THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HODERN AT ARUA
CIVIL APPEAL NO. 0010 0F 2013

DAVID RADA SINDANO ---------- APPELLANT

=VERSUS=

ALUMA THOMAS ---------- RESPONDENT

BEFORE HON: JUSTICE OKWANGA VINCENT
JUDGMENT

This appeal arises from the ruling and orders of the Chief Magistrate His Worship Moses Angualia in Misc. Civil Application No. 0012 of 2012 delivered at Arua on 11/04/2013. In that application, the applicant now appellant had sought to set aside the Exparte Judgment and decree in Civil Suit No. 0054 of 2009.

The background of that application is that the respondent, Aluma Thomas had sued the appellant, David Rada Sindano in Civil Suit No. CM/AR/0054 of 2009 for trespass and a permanent injunction to restrain the appellant, his agents, servants, assignees, workers or any persons acting under his authority, from trespassing, developing and or interfering with the respondent's quiet enjoyment of the suit and situated on Plot No. 23, Samuel Baba Road, Koboko Town Council in Koboko District.

Summons to file a defence was taken out on 16/10/2009 and served upon the appellant (then defendant) together with the plaint annexed on 23/10/2009.

The appellant acknowledged receipt of the same but failed to file his defence within the required time and on 09/11/2009, an interlocutory judgment was entered against the appellant/defendant and the suit set down for formal proof on 10/12/2009.

The suit having been set down for formal proof the respondent appeared in court together with two other witnesses to prove his case and on 27/09/2011, an Exparte judgment was entered for the respondent against the appellant.
On 17/04/2012, the appellant filed Miscellaneous Application No. 0012 of 2012, seeking order that the Exparte Judgment in Civil Suit No. 0054 of 2009 be set aside.

On 11/04/2013, that application was dismissed, hence this appeal.
Two grounds of appeal were filed in the appellant's memorandum of Appeal dated 25/04/2013 as follows:-
On ground one the appellant contends that ***"the learned trial Magistrate erred in law and fact when he held that the appellant/applicant did not prove that he was prevented by sufficient cause from filing his defence in Civil Suit No. 0054 of 2009.***

On ground two, he contends that the learned trial Magistrate erred in law and fact when he held that the appellant/applicant had no prima facie defence to the case as he had relinquished his interest in the suit land.

He prays that the appeal be allowed, orders of the trial Magistrate be quashed, and that the appellant be granted leave by this Honourable Court to file his defence in Civil Suit No. 0054 of 2009, and that costs of this appeal and costs for the application in the lower Court be granted to the appellant.
Learned Counsel for the appellant Ms. Bandaru Patience made an oral submission, while learned Counsel for the respondent, Mr. Madira Jimmy with the leave of this court filed written submissions. At the time of writing this judgment I could not find any rejoinder from Counsel for the appellant in the Court file.

However, as I was writing this judgment I came across a document entitled '**Reply to Memorandum of Appeal**' dated 5th June 2014, and filed by M/s Madira & Co.

Advocates of Plot 9/11 Adumi Road P.O Box 1529, Arua as counsel for the respondent/judgment creditor/plaintiff, the document contains three grounds and three independent heads of prayer as follows:-

1. That the trial court upon considering the written submissions filed by learned counsel for the applicant and the respondent rightly found no justification to set aside the judgment entered against the applicant/appellant in Civil suit No. CM/AR/CL/0054/2009 and dismissed the same with costs.

2. That the trial court properly addressed its mind to the law and facts when it found that the applicant/appellant miserably failed to prove that it (he) was prevented by some sufficient cause from filing his defence in Civil Suit No. CM/AR/CL/0054 of 2009.

3. That the trial court properly addressed its mind to the law and facts when it held that the applicant/appellant had no prima facie defence to the suit as the applicant/appellant had relinquished its interest in the suit land.

Whereupon the respondent shall ask this Hon. Court to:-

1. Uphold the judgment and orders of the trial court delivered on 11/04/2014 by the learned Chief Magistrate Arua in Civil Suit No. CM/AR/CL/0054/2009.

2. Issue a permanent injunction to restrain the applicant, his successors, assignees and or any other person whoever, claiming interest in the suit land through him from trespassing, alienating, transferring, mortgaging, and or claiming an exclusive interest in the suit land.

3. The appellant/applicant be condemned in costs in this court and the court below. This document having been filed in court it is prudent that court shouldn't have ignored it completely. I have therefore considered it as a short of "addendum" to the written submission by counsel for the respondent.

In her submission, learned counsel for the appellant/applicant Ms Badaru Daisy Patience argued, referring to the affidavit of the appellant/applicant in Misc. Civil application No. 0012 of 2012 dated 12/04/2012 in paragraphs 4, 2, 5 thereof that the applicant deponed therein that he was prevented from sufficient cause in that he was sick suffering from hypertension and diabetes and given complete bed rest for two weeks. She argued further that in his affidavit, the applicant depones that he was served with summons to file a defence with the plaint attached on 23/10/2009, and then on 29/10/2009, he became ill and was advised by a medical doctor to have complete bed rest for two weeks from that date. Within that period of bed rest, the time within which to file the defence had lapsed as required by law, and the applicant's/appellant's health kept detorating prior to 29/10/2009 thereby preventing him from following up the case in Court.

