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

CIVIL APPEAL NO. 119 OF 2015
(ARISING FROM MISC. APPLICATION NO. 046/2013)
(ARISING FROM CIVIL SUIT NO. 131/2011)

UGANDA TRADE INDUSTRIAL ENTERPRISE LTD...............APPELLANT

VERSUS

1. **WANZIMA ROBERT**
2. **KALIISA GEORGE**
3. **OKOT STEVEN..RESPONDENTS**

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

JUDGMENT

This is an appeal against the Ruling of **Her Worship Catherine Agwero** delivered on 27th August 2015.

The background to the appeal is that the Respondents filed a suit against the appellant. The suit was fixed for hearing on the 30th May 2012.
The matter was adjourned to the 4th July 2012 with an order that hearing notices be issued. On 4th July 2012 Counsel prayed to court to proceed exparte. The matter proceeded exparte and judgment entered in their favour.

Appellant filed Misc. Application No.046/2013 for setting aside the exparte judgment on grounds that no hearing notices were served on them on 4. July 2012. The Trial Magistrate dismissed the application giving rise to this appeal.

As per the guidance in ***Pandya v. R (1957) E.A 336***, the duties of a first appellate court are to inter alia re-evaluate the evidence, make its own conclusions thereon, bearing in mind that it never had chance to listen to and observe the witnesses.

With that duty in mind, I now determine the grounds of appeal together as they were argued by the appellant's counsel.

Grounds 1, 2 and 3 and 4:

All these grounds relate to the failure by the learned trial Magistrate to correctly evaluate the evidence and the law, thereby reaching a wrong decision.

The appellant's counsel submitted that given the fact that when Civil Suit 131/2011 was called on 30.5.2012 counsel for the Plaintiff submitted thus:

> "*In the absence of the defendants and their lawyer, I pray that hearing notices be issued to the defendants. I undertake to serve them*."

The court then ruled:

> "*Adjourned to 4th July 2012. Let hearing notices be issued*."

Counsel further submitted that on 4th July 2012 counsel instead moved court to proceed exparte which was granted. Referring to Order 5 Rules 10, 14 and 16, counsel argued that the case of ***Edison Kanyabware vrs. Pastori Tumwebaze SCCA 6/2004*** held that;

> "*The above rules also govern service of hearing notices*."

It was their arguement that the learned trial magistrate having found for a fact that service of the hearing notice was not effected, was in error in not setting aside the exparte judgment and decree. To further buttress their argument they referred to ***Kibuka Nelson & anor. V. Yusuf Zziwa HCCS.225/2008***, and argued court to find for appellants on all grounds.

On the other hand counsel for the Respondents argued that though court had ordered that the appellant be served with fresh hearing notices for 4. July 2012, the court later in exercise of its discretion dispensed with the order of serving the hearing notices since Advocates and his client had been in court on 30th May 2012 and were aware that they have a suit before the court and had not bothered to find out what transpired on that date; they therefore agree with the learned trial magistrate's conclusions and argued that there is no merit in the appeal.

I would like to begin by correcting the record as regards what transpired in court on 30.5.2012. Contrary to what counsel for respondent argues, the defendant and his counsel were not present. The record reads thus:

> "*30/5/2012: Plaintiff in court*
> *Defendant: absent*

Counsel Namono for plaintiffs

Counsel Gyabi for defendant absent

....

Having settled that, the record further shows that Counsel Namono prayed that;

> "*In the absence of the defendants and their lawyer I pray that hearing notices be issued to the defendant. I undertake to serve them*.

It is record that court granted the prayer thus:

> "*Adjourned to 4th July 2012. Let hearing notices issue*."

The record further shows that on 4.07.2017, the plaintiff was in court but defendants were absent, and their counsel were also absent.

It is recorded that **Counsel Namono** moved court on that day to proceed exparte, and court granted the order.

The law is very clear that once court issues an order such an order must be followed and obeyed unless it is vacated by another order. (See: ***Edison Kanyabwera v. Pastori Tumwebaze CA. 6 of 2004***).

From this legal position, it is clear that when court granted the adjournment on 30.5.2012 to the 4th July 2012, it did so with a specific order that hearing notices should issue. It has to be noted that **Counsel Namono** had moved court on ground that she would undertake to serve the defendants.

When court convened on 4. July 2012 there was no evidence on record to prove to the court that the orders of 30.5.2012 had been complied with.

The court ought to have received proof of service upon the defendants as per procedure set out under O.5 r. 16 of the Civil Procedure Rules which requires that the serving officer should file an affidavit of service.

The whole procedure followed by court did not satisfy the strict provisions of O.5 regarding service of summons, which also governs the service of hearing notices as was held by the Supreme Court in the case of ***Edison Kanyabware v. Pastori Tumwebaze SCCA 6/2004*** (Supra).

The Supreme Court held that:

> "*Order 5 rule 17 (now 16) of the Civil Procedure Rules provides that where summons have been served on the defendant or his agent or other person on his behalf, the serving officer shall in all cases make or annex or cause to be annexed to the original summons an affidavit of service stating the time and manner in which summons was served...... The provisions of this rule is mandatory, it was not complied with in the instant case. What the rule stipulates about service of summons, in my opinion applies equally to service of hearing notices*."

That is the law and it is binding. I do find as indeed was found in the above case that there being no affidavit of service on record, leads mutually to the conclusion that defendants were not properly served with the hearing notice before the suit was heard exparte.

There is therefore no justifications in all arguments by counsel for respondents. The learned trial Magistrate made an erroneous decision and made fundamental errors in law and in evaluation of the facts giving rise to this appeal.

Accordingly this appeal succeeds on all grounds as pleaded. The appeal is allowed, the judgment and orders of the learned trial magistrate are set aside and appellant is allowed to appear and defend the suit on its merits.
Respondent shall pay costs of this appeal and in the court below.

I so order.

Henry I. Kawesa

JUDGE

23.08.2017