THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

AT MBARARA

HCT – 05 – CV – CA – 029/2010

(From MBR – 00 – CV –MA-0094/2010)
(From MBR -00 –CV-CS-2/2010)
(Originating MDLT 047/2006)

1. BYANSI ELIAS
2. BURINDI BUDALATIF:::::::::::::::::::::::::::::::::::: APPELLANTS

VERSUS

KIRYOMUNJU TOFASI :: RESPONDENT

BEFORE: HON. MR. JUSTICE BASHAIJA K.ANDREW

JUDGMENT

This is appeal arises out of the ruling and order issued by ***His Worship Julius Barore,*** Magistrate Grade I at Mbarara (*hereinafter referred to as the "trial court")*delivered on 16/7/2010. ***BYANSI ELIAS and BURINDI BUDALATIF*** *(hereinafter referred to as the "Appellants")* filed an application for leave to file their defence out of time vide ***MBR-00-CV-MA-0094/2010*** on ground that;

1. ***the Defendants/Applicant was not served with summons;***
2. ***the Defendants/Applicants were prevented by sufficient cause from appearing when the suit was called for hearing***

In the supporting affidavits tothe applicationthe main reasons set out were that;

1. ***The Applicants failed to file their defence because their Advocates M/s Kwizera & Co. Advocates had a busy schedule.***
2. ***The Applicants were ignorant of the court procedures after being served with summons***
3. ***The failure of the Defendants' Advocates to file the defence should not be visited upon the Applicants /Defendants.***

The trial court, however, dismissed the application with costs, hence this appeal.The Appellants preferred three grounds of appeal as follows:-

1. ***The learned trial Magistrate erred on the law and evidence when he dismissed the Applicant's application without considering the grounds thereof, thereby making a ruling that was against the weight of evidence on record.***

2. ***The ruling and order of the trial Magistrate was bad in law and has occasioned a miscarriage of justice to the Appellants.***

3. ***The learned trail Magistrate erred in law when he awarded costs to the Respondent who had not entered appearance during the trial.***

The Appellants pray that the appeal be allowed, and the ruling and order of the trial court be set aside with costs.***M/s Kwizera & Co. Advocates*** represented the Appellants while ***M/s Ahimbisibwe & Agaba & Co. Advocates*** the Respondent. Both counsel filed written submissions which I have taken into consideration in arriving at a decision in this this judgment.

Ground 1:

The main complaint in this ground is that the trial court dismissed the Appellant's application without considering the grounds thereof, thereby making a ruling that

was against the weight of evidence on record.It is noted that this is a general ground regarding the evaluation of the entire evidence by the trial court. What ought to be emphasised specifically thoughare the general provisions of the law that govern applications to set aside *ex parte* judgments.***Order 9 r.12 CPR*** provides states that;

> ***"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 above rule confers on court wide discretion to set aside*ex parte* judgments, but in doing so, the court must be satisfied that to do so would meet the ends of justice in the circumstance of each case.

The circumstances that warrant setting aside an *ex parte* judgment are set out under ***Order 9 r.27 CPR.*** Firstly, court will usually set aside the *ex parte* judgment where it is proved that there has been no proper service. See ***Wamini v. Kirima [1969] E.A. 172; Korutaro v. Mukairu [1978] HCB 215.*** Secondly, the defendant must demonstrate; not only that he or she was prevented by sufficient 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 Hussein Habib Viran, S.C. Civ Appeal No. 9 of 1993; Nasaka Farmers & Producers Ltd. v. Aloysius Tamale [1992 – 1993] HCB 203.***

In addition, a defendant who wishes to have an 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 Hussein Habib. Viran (supra).***

In the instant case, one of the grounds the Appellants advance in their application before the trial court for their failure to file a defence in time was that they were not served with summons. This ground, however, stands discounted at the outset on account of the lower court's recordclearly showingthat summons was duly served on the Appellants on 13/07/1006. The 2nd Appellant acknowledged service by endorsing at the back of the copy thereof. Therefore, it would not be true at all to claim that the Appellants were not served, and the trial court was justified to dismiss their application on that ground.

Another ground advanced by the Appellants in their application for failing to file their defence in time was that they are laymen, ignorant of the court procedures when they were served with summons. With due respect, this ground too could not amount to sufficient cause to compel the trial court to set aside the *ex parte* judgment.This reason advanceis flawed mainly in two aspects. Firstly, it contradicts totally the Applicants (now Appellants)earlier argumentthat they had not been served with court summons, because they now acknowledge that after all they were served. Secondly, to plead ignorance of the court procedure is untenable because as the Latin maxim goes;"*ignoratia juris non excusat*" - meaning that ignorance of the law is no excuse.