She referred to some medical reports dated 14/11/2011. Counsel argued that she only came in to file the application to set aside the Exparte judgment and the decree in civil suit No. 0054/2009, (in April 2012).

Counsel submitted further that such illness of the applicant as above couldn't allow him file his defence within the time allowed until after the Exparte judgment and decree were passed against him.

To Counsel for the appellant such illness of the appellant amounts to sufficient cause and that the applicant was prevented from filling his defence in Civil Suit No. 0054 of 2009 within time due to sufficient cause. Counsel further attacked the trial Magistrate's ruling that the applicant's sickness couldn't have prevented him from instructing a lawyer to file his defence even if he was sick and when the sickness gave the applicant some relief, he didn't take any steps to come and explain his circumstances to court. To counsel that was an error in law on the part of the trial Chief Magistrate as he ignored the clear evidence of the applicant's sickness as contained on the medical reports and notes attached and the affidavit in support of the application No. 0012 of 2012. Going to source for a Lawyer would have been disastrous for the applicant's health. Counsel cited the case of **P.B. Patel =Vs= The Star Mineral Water & Ice Factory;[1961] EA 455.**

On ground 2, Counsel attacked the trial Magistrate's holding that the applicant had no prima facie defence to the case as he had relinquished his interest in the suit land.

To counsel such a holding was erroneous in that there is no evidence in any supporting affidavits or attachments annexed to suggest that the applicant had relinquished his interests in the suit land. To counsel that was reliance on extraneous matters not supported by the evidence on record.

She cited another case of **Patel =Vs= EA. Cargo handling Services Ltd, [1974] EA 75,** where it was held that court will not usually set aside an Exparte judgment unless it is satisfied that there is a defence on the merits, which means that a triable issue which raises a prima facie defence which should go to trial for adjudication. It is her submission that the applicant's application No. 0012 of 2012 raises triable issues which ought to have been subjected to adjudication by the trial Chief Magistrate who unfortunately ignored the applicant's affidavit in rejoinder on this point.
Had he considered the same, he would have most probably found that the applicant's application raises a prima facie defence and further that he was prevented from filing his defence to the civil suit No. 0054 of 2009, due to sufficient cause. She prayed that the appeal be allowed, orders of the trial Chief Magistrate in Misc. Civil Application no. 0012 of 2012, be quashed, leave be granted to the appellant/applicant allowing him to appear/file a defence and defend Civil Suit No. 0054 of 2009, and costs of the appeal and also costs in Misc. Civil Application No. 0012 of 2012 in the Chief Magistrate's Court and for any other relief this Hon. Court may deem necessary in the circumstances.

On his part, Counsel for the respondent Mr. Jimmy Madira, with the leave of Court filed a written submissions by way of reply to the appellant's submission. In their written submission Counsel for the respondent contended that the learned trial Chief Magistrate properly directed his mind to the law and the facts in this case in finding that the appellant had not shown any sufficient cause for his failure to file the defence in time. Counsel argued that even if the appellant was sick as alleged in their submission, the appellant could have still instructed a legal practitioner (Advocate) or even a practitioner from Legal aid Project of the Uganda Law Society Jinja branch which was available to him in Jinja to file his defence in time or he could have even delegated to an agent or an Attorney for someone to appear and defend the suit on his behalf. They argued further that being put/advised by medical officer to be on bed rest for seven (7) days could not

alone prevent him (the appellant) from instructing a legal Counsel to file his defence in court. Counsel relied on the case of **Mitha =Vs= Ladolc [1960] EA 1054 at 1057;** to show that, "if a party deliberately withdraws instructions for his advocate, he is not prevented from sufficient cause.
I hold that is not in these circumstances prevented by sufficient cause".

Counsel attacked the medical reports on annexxture 'B' relied upon by the appellant as being full of falsehoods as they relate to the records of the appellant's prior illness in 2007 before the institution of Civil Suit No. 0054 of 2009. That the medical report on annexture 'A' does not bear any official seal or stamp from Kakira hospital and that there is no record to show that the appellant has been ill and continued to be ill from October 2009.

From the records of the lower court and the annextures attached to the affidavit in support and rejoinder to the Civil application No. 0012 of 2012, I find that the appellant was treated at Kakira Sugar Works Hospital at the Out Patients department on 29/10/2009 (Annexture 'A'). Further documents also show some medical treatment received by the appellant on various dates in 2007. I also find that the appellant had earlier on been served and acknowledged service of Summons to Enter appearance and file a defence in Civil Suit No. CM/AR/CL/0054 of 2009, on 23/10/2009 almost a week, before he sought medical treatment at the Out Patients Department of Kakira Sugar Works Hospital, in Jinja.

In their argument Counsel for the appellant argued that because the medical officer at the Kakira Sugar Works Hospital had recommended complete bed rest for two (2) weeks, on 29/10/2009, six days after the appellant was served and acknowledged service, he was unable to source for and or secure the services of a Lawyer or legal Counsel to file his defence in Civil Suit No. 0054/2009, as his health continued to detiorate thus preventing him from filing his defence.

From the medical report on annexture 'A' dated 29/10/2009, the appellant's diagnosis reads;

"**Known hypertensive with Diabetes mellitus**" which means that the appellant's case of ill health did not start on 29/10/2009 – it was a known case which the appellant was suffering from as early as 2007 or earlier.

From the lower court's records I also find that on being served with the summons to file a defence, the appellant instead of filing his defence in civil suit No. 0054 of 2009, rather embarked on a construction upon the suit land in total defiance of all the various court orders issued to restrain him or to cease construction thereon the disputed land. Some of these court orders are the temporary order/injunction dated 11/11/2009, by the G.1 Magistrate Arua – annexture 'A', the Interim Order of 16/10/2009 by the trial Chief Magistrate Arua, the court Decree dated 17/11/2011 all of which were served upon the appellant promptly. Instead of instructing a Lawyer to file the defence – the appellant concentrated upon a shift construction of a permanent building on the suit land until around April 2012, when he finally decided to secure the services of M/s Bandaru & Co. Advocates of P.O Box 1198, Arua to file the Misc. Civil application No. 0012 of 2012 to set aside the Exparte judgment and Decree in Civil suit No. CM/AR/CL/0054 of 2009. by that time the permanent building he was constructing had reached roofing level.

I am therefore satisfied that the Chief Magistrate was right in holding that the appellant/applicant has not proved that he was prevented by sufficient cause from filing his defence in civil suit No. 0054 of 2009 within time. Ground one of the appeal therefore fails.

Regarding ground 2 of the appeal, Counsel for the appellant attacked the finding of the trial Chief Magistrate so much arguing that the Chief Magistrate imported extraneous matters in evidence in holding that the appellant (applicant) had no prima facie defence to the case as he had relinguished his interest on the suit land.

With due respect to counsel for the appellant, I find that exhibit P2, which is some hand written "Memorandum of understanding Gentleman's agreement dated 22/07/2009, between the appellant/applicant and one Ali Taban, the original customary owner of the suit land, actually supports this findings of the Chief Magistrate.

In that memorandum/agreement the appellant did surrender his interest in the suit land to the original owner from whom the appellant/applicant had sought to purchase the suit land, but failed to pay the full purchase price.

He did this at a consideration of UGX (shs) 4,000,000=, (Four million shillings) and surrendered all the original documents pertaining thereto to Taban Ali on the ground that "*the said land is full of dispute. Therefore Mr. Ali Taban has paid all my expenses on the said land worth 4,000,000= (Four million shillings.……"*. This memorandum (agreement) was signed by the appellant/applicant with four other members of his family in the presence of two other witnesses like Apangu Simon Luke and Mr. Aluma Thomas.

I am therefore unable to fault the findings of the trial Chief Magistrate on this ground either.
Accordingly, ground 2 of the appeal equally fails.

All in all, I find that this appeal bears no merits to warrant this Hon. Court faulting the findings of the trial Chief Magistrate on the two grounds raised and or on any other issues apparent on the records.
In any case, I find that no miscarriage of justice has been occasioned to the appellant by the findings of the trial Chief Magistrate.

This appeal therefore fails and is dismissed with costs to the appellant. Orders and decision of the Chief Magistrate upheld!

Per incuriam
Before I take leave of this matter, I want to point out to court and especially to Counsel for the appellant, M/s Bandaru & Co. Advocates, Arua, that there appears to have been an error- typographical error on the date in paragraph 10 of the affidavit in support of Notice of Motion deponed to by the appellant on 12/04/2012, before the commissioner for oaths. According to paragraph 10 of that affidavit, the appellant depones quote:

> *"10. That when I instructed M/s Bandaru & Co. advocates on the 11th day of April, 2009 to represent me in this suit, they informed me which information I verily believe to be true that upon perusal of the court file, Exparte judgment and decree had been passed against me".*

The contents of that paragraph cannot therefore be true as by 14/10/2009, the respondent/plaintiff's original claim against the appellant/applicant on the plaint in Civil suit No. CM/AR/CL/0054/2009 dated 13/10/2009, had not even been filed in lower court. The appellant (original defendant) was only served with the summons to file a defence on 23/10/2009 so by April 2009, no Exparte judgment and or Decree could have been passed in civil suit No. CM/AR/CL/0054/2009 as averred on oath. That is my honest construction and legal interpretation on that point. The error being an apparent typographical error, this Honourable Court shall not draw any adverse inference from it either against the Counsel for the appellant or against the appellant; the maker himself. Neither did such averment affect my decision on this appeal in of way as I said before, I realized beforehand that this was a typographical error on the part of the draftsman and may be an honest omission on the part of the officer who drafted the affidavit. It is hereby ordered!

VINCENT OKWANGA
09/04/2015