THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CV-CA-0096-2011
(Arising from Mbale Chief Magistrate's Court Miscellaneous Application No. 84/2011)
(Arising from Civil Suit No. 44/2008)

GIZAMBA ANNAS……..……..…APPELLANT
VERSUS
MUGOBERA MASSA MOSES……..……..DEFENDANTS

BEFORE: THE HON. MR. JUSTICE STEPHEN MUSOTA

JUDGMENT

This is an appeal from the refusal of the learned Magistrate Grade I to set aside an *exparte* judgment in a land dispute between *inter alia* the parties hereto.

The appellant is represented by M/s Madaba & Co. Advocates, while the respondent is represented by M/s Anukur Cheptoris & Co. Advocates.

The undisputed background to this appeal was outlined by **Mr. Madaba** for the appellant because it rhymes with what is on record.

On 6th June 2008, the respondent sued the appellant with 3 others in the lower court for a declaration that he was the rightful owner of the suit land and an order that the defendants do acknowledge receipt of shs.70,000/= as the balance of the purchase price, general damages, permanent injunction and costs of the suit.

Summons to file a defence was issued by the court for service upon all the four defendants. According to the affidavit of service dated 22nd July 2008 sworn by one *Gibogi Godfrey*, he purportedly served all the defendants including the appellant. Since the appellant did not file a defence, the suit proceeded *exparte* and judgment was entered in favour of the respondent against all the defendants on 5th March 2010. A warrant of arrest in execution was issued against the appellant and subsequently he was committed to civil prison on 24th June 2011. The appellant therefore filed Miscellaneous Application No. 84 of 2011 to set aside the *exparte* judgment as well as stay of execution. The respondent filed an affidavit in reply to oppose Misc. Application 85 of 2011. Upon hearing the parties the learned trial Magistrate dismissed Miscellaneous Application 84 of 2011 with costs to the respondent on 27th September 2011 hence this appeal.

The appellant raised three grounds of appeal that:

1. The trial Magistrate erred in law and fact when he held that summons to file a defence in Civil Suit No.44 of 2008 was dully served upon the appellant.
2. The trial Magistrate erred in law and fact when he failed to give an exhaustive scrutiny and proper evaluation of evidence and legal arguments on record thus arriving at a wrong conclusion.
3. The trial Magistrate erred in law and fact when he failed to exercise his judicial function to examine the entire record of proceedings for errors thus occasioning a miscarriage of justice.

During the hearing of the appeal, I allowed respective counsel to file written submissions in support of their respective cases.

I will not reproduce the said submissions but I have studied the same and will consider them while determining this appeal. I am also mindful of my duty as a first appellate court to re-evaluate the evidence on record and reach my conclusion whether the decision by the lower court can be supported.

I will deal with the grounds of appeal as argued.

Ground 1:

In opposing this ground of appeal, **Mr. Anukur** learned counsel for the respondent supported the finding by the learned trial magistrate citing O.5 r.13 CPR which permits service on an adult member of a family when the defendant cannot be found. That a single attempt to serve is enough and the Process Server swore an affidavit of service indicating he served the wife to the appellant. Learned counsel also relies on O.5 r.14 CPR and concludes that the wife simply refused to endorse the summons.

Mr. Madaba for the appellants submitted to the contrary and I agree. First of all the purported service was not made by a process server but by a person who had covert interest in the matter, one **Gibogi Godfrey** a Court bailiff. He swore an affidavit of service on the four defendants on 22.7.2008.

In his affidavit of service he stated in paragraphs 6 and 7 thus:

> *"6 That on the same date I proceeded to Bulweta 'B' village where the 4th defendant resides.*

> *7 Then I went to the home of the 4th defendant whereby I met his wife one Gizamba Sarah who received service on behalf of her husband but declined to endorse the said summons*."

I was not satisfied that this amounted to effective service and does not reflect due diligence on the part of the "Process Server" who was a court bailiff. I doubt if he bothered to explain the importance of his service to whoever he served and the consequences of failure to accept service. This service was not in compliance with O.5 r. 10 CPR which requires that;

> "*Whenever it is practicable service shall be made on the defendant in person unless he or she has an agent empowered to accept service, in which case service on the agent shall be sufficient*."

This provision puts the onus on the process server to exercise due diligence while effecting service and only in exception circumstances should somebody else other than the defendant be served. There ought to be sufficient reason to compel this. This reason must be contained in the affidavit of service to inform court to enable it decide whether service was effective or not. This will curtail false affidavits of service.

Whether service on an adult member of the family is effective as allowed under O.5 r.13 CPR depends on the facts of a given case. It must be deponed that the defendant could not be found after exercise of due diligence.

In the case under consideration the court bailiff who served did not adduce sound reasons why he did not serve the defendant/appellant personally. He did not depon that the so called wife of the appellant was known to him or that she was identified to him by a third party. The circumstances under which the "wife" refused to sign were not disclosed either.

Since there is no evidence on record of any proper effort at personal service onto the defendant and it is revealed that the defendant's wife had not appended her signature on the copy of the summons and was not identified by a third party to the server, I am not satisfied that the summons was served in accordance with the Civil Procedure Rules and I so find.

Ground 2:

According to **Mr. Cheptoris** the learned trial magistrate exhaustively evaluated the evidence on record and thoroughly scrutinized the affidavits of service and was convinced that there was proper service.

With due respect, I do not agree with this assertion.

When I perused the brief ruling by the learned trial Magistrate, I was not convinced that he examined and considered the evidence and legal arguments before him to ascertain if the appellant was served. There is no indication that the affidavit of service came under scrutiny. He simply ruled thus;

> "*I wish to point out that there is clear evidence of service of summons. The question then becomes where was the Applicant all this time to challenge the exparte judgment. It is not possible that he could not have been aware of the summons, aware of the sale to the respondent. It is highly unlikely that he was only made aware of the suit against him after his arrest. Had there been no proof of service or that indeed the person who purportedly served the respondent was not a lawful process server I would not have had any problem setting aside the exparte judgment*."

The record has no evidence to support the learned magistrate's conclusions. To find that there was effective service does not merely depend on one being a process server. How he or she executed service is of paramount importance. As rightly submitted by **Mr. Madaba**, the learned trial Magistrate erred when he advised the appellant to either apply for review in the High Court or apply to set aside the *exparte* judgment out of time. None of these remedies are applicable in this case. In any case according to the ink record of the ruling, the same is headed both as Misc. Application 84 of 2011 and Misc. Application 85 of 2011, the former being for setting aside the *exparte* judgment but had never been fixed for hearing and the latter being for stay of execution which was fixed for hearing. The omnibus handling of the two applications which are unrelated raises procedural questions.

Consequently I am satisfied that the learned magistrate did not properly evaluate the evidence on record before finding that the summons were dully served whereas not.

By dealing with two unrelated applications at ago, the learned magistrate failed to exercise his judicial function and as such occasioned a miscarriage of justice as complained about in ground 3.

Consequently I will uphold all the grounds of appeal. This appeal will be allowed. The omnibus ruling in the interparty application No.84 of 2011 and the *exparte* application to set aside judgment in Misc. Application 85 of 2011 are set aside. The *exparte* judgment passed in civil suit No.44 of 2008 is hereby set aside.

The appellant is allowed to file his defence out of time within 30 days of this judgment. The appellant will get the costs of this appeal.

Stephen Musota

JUDGE

7.3.2013