

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0092 OF 2016

(Arising from Miscellaneous Application No. 0013 of 2016 and Civil Suit No. 024 of 2015)

SPENCON SERVICES LIMITED APPELLANT

VERSUS

ONENCAN HABIB RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The respondent was an employee of the appellant. Following an accident that resulted in the amputation of the respondent's left leg, the respondent sued the appellant for general and special damages for negligence, unpaid salary and costs. The suit was filed before the Grade One Magistrate's Court at Paidha and the trial proceeded ex-parte against the appellant on account of an affidavit of service which indicated service had been effected on the Administrator of the appellant. Judgment was entered ex-parte against the appellant on 29th September 2016 in the sum of shs. 16,000,000/= as general damages for the amputated leg, shs. 2,080,000/= for unpaid salary, shs. 780,000/= as salary in lieu of notice and shs. 518,000/= as medical expenses, making a total of shs. 19,378,000/=. The respondent proceeded to cause execution of the resultant decree by way of attachment and sale of an assortment of the appellant's moveable assets including a generator and a roller. This prompted the respondent to apply for a stay of execution and for setting aside the ex-parte decree. The application was dismissed hence this appeal by which the appellant raises the following grounds, namely;-

1. The learned trial magistrate erred in fact and law when he ruled that service of court process on the applicant in Civil Suit No. 024 of 2015 was effected in accordance with the law.
2. The learned trial magistrate erred in fact and law when he failed to properly evaluate the law and evidence pertaining to setting aside an ex-parte order under

Order 9 rule 27 of The Civil Procedure Rules thereby arriving at a wrong decision and occasioning a miscarriage of justice.

The appeal came up twice for hearing and on each occasion the appellant was not represented in court yet the respondent was present. When it came up the third time, the respondent was in court and the appellant was not. Court decided to dispense with the submissions of the appellant and the respondent on being asked whether he wished to present any submissions he indicated that he preferred that the court proceeds to deliver its judgment.

By virtue of Order 44 rule 1 (1) (c) of *The Civil Procedure Rules*, an order made under Order 9 rule 27 rejecting an application for an order to set aside a decree passed *ex-parte*, is appealable as of right. This being a first appeal, this court is under an obligation to re-hear the case by subjecting the proceedings before the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion. This duty is well explained in *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17 of 2000*; [2004] KALR 236 thus;

It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.

It is evident from the record of the trial court that the decision to proceed *ex-parte* against the appellant was premised on an affidavit of service which indicated that the appellant had been served with a summons to file a defence, through its administrator named as Stephen. According to Order 29 rule 2 (a) of *The Civil Procedure Rules*, where a suit is against a corporation, the summons may be served on the secretary, or on any director or other principal officer of the corporation. From the wording of this provision it is important that the identity of the post held by such principal officer in the company must be specified. In other words if such officer is neither secretary nor director, his position in the company must be specified. It is not enough just to say that such a person is a principal officer (see *Kiganga and Associates Gold Mining Co Ltd v. Universal Gold NL [2000] 1 EA 134 at 138*). The rule is very strict on the issue of service upon a corporation and makes it clear that no service effected upon any person other than a principal officer of the company, will be recognized.

The rule though does not define who a “principal officer of the corporation” is. However, considering the mischief aimed at by the provision, it seems to me that the determination of who in the corