THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT – 05 – CV – CA – 011 – 2010

(*Arising from Civil Misc. Application No. 98/2009 and CS. No. 343/2009)*

TWEHEYO EDSON ::: APPELLANT

VERUS

BARURENGYERA KAMUSIIME HILLARY ::::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE ANDREW .K. BASHAIJA

JUDGEMENT

This appeal arises out of the ruling and order by His Worship Borore .K. Julius, Magistrate Grade I *(hereinafter referred to as the "trial court")* delivered on 23/3/2010, in which the trial court dismissed an application by the Applicant to set aside *exparte* judgment and to have the suit heard on merit.

Background.

TWEHEYO EDSON *(hereinafter referred to as the "Appellant")* who was the Defendant in the trial court sold a piece of land to***BARURENGYERA KAMUSIIME HILLARY*** *(hereinafter referred to as the"Respondent")* who was the Plaintiff at the trial. The two executed a sale agreement, and the Respondent paid Shs.1, 400,000 = as purchase price and remained with the balance of Shs.300, 000 = to be paid not later than 13/4/2007.

It would appear the transaction fell through and each of the parties alleges that the other did not perform their part of the bargain. The Respondent then sued the Appellant for a declaration order that the Appellant had sold the land to the Respondent, and that the Appellant should be compelled to collect the balance of the purchase price from the Respondent. The Appellant also prayed for costs of the suit.

When the Respondent tried to serve the summons on Counsel Mr. Kahungu – Tibayeita as lawyer for the Appellant, the lawyer declined servicethat he did not have the instructions, and instead directed the Process Server to the Appellant's residence to effect personal service.After failing to trace the Appellant, the Respondent took out substituted service and affixed the copy of summons on Court Notice Board, and also advertised it in the *"**ORUMURI**"*newspaper. The case proceeded *exparte* and the trial court entered judgment for the Respondent.

The Appellant was then served with the copies of thejudgment and decree, and he filed an application in the trial court seeking orders to set aside the *exparte* judgment so that he could be given a chance to defend himself, and the matter be heard on merit.The trial court, however, dismissed the application, hence this appeal. The Appellant advanced three grounds of appeal as follows;

1. ***The learned trial Magistrate erred in law when he dismissed the application for setting aside the exparte judgment on the ground that counsel for the Applicant had refused service on his behalf.***

2. ***The learned trial Magistrate erred in law when he ignored the evidence by the Applicant in his affidavit to the effect that the Applicant's whereabouts***

were always known to the Respondent so they could not have resorted to substituted service which he held to be necessary and effective.

3. ***The learned trial Magistrate erred in law and in fact when he held that lawyers for Plaintiff were diligent to serve Defendant in person when it was clear that the affidavit of service was false.***

The Appellant prayed that;

(a) This appeal be allowed.
(b) Ruling of the lower court be set aside.
(c) Exparte judgment/decree be set aside.
(d) Appellant be granted to file his defence and have the case heard on merit

Mr. Kahungu - Tibayeita and Mr. Ngaruye – Ruhindi, Counsel for the Appellant and Respondent respectively filed written submissions.

Appellant's Submissions.

Mr. Kahungu - Tibayeita, Counsel for the Appellant submitted that the trial court erred to have declined to set aside the *exparte* judgment against the Appellant,and that if the trail court had scrutinized the affidavit of service,it would have realized that the Process Server, one Mugisha Anthony was lying. Counsel questioned the motive why the Process Server wanted to serve Appellant's former advocates whohad clearly indicated to him that they were no longer representing the Appellant and directed him to Nkokonjeru in Mbarara where the Appellant was residing.

Counsel further submitted that the Respondent was aware of the Appellant's whereabouts, but did not want him to know what was going on given the fact that

the copy of the*ex parte* judgment was taken to the Appellant's home when it was issued. Further, that from the Respondent's case it is clear that the Appellant was not aware that the case was proceeding against him, even assuming that the Appellant's former lawyer had rejected service and substituted service had been effective. That this should have persuaded the trial court to allow the application so that the case could be heard on merit.

Mr. Kahungu - Tibayeita also submitted that the court did not consider that the Appellant's case had high chances of success, given the fact that the Respondent failed to fulfill his terms of the bargain and the land was sold to another party. Further, that refusal to set aside the *exparte* judgment would confer ownership of land on somebody who did not buy it and deprive ownership of the person who acquired it by purchase and in good faith. That theRespondent had purported to buy the land but in fact never bought it after failing to pay, and had breached the terms of contract and the land was sold to somebody else.

Counsel maintained that legally and technically, substituted service may be effective but is it enough to use it to confer ownership of land on somebody who is not entitled to it. Counsel cited the case of ***E. Zikampata v. Uganda Libyan Trading Co. Ltd (1979 H.C.B 32)***where it was held that***O9 r.9*** unlike ***r.24 CPR*** bestows upon the court wide discretion to set aside or vary an *exparte* judgment, but that in the exercise of this discretion the court must in the interest of justice consider all the circumstances of the case.

Counsel argued that in view of the current trend in trial practice where emphasis is placed on substantive justice instead of technicalities, it would cause grave injustice to a party to deny him right of audience in a matter involving land. That this matter involved service which was never brought to the attention of the

Appellantin spite of the substituted service, and that the Respondent never acquired and never indeed even occupied the land since it was never transferred to him.

Mr. Ngaruye – Ruhindi, Counsel for the Appellant submitted that the Appellant has run away from his grounds of appeal, and instead re-framed ground as follows:

"***The learned trial Magistrate rejected the application on wrong premises***"

That this is contrary to the provisions of ***O.43 r.2 CPR*** which provides that an appellant cannot; except with leave of court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal. That the first ground set forth in the Appellant's submissions is not the ground set forth in the memorandum of appeal, and that the submissions of Counsel on the first and second pages in support of a ground not set forth in the memorandum of appeal ought to be rejected, and ground 1 and 2 ought to be presumed to have been abandoned.

Counsel for the Respondent submitted that Ground 1 as set forth in the memorandum of Appeal ought to be rejected because in his submissions Counsel for the Respondent does not deny that he declined service, but in fact he suggests that he directed the process server to serve the Appellant personally in Nkokonjeru. This admission renders ground 1 unarguable.

Further, that *Annexture C* to the affidavit of the Respondent in ***MA 0256 of 2009*** which gave rise to this appeal is very clear that M/s Kahungu - Tibayeita & Co. Advocates had indicated that they were Counsel for the Appellant and the service on them on behalf of the Appellant was in order.When they declined service, the Process Server made efforts to serve the Appellant in person but failed to effect personal service hence resorted to substituted service by order of court, which is

considered as effectual as if it had been made on the Appellant personallyunder O.5***r.18 (2) CPR***.

That above all, the Appellant did not state in his affidavit that M/s Kahungu - Tibayeita & Co. Advocates did not inform him that he had been served and declined service nor did he state in the said affidavit that he had not read the summons in the ***ORUMURI***newspaper or at the Court Notice Board.Mr. Ngaruye - Ruhindi opined that the appellant only filed the application to delay execution proceedings.

Regarding the point that the Appellant's case had high chances of success in the suit, Mr. Ngaruye – Ruhindi submitted the argument is hollow because no ground of appeal has been canvassed along that argument, and that had the Appellant had a good case he would have entered appearance to defend the suit.

Consideration:

I will start with the point regarding the framing and canvassing of a ground not framed in the memorandum of appeal.***Order 43 r.2(1) CPR*** provides that;

> ***"The appellant shall not, except by leave of the High Court, argue, or be heard in support of any ground of objection not set forth in the memorandum of appeal."***

The rule is mandatory and any party who flouts it risks having the ground struck off and the arguments of no consequence.Considering provisions of ***Order 43 r. 2 (1) CPR***this court held in the case of ***Nansanga Aisha v. AbibYawe & 3O'rs, H.C.Civ. Appeal No 76 of 2011*** held that it is trite law that no appellant can be heard on any ground of appeal not set out in the memorandum of appeal except with leave of court, and that to introduce and argue a fresh ground of appeal would

be unsustainable. Similarly in the instant case the Appellant re-framed and argued a ground that was quite different from the one framed in the memorandum of appeal without leave of court, hence the ground and submissions in support thereof ought to be rejected.

Applications to set aside *exparte* judgmentsare governed under ***Order 9 r.12 CPR*** which states:-

> "***Where judgment has been passed pursuant to any of the proceeding rules of this Order, or where judgment has been entered by the registrar in cases under Order L of the Rules, the court may set aside or vary the judgment upon such terms as may be just.***"

The rule cited above bestows on court wide discretion to set aside *exparte* judgment, but in doing so, the court must be satisfied that to do so would meet the ends of justice given the circumstance of the case.

The circumstances that warrant setting aside an *ex parte* judgment are similar to those under ***Order 9 r.27 CPR.***Firstly, court will usually set aside the *exparte* judgment where it is proved that there has been no proper service. See ***Waminiv Kirima [1969] E.A. 172; Korutaro Mukairu [1978] HCB 215***.Secondly, the defendant must demonstrate; not only that he or she was prevented bysufficient cause from filing a defence within the requisite period, but also that there is merit in the defence to the case. See; ***S.Kyobe Senyange v. Naks Ltd [1980] HCB 31; Nicholas Roussos v. Gulam H.H Viran, S.C. Civ Appeal No. 3 of 1993; Nasaka Farmers & Producers Ltd v. Aloysius Tamale [1992 – 1993] HCB 203.***

In addition to the above, adefendant who wishes to havean the *ex parte*judgment set aside should act reasonably and promptly, and in event of delay in making the

application, he or she should explain the reasons for such delay. See ***Nicholas Roussos v. Gulam H.H.Viran (supra),***

In the instant case, the Appellantargues that he was not duly served with summons to file the defence. However, in the affidavit of service *(Annexture E)* by one Mugisha Anthony a Process Server,paragraph 3 thereof,it is deposed that he could not locate the Appellant after Mr. Kalungu – Tibayeita declined to receive service that he nolonger represented the Appellant, which prompted the Respondent to take out substituted service by affixing the summons on Court Notice Board on 13/2/2008, and advertising in the ***ORUMURI***newspaper of 3rd – 9th March 2008.

Order 5 r 18 CPRstipulates that where court is satisfied for any reason that the summons cannot be served in the ordinary way, the court shall order the summons be served by substituted service in the prescribed manner. Under ***sub- rule (2)*** thereof, substituted service shall be as effectual as if it had been made on the defendant personally. See ***Erukana Omuchilo v. Ayub Machiwa [1960] E.A. 229.***

In the instant case, the trial court was satisfied that summons could not be served in the ordinary way and ordered substituted service instead. Based on provisions of ***Order 5 r 18(2)(supra***), the Appellant's argument are implausible that he was not duly served merely because the service was by way of substituted service, and that the Respondent knew where the Appellant could be found but opted for this particular mode of service. There is evidence that the Process Server could not tracethe Appellant athis home,and was informed by neighbors that the Appellant had left the place. There is no evidence rebutting these facts; and where facts are sworn in an affidavit and they are not rebutted or denied the presumption is that they are admitted. See ***Massa v. Achen [1975] HCB 297.***I find nothing false about the affidavit of the Process Server.

For the foregone reasons, I cannot fault the trial court for holding that the lawyers for the Respondent were diligent to serve the Appellant in person but that their efforts came to nothing. There is nothing on the evidence to show that the Appellant could have been served in the ordinaryway. The trial court exercised its discretion and found that the circumstances of the case merited service through substituted service. As was held in ***Clouds 101 Ltd. v. Standard Chartered Bank(U) Ltd (1992) 111 S.C.C.A. No.1 0f 19992***, the appellate courtwill normally not interfere in the exercise of discretion by the trial court merely it could have exercised it differently, but only upon the exercise of the discretion on a wrong principle of the law or upon a misdirection as to the facts so that the decision was entirely unreasonable. This was not the case in the instant case.

Regarding the condition whether the Defendant has a good defence to the case, noground of appeal was advanced by the Appellant that would be canvassed along that argument. It only came up in the submissions of Counsel for the Appellant on appeal, but not before the trial court at the hearing of the application in issue. Therefore, the trial court cannot be faulted for not considering an issue that was not raised before it by the parties. Ground 1 of the appeal lacks merit and it fails; and it disposes of Ground 2 and 3 of the appeal which fail as well.For the foregone reasons, the entire appeal fails. It is dismissed with costs.

BASHAIJA K. ANDREW

JUDGE

05/08/2013