It is alsoon record of the lower court that the trial court, on 13/05/ 2009, went to the extent of reminding one of the Applicants that they ought to make an application seeking to file their defence out of time; which advice the Applicants apparently did not heed. With these facts in evidence, one cannot justifiably fault the trial court's decision not to grant the application.

In their application before the trial court, the Appellants also raised the issuethat they could not file their defence in time because their lawyers had told them that

they had a busy schedule, and that this was a mistake of counsel which should not be visited on them as litigants. In support of this view, Counsel for the Appellantsin his submissionson appealalso cited the case of ***Sepiria Kyamulasire v. Justine Bikanchunka Bagambe S.C.C.A. No. 20 of 1995.***

In as much as it the principle that mistakes of counsel should not be visited on the litigants, I am unable to find that a busy schedule of an advocate could reasonably amount to "mistake of counsel". A mistake of counsel, in my view, would arise where due to some inadvertent act or omission, the advocate duly instructed by a litigant does or omits to do somethingthat prejudices the litigant's interest who must not have been party to or known of the act or omission. The act or omission must be solely attributable to the professional negligenceand or conduct of the advocate.

In this case,the Appellants knew for a fact that the particular advocatehad a busy schedule. It was incumbent upon themto retain services of other less busy advocates if they wished to have their defence filed in or out of time. It would be an absurdity if court procedures were to be subjected to the busy schedules of advocates; for then there would be no telling when any of the court processes would take off.

If, on the other hand, the Appellants felt that they had been let down by their Counsel, still thiswould not be visited of the Respondent. As was held in the case of ***Capt. Philip Ongom v. Catherine Nyero Owota, S.C.C.A. No. 14/2991*** if anyone was to suffer for counsel's negligence, it was his client, (the Appellants in this case, and not the Respondent). The Supreme Court in that case gave further guidance that where counsel was guilty of a high degree of professional negligence, the client could successfully sue him personally, but that a successful

party should not be denied of the fruits of litigation.The net effect is that the Appellant's advocate's busy schedule could not amount to sufficient cause, and the trial court was right to disallow the application on that ground.

After re-appraising the entire record of the trial court, this court is satisfied that the Appellants failed to demonstrate sufficient cause as to why the trial court should have set aside the *ex parte* judgment. Ground 1 of the appeal lacks merit and it is dismissed. This also disposes of Ground 2, which also fails.

Ground 3.

The main complaint in this ground is thattrail court awarded costs to the Respondent who had not entered appearance during the trial; and when the application ***MBR-00-CV-MA-0094/2010*** was not opposed because the Respondent did not file an affidavit in reply. Counsel for the Appellants submitted that the purpose of awarding costs is to the re-imburse the successful party of the expense he could to have spent during the trial, but that the trial court in this case awarded costs to a party who had not appeared in the proceeding, and as such had not spent any money during the trial, and that that would leave the Appellants at a risk of suffering execution of an order awarding costs that were not incurred.

In reply, Counsel for the Respondent submitted that ***Section 27 Civil Procedure Act***provides that costs shall be in the discretion of the court which shall have full power to determine by whom and out of what property and to what extent those costs are to be paid and to give all necessary directions for the said purpose. Further, that it is trite law that costs follow the event and the successful party is entitled to them. That the Respondent was the successful party in the suit when the Appellants refused /neglected to file their defence in time, and hence was entitled to the award of costs.

Indeed,under ***Section 27 CPA*** costs are awarded at the discretion of court. In ***sub-section (2)*** thereof, costs follow the event, unless for some reasons court directs otherwise. See ***Jennifer Rwanyindo Aurelia & A'nor v. School Outfitters (U) Ltd., C.A.CA No.53 of 1999; National Pharmacy Ltd. v.Kampala City Council [1979] HCB25.*** It was also held in***Uganda Development Bank v. Muganga Constructions (1981) HCB 35*** that successful party can only be denied costs if it proved that but for his or her conduct, the litigationcould have been avoided, and that costs follow the event only where the party succeeds in the main suit.

In the instant case, the Respondent, who was the plaintiff in the original suit, vide ***MDLT – 047/2006 and MBR 00-CV-CS- No- 0012/2010*** was the successful party when the Appellants/Defendants failed to file their defence in time. Failure to "enter appearance", which Counsel for the Appellants appears to point at as reason for which the trial court ought to have denied the Respondent costs, is inapplicable in this case, because to"enter appearance"does not necessarily imply personal physical presence, but representation by whatever legal means. In this case the Respondent who is said to be a frail old woman was fully represented at trial. As for the Respondent's failure to file an affidavit in response to the application, there is no legal requirement to do so, and a party would not be penalised in costs for not filing an affidavit in reply. There is therefore no compelling and justifiable reason for this court to interfere with the award of costs by the trial court

BASHAIJA K. ANDREW
JUDGE
06/08/2013