation that provides a rational justification for the rule's assertion that possession of the shared characteristics in an item rationally warrants the inference to the conclusion that the item also possesses the inferred characteristics. That not only have they not found 20 shared relevant characteristics between representative suits and affidavit evidence, but also failed to find a rational justification for applying a principle of convenience intended for representative suits, to affidavit evidence adduced by parties having the same interest in the litigation and testifying to facts in their common knowledge.

That of course the Rules of Procedure, like any set of rules, cannot in their very nature provide for every procedural situation that arises. That where the Rules are deficient, my view is that the court should go so far as it can in granting orders which would help to further the administration of justice, rather than hampering it.

That for those reasons they are not persuaded to follow the principle that where there is no written authority to swear on behalf of the others, an affidavit is defective; most especially since the decisions in which it was applied are not binding on him. That object is accordingly overruled." That as such it is our humble submission that the court over rules this point of law and finds that the affidavit of the 2nd applicant is sufficient evidence to support the application before the court.

That the application is not seeking sympathy nor appealing to sentiments. The respondent was charged, tried, convicted and sentenced. What the applicant deposed was factual and not intended to embarrass anyone. That the court interests itself on whether the applicants were aware of the fixture for the 29th day of October 2014 and not any other date before. That it is the applicants' case that she was not served on the 20th day of September 2014 and that she was not aware that the matter was scheduled for hearing on the 29th day of September 2014. That the reason the judge ordered that the applicant be served personal is that the previous serving were found to be ineffective. The prior serving of the

applicant and or her advocates before the 2oth day of September 2014 is immaterial. That what is immaterial is the applicant was not served with hearing notices for the 29th day of September 2014 and the alleged service was false as the applicant does not know how to write at all not even her own name.

That it is true that the application was prompted by the execution. The applicant only learnt during execution that the matter was heard and determined without affording her a hearing. Before that, the applicant had no knowledge that the matter had been determined against her. That it is true that in an application of this nature, court is not interested in the merit of the matter, however, court is interested in the applicant showing that she has a case that should be heard by the court. That there is a prima facie case against the appeal. That the case of ***Kiige Fred & other vs Kaluya Yonasani*** relied on by counsel for the respondent is distinguished from the instant case. In that case the judge found that the applicants were served and in the instant case the applicant was never served. That they agree with counsel for the respondent that "justice shall not be delayed" but also seek to add that justice must be seen to be done and delaying the applicant a chance to be heard is not justice. "Justice hurried is buried".

That to put the record straight, the application to set aside exparte judgement was not filed in September 2018 but was filed on the 14th day of September 2015 vide Misc. Application No. 318 of 2015 and was first fixed for the 27th day of January 2016. That the application was filed hardly a month from the time the applicant learnt of the exparte judgement and it is not true that the application was filed after 3 years and 10 months after. It was filed only after a few weeks. They prayed that the application is allowed so that the matter is heard after according both parties a hearing and the costs of this application are awarded.

In resolving this application, I have carefully examined the record on which the Exparte Judgment in **Civil Appeal No. 051 of 2009** was arrived at and delivered on the 20th of November 2014. I have also examined the grounds raised in this application seeking to set aside the Exparte Judgment on grounds of non-service of notices on the 20th of September 2015 and the submissions of both learned counsel.

It is noted that this application was filed almost 10 months after the date of the said exparte judgment. The applicants then amended the application on the 19th day of February, 2020. In all this, the gist of the grounds relied upon by the applicants is that they were not served with the hearing notices to appear and defend the suit when it was fixed for the hearing.

They further denied ever being served by the court process servers who swore affidavits of service.

I have carefully examined the record out of which this application arises and found three sworn affidavits of service. A close examination of each of the reveals that attached thereto, are the Hearing Notices of 14th March 2012 fixing a date of 7th June 2012 in which the court process server affirmed that the 2nd applicant refused to acknowledge receipt of the same.

The second affidavit of service is dated 31st of January 2014 attached to it is the hearing notice of 9th December 2013 fixing hearing for 3rd April 2014. This one clearly shows that the 2nd applicant's lawyer acknowledged receipt of the same.

The third affidavit of service is dated 26th of September 2014 and attached to it is the Hearing Notice of 26th August 2013 fixing hearing for 29th October 2014. It is clear that this as well was received by the 2nd applicant.

I have also examined the record and found that on those particular dates, neither the 2nd applicant nor their lawyer ever appeared for hearing. The record reveals also that the 2nd appellant as the respondent in the appeal last appeared in court on the 14th of September 2012.

