

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HCT – 01 – CV – CA – 0008 OF 2016
(Arising from KAS – 00 – CV – MA – 05 of 2016)
(Arising from KAS – 00 – CV – CS – 106 of 2014)

HANDIRO ENGINEERING SERVICES

LIMINYA JOSEPH**APPELLANTS**

BISTWAMBA EDWARD

VERSUS

BWAMBALE SALVERI.....**RESPONDENT**

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.

Judgment

This is an appeal against the ruling of His Worship Matenga Dawa Francis Chief Magistrate at Kasese.

Background

The Respondent instituted a summary suit against the Appellants for recovery of UGX 21,000,000/=, interest and costs of the suit.

That on 31st December 2009, the Appellants on their own behalf and on behalf of the 1st Appellant borrowed from the Respondent UGX 11,000,000/= attracting an interest of 10% per month refundable in a period of 3 months from the date of the agreement being not later than 31st March 2010.

The Appellants paid UGX 5,500,000/= leaving a balance of UGX 5,500,000/= unpaid till the institution of the suit which accumulated to UGX 21,000,000/=. That all effort to settle the matter amicably has failed.

A default judgment was entered in favour of the Respondent for a decretal sum of UGX 21,000,000/= at an interest of 8% per month till full satisfaction of the decree and costs were awarded.

The Appellants were arrested and entered a consent in Court to pay the Decretal sum and costs of the suit and made part payment of UGX 1,000,000/= towards the satisfaction of the decree.

The Appellants made an application seeking to set aside the decree, stay of execution and to be granted leave to file a written statement of defence and the ruling was made in favour of the Respondent.

The Appellant being dissatisfied with the above Ruling lodged the instant appeal whose grounds are:

1. That the learned Chief Magistrate erred in law and fact when he found that the Appellants' application to set aside the decree, stay of execution and leave to appear and defend the suit on merit was a waste of Court's time and judicial process.
2. That the learned Chief Magistrate erred in law when he held that the Appellants had no defence and he dismissed the application with costs.

Counsel Ruth A. Ongom appeared for the Appellants and M/s Guma & Co. Advocates for the Respondents. By consent both Counsel agreed to file Written Submissions.

Resolution of the Grounds:

Ground 1: That the learned Chief Magistrate erred in law and fact when he found that the Appellants' application to set aside the decree, stay of execution and leave to appear and defend the suit on merit was a waste of Court's time and judicial process.

The duty of the first Appellate Court is to re-evaluate the evidence on record to come to its own conclusion keeping in mind that it never saw nor heard the witnesses in the lower court. (See: **Peters versus Sunday Post Ltd [1958] E.A 424**).

In the instant case the Respondent instituted a summary suit which was not challenged by the Appellants and a default judgment was entered against them. The Appellants in a bid to save themselves from Civil prison made a consent to settle the decretal sum of which they paid UGX 1,000,000/=. The Application for leave to appear and defend the suit, setting aside the default judgment and stay of execution was dismissed with costs thus, this appeal.

Counsel for the Appellant submitted that the Appellants were not served with the summons to file a defence. The affidavit of service as sworn by the process server was not sufficient to prove effective service and was not in compliance with **Order 16 Rule 5** of the Civil Procedure Rules. It is actually **Order 5 Rule 16** of the Civil Procedure Rules and not the other way round as cited by Counsel.

Order 5 Rule 16 of the Civil Procedure Rules provides that;

“The serving officer shall, in all cases in which the summons has been served under rule 14 of this Order, make or annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which the summons was served, and the name and address of the person, if any, identifying the person served and witnessing the delivery or tender of the summons.”

In the case of **M. B. Automobile versus Kampala Bus Services [1966] E.A 480**, it was held that the disclosure of the name of the person who identified and witnessed delivery to tender of summons to the Defendant at the material time was a statutory requirement.

That in the circumstances the Chief Magistrate did not investigate whether there was service or not upon the Applicants/Appellants.

Counsel for the Respondent on the other hand submitted that the Appellants lodged various applications in Court to frustrate the Respondent from executing the judgment and their conduct exhibited abuse of Court process and even constituted *Res-judicata* which is prohibited by **Section 7** of the Civil Procedure Act.

Further, that the instant appeal is equally an abuse of Court process and the Appellants failed to pursue and refused to file written submissions as per the Court schedule.

I have read the affidavit of service and it is lacking in particulars much as it states that the Appellants refused to sign. I do not find the affidavit of service as one that suffices as sufficient proof of effective service. The said affidavit is even doctored with different colours of ink and makes it unreliable.

As far as the suit being *Res-Judicata*, I do not see anywhere on the Court record that the Appellants instituted a fresh suit constituting the same parties and same facts.

This ground therefore succeeds.

Ground 2: That the learned Chief Magistrate erred in law when he held that the Appellants had no defence and he dismissed the application with costs.

Counsel for the Appellants submitted that the Appellants in their affidavits disclosed that they had a good defence which was supported by proof (Annexure A₁ and A₂ to the application) which indicated that the debt had been paid in full. That the subsequent loans obtained by Musyenene Kassim and Bwambale Semu were not authorised by the Appellants and they were not liable to pay the said loan.

Further, that the Chief Magistrate disallowing the application occasioned an injustice to the Appellants and the fact remains that they were not served with summons thus the default judgment and the execution.

Counsel for the Respondent on the other hand submitted that the Chief Magistrate rightly held that the Appellants had no defence. That the Appellants did not dispute being indebted to the Respondent and even made part payment of UGX 1,000,000/= as settlement of the debt. That the Appellants have no good defence and thus the Respondent should be left to enjoy the fruits of his judgment.

In the interest of justice, I see no reason why the Appellants should be denied a chance to be put to their defence. Let them apply for leave to defend themselves.

This ground succeeds.

In a nut shell and in the interest of justice this appeal succeeds and costs in the cause.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE

30/03/2017

Judgment read and delivered in open Court in the presence of;

1. Counsel Bwiruka Richard holding brief for Counsel Ruth Ongom for the Appellant.
2. James – Court Clerk

In the absence of Both parties and Counsel for the Respondent.

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OYUKO. ANTHONY OJOK

JUDGE

30/03/2017