THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

1. **HCT-04-CV-CR-0012-2013**

(ARISING FROM CIVIL SUIT NO. 166/2013)

WAMWANGANA JOHN.....APLICANT

VERSUS

TAIKA JACKSON .....RESPONDENTS

2. HCT-04-CV-CR-0013-2013

(ARISING FROM CIVIL SUIT NO. 165/2013)

WAMWANGANA JOHN.....APLICANT

VERSUS

BOB KINTU.....RESPONDENTS

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

RULING

This is an application by Notice of Motion under section 83 and section 98 of the Civil Procedure Act.

The motion requests this honourable court to revise and dismiss the decision of the trial Magistrate at Pallisa Court in entering judgment against the applicant in civil suit No.166 of 2012 and to also set aside the default Judgment and execution proceedings in civil suit 165/2012.

The grounds are that the court acted in the exercise of its jurisdiction with material irregularity or injustice, and that it is just and equitable that the orders being sought be granted.

I have gone through the pleadings and affidavits in support and reply to the application. I have also gone through the arguments in the submissions.

I have made the following findings:

Jurisdiction

Under Section 83 of the Civil Procedure Act, this court has the jurisdiction to entertain this application; where court exercises jurisdiction not vested in it in law or fails to exercise its jurisdiction, or acts in excess of its jurisdiction (that is illegally or with material irregularity and injustice). This court may revise the case and may make such orders as it thinks fit.

Exercise of jurisdiction by the trial Court in Civil Suit 166/2012 Pallisa Chief Magistrate's Court.

I have perused the proceedings and arguments by both counsel. I have found the following glaring irregularities on record.

(i) Service of summons to defendant:

Was irregularly conducted (done) in violation of Order 5 rules 9, 11 and 13 of the Civil Procedure Rules.

The first service of summons issued on 14.11.2012 was served on 18th November 2012 on a son of the defendant. The Process Server **Munghono Patrick** in his affidavit of service annexed as 'A' paragraph 4 confirms so.

The requirement for effective service is one of the Cardinal tanets of our legal procedures. It is not a mere technicality. It is one of those rules of procedure which cushion parties against unfair ambushes in court.

It is therefore a requirement of the law that service of the plaint and summons to enter appearance should be served personally on the defendant and where it is not possible or practicable the plaintiff can proceed with substituted service (see *Kakulu v. Transocean (U) Ltd (1975) HCB 46*.

This however does not preclude service on an agent of the defendant, who could be the spouse, an Advocate etc. However such service is only done where proper effort is made to effect personal service, and it is not possible. (See *UTC v. Katongole & Anor. (1975) HCB 336*).

The import of the above position is that as much as possible service should be personal or substituted with leave of court, otherwise there is no proper service. (See *Kiggundu v. Kasujja (1971) HCB 164*.

The circumstances before me show that the very first attempt to serve was done on the child of the defendant. The second attempt was done on 13.1.2013. This subsequent service was an attempt to salvage the first. However it violated the provisions of Order 5 rules 1(2) requiring service within 21 days. There is no order of court on record which granted the extension of this warrant as per the requirements of the law.

In view of all those procedural hiccups I do not agree with **Counsel Mutembuli** that Section 98 of the Civil Procedure Act can be invoked by the plaintiff who fails to serve a summons on the defendant but serves on his child and swears an affidavit that service was effective; then goes to court obtains another summons informally and serves it to the defendant outside the required time, and then claims that the Rules should be interpreted lightly in his favour. He who comes to equity must have clean hands. If the Rules have to be resorted to, to guide procedure then they should be respected all through. I find that service of summons in this case was not proper (effective).

(ii) Violation of the illiterate Protection Act Cap.78

According to section 3 of the above Act, it is mandatory to have an attestation of the said document. In this case the deponent of the affidavit in support of the motion did not say or depone that he is illiterate. I do not read illiteracy into his document, merely because he thumb marked it. However his affidavit was not commissioned by the Commissioner for Oath. It is not dated. The attachments are not sealed and secured. The affidavit violates S.5 of the Commissioner for Oaths (Advocates) Act. According to decided cases, inconsistencies and falsehoods in affidavits cannot be ignored however minor (See *Bitaitana v. Kananura (1977) HCB 34*. The affidavit before me is incompetent for reasons stated above and will be struck off.

I however find that this application will survive the affidavit because no affidavit is necessary where the application rests on a matter of law. Section 98 of the Civil Procedure Act under which the application was founded is basically clothed on law. I will therefore hold that the affidavit be struck off, but the motion be retained.

(iii) **Irregular default Judgment, irregular warrants of execution, and irregular joint taxation notices etc**.

All above documents as argued by both counsel were issued by court. However they were at best irregularly issued.

Counsel Mutembuli referred court to Article 126 (2) (e) and argued that the litigant being unrepresented these matters be regarded mere technicalities. He also referred to *Bwengye v. Haki Bonera HCCA No. 33/2009*, to urge this court to overlook the wrong law cited in the application for a default judgment entered under O.36 r. 3 of the Civil Procedure Rules instead of O.9 r. 6 of the Civil Procedure Rules.

I am unable to agree with Counsel's invitation to court to ignore such glaring irregularities that were committed by the plaintiff throughout the trial. The matter was being handled by a court of law, which is governed by law and procedure. As pointed out in *Makula International v. Cardinal Nsubuga Wamala (1982) HCB 11*, once an illegality has been brought to the attention of court, it overrides all questions of pleadings.

For the above reasons, I do find that the trial Court acted in the exercise of its jurisdiction illegally and with material irregularity. I will uphold the prayers by the applicant and make orders as herebelow.

1. The orders and Judgment of the learned trial Magistrate in Civil Suit 166 of 2012 are hereby set aside.
2. The orders and judgment of the learned trial Magistrate in Civil Suit No. 165 of 2012 are hereby set aside.

3. Both Civil suit 165 of 2012 and Civil Suit 166/2012 are to be retried inter-parties before another competent Magistrate.

Due to the irregularities committed by each party, the parties shall bear their own costs here and below. I so order.

Henry I. Kawesa
JUDGE
20.10.2015