THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT NAKAWA-CENTRAL CIRCUIT

CIVIL APPEAL NO. 76 OF 2012

(ARISING OUT OF MISC. APPLICATION NO. 114 OF 2011)

(ARISING OUT OF MISC.APPLICATION NO. 94 OF 2010)

(ALL ARISING OUT OF CIVIL SUIT NO. 179 OF 2008)

MAGUNDA RONALD ========== APPELLANT

VERSUS

SSEMANDA VICENT ========== RESPONDENT

Before: HON. MR. JUSTICE WILSON MASALU MUSENE

JUDGMENT

This is an Appeal from the Judgment of the Learned Magistrate's Court at Mpigi by Her Worship Tusiime Sarah in Misc. Application No. 114 of 2011 delivered on 22nd day of June, 2012 Mpigi wherein the Learned Magistrate entered Ruling against the Appellant. The Appellant being dissatisfied with the Ruling and Orders of the Learned Magistrate, Appealed to this Honourable Court on the following grounds:-

1. That the trial Magistrate erred in fact and in law when she held that there were no sufficient grounds for setting aside the exparte Decree in the main suit.
2. That the Learned trial Magistrate erred in law and fact when she held that there was fraud against the Respondent and that the Respondent is not

bound by the consent entered into on his behalf by his Counsel's and that of the Appellant's.

3. That the learned trial Magistrate erred in law and fact when she held that the Appellant was not vigilant in prosecuting his case for failure to file an amended written statement of defence.
4. That the learned Trial Magistrate erred in law and fact in holding that neither of the two lawyers appeared when the complaint was made by the Respondent.
5. That the learned Trial Magistrate erred in law and fact when she relied on a complaint to set aside consent.

The Appellant prayed that the Appeal be allowed and ruling and orders entered for the Respondent against the Appellant be set aside. That Civil Suit No. 179 of 2008 be heard on its merits. And that the Respondent pays costs of the Appeal and in the Court below.

Representation

Mr. Kavuma Issa represented the Respondent and MS. Kanyago Annet represented the Appellant.

The brief facts of the case are that the Respondent sued the Appellant for trespass on his Kibanja and obtained an ex parte Judgment against the Appellant vide Civil Suit No. 179 of 2008. The Appellant filed Misc. Application No. 094 of 2010 to set aside the ex parte Judgment. And a consent dated 1st day of March, 2011 was signed between the lawyers for both sides to set aside the ex parte Judgment.

However, the trial Magistrate by an Order of 7th day of June, 2011 cancelled the Consent Order of 1st March 2011 and restored the ex parte Judgment. The Appellant filed Misc.Application No. 114 of 2011 to set aside the ex pate order of 7th day of June 2011 and the ex parte decree and Judgment in the main suit which Application was dismissed with costs. Hence this Appeal.

When the Appeal came up for hearing on the 2nd day of April, 2014, the Advocates for both parties were directed to file written submissions. And on record are submissions of the Respondent which were served unto the Appellant but to date the Appellant has never filed his reply. A copy of affidavit of service is on record. In the premises, court decided to proceed exparte.

The powers of the High Court as an Appellate Court subject to such conditions and limitations as may be prescribed are stipulated in **Section 80 of the Civil Procedure Act Cap 71. The High Court accordingly has power to determine the case finally, to frame issues and refer them for trial, to take additional evidence or to require such evidence to be taken and to order a new trial. According to Section 80 (2) of the Civil Procedure Act, the High Court has the same powers and nearly the same duties as are conferred on courts of original jurisdiction in respect of suits instituted in it.**

The duty of the first Appellate Court is to evaluate the evidence of the lower court record a fresh to enable it to come to an independent decision if the lower court record can be sustained. **See Kifamunte Henry VS Uganda SCU CR. Appeal No.10 of 1997. The same position was stated in Fredrick Zaabwe VS Orient Bank Ltd C/A NO.4 of 2006.**

I shall now proceed to consider the grounds of Appeal as set out in the Memorandum of Appeal.

Before I tackle the grounds of Appeal, Counsel for the Respondent raised preliminary objection. He submitted that no order was extracted for the purpose of this Appeal since it is a cardinal principal of Appeal in the High Court that a party who intends to Appeal must extract a decree or an order for the purpose of Appeal and failure of which the Appeal becomes invalid. Counsel for the Respondent referred Court to the case of **Mugabo Peter Bagonza & Ors VS James Kimala & Ors Misc.Application No. 631 of 2011** that;-

“Case law is that it is the duty of a party who wishes to Appeal against or apply for review of a decree or order to move the Court to draw up and issue in the formal decree or order.”

Therefore, that in absence of the order against which this Appeal was brought, the Appeal perse is incompetent and should be dismissed.

Be as it may, I shall proceed to evaluate the grounds of Appeal one by one as brought by Counsel for the Respondent.

As far as the first ground of Appeal is concerned, the Appellant complains that the Trial Magistrate erred in Law when she held that there were no sufficient grounds for setting aside the ex parte decree in the main suit. Order 9 Rule 27 of the Civil Procedure Rules gives Court discretion to set aside a decree passed ex parte if the Defendant satisfies Court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing.

Paragraph 3 of Notice of Motion states that the Applicant and his Counsel were prevented by sufficient cause from attending Court when the matter came up for hearing on 12th day of February, 2010. Paragraph 6 of the affidavit of Magunda Ronald states that his Counsel had lost his diary as the cause of not attending Court.

I do agree with the Trial Magistrate that loss of diary cannot be a sufficient ground for non attendance of Court since both the Appellant and his Counsel were in Court when the matter was adjourned to enable them file an amended written statement of defence which they failed to file and did not come back to court. Both the Appellant and his Counsel should have gone to Court to check for the date since both of them admit that the lawyer’s diary had lost. Therefore, loss of a diary alone cannot be a sufficient ground for not attending the Court. Therefore, ground one of the Appeal fails.

Grounds 2, 4, & 5 are all based on setting aside the consent dated 1st March, 2011.

Counsel for the Respondent submitted that the above consent order was set aside by an Order of Court dated the 7th day of June, 2011 after a complaint by the Respondent that he was not aware or consented to it. The order for setting aside the consent was signed on 7th day of June, 2011 under Section 9 of the Civil Procedure Act. But the Appellant did not Appeal against that order instead filed a fresh Application to set aside the ex parte Judgment.

Furthermore, the Appellant did not seek leave of Court to Appeal against the said order which was given under Section 98 of the Civil Procedure Act which is a mandatory requirement under Order 44 Rule 2 of the Civil Procedure Rules.

Therefore, without the leave of Court, the issue concerning the Order of 7th day of June, 2011 cannot be considered at this stage as the Appellant chose not to challenge it when it was given and instead filed a second Application to set aside the ex parte Judgment. For the reasons given above, this Appeal has no merit. The 2nd, 4th, 5th and 6th grounds of Appeal also fail.

Counsel for the Respondent did not discuss the 3rd ground of Appeal.

In the premises, this Appeal fails and the same is dismissed with costs to the Respondent.

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WILSON MASALU MUSENE

JUDGE

18/09/2014