The High Court then sat six more times and in respect of all those times, the respondent was always absent.

The reason for her absence as submitted their learned counsel is that they were not served with hearing notices. The law under which this application was brought is very clear as seen below.

Order 43 Rule18 of the Civil Procedure Rules provides for rehearing on application of respondent against whom ex parte Decree made that; *"Where an appeal is heard ex parte and judgment is pronounced against the respondent, he or she may apply to the High Court to rehear the appeal; and if he or she satisfies the court that the notice was not duly served or that he or she was prevented by sufficient cause from appearing when the appeal was called on for hearing, the court shall rehear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him or her."*

Further, **Section 98 of the Civil Procedure Act** reads that:-

"Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court".

This section empowers the court to grant any orders in all cases in which it appears to the court to be just and convenient to do so to ensure that justice is not only done, but seen to be done.

Again, **Section 33 of the Judicature Act Cap 13** empowers this court to grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy are finally determined and all multiplicities of legal proceedings concerning any of those matters avoided. ***See HC CA No. 07 of 2011 Kaahwa Stephen & Another vs Kalema Hannington*** per Hon. Lady Justice Monica K. Mugenyi.

While the above two sections, gives Court wide discretionary powers to make any orders that are necessary to meet the ends of justice, it is clear that this must be exercised judiciously and only in deserving cases. In order for court to set aside any exparte decree, the court must satisfy itself on the fact that the Applicant was not duly served with Hearing Notices and that the Applicant has furnished sufficient cause to set aside the Exparte judgment of the court.

I'm also alive to **Article 126(2) (e) of the Constitution** invoked by learned counsel for the applicants, however, I'm also aware that this is not an open checque to be used at will by indolent litigants, who fail to submitted to law but must be jealously guarded and only invoked in deserving cases where there is proof that the party invoking it has sufficient reasons.

Having analyzed the grounds on which this application is based and the facts as can be discerned from the record on which that appeal was heard and decided, as availed to me, it is my finding that I cannot fault the trial court on deciding to proceed exparte after satisfying itself that there was proper service of the Hearing Notices.

I have also had occasion to examine a copy of the resultant Judgment as annexed and **marked 'F'**. It is clear that the original suit in this case was filed in Kamuli Magistrates Courts as **Civil Suit No. 24 of 2009** and was concluded at Kamuli on 3rd February 2009. The appeal was filed in this Honourable Court on 20th March 2009 and the Exparte Judgement on appeal was delivered on 20th November 2014.

I have also found convincing evidence that the execution of the decree was effected on or about the 24th August 2015; and there is a Return of Warrant dated 4th September 2015 although it does not state the date of execution.

As to whether the applicants exercised due diligence in following up on their appeal, according to **Black's Law Dictionary 6th Edn at page 457**, 'due diligence' means *"such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case".*

My findings are that it is clear that the current application to set aside the exparte judgement was filed on 14th September 2015, after the date of execution of the Decree as evidenced by the Return of Warrant dated 4th September 2015 and 10 months after the date the Judgement was delivered.

With the above findings, I therefore agree with the law as cited by learned counsel for the respondent that an application to set aside an exparte judgement must be filed within reasonable time as was expounded upon in the case of ***Lucas Marisa vs Uganda Breweries Ltd (supra)*** relied upon by learned counsel for the respondent.

It is also clear that this application was filed as an afterthought to try and avert justice and too late after Execution had been completed as evidenced by the Return of the Warrant of Execution; and as such, the discretion availed to court under **section 98 of the Civil Procedure Act** is not deserving.

For all the reasons given in this Ruling, it is my finding and decision that the applicants have failed to prove to this Honorable Court that they were not duly served with notices to appear for hearing and in the circumstances, this application fails. It is also clear that this application is just an abuse of court process since the law is clear that litigation must come to an end.

The decision made by my brother Judge in respect of the Appeal stands. The costs are awarded to the Respondent.

I SO ORDER

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JUSTICE DR. WINIFRED N NABISINDE
JUDGE
30/08/2023

This Ruling shall be delivered by the Honorable Magistrate Grade 1 attached to the Chambers of the Senior Resident Judge Jinja who shall also explain the right to seek leave of appeal against this Ruling to the Court of Appeal of Uganda.

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JUSTICE DR. WINIFRED N NABISINDE
JUDGE
30/08/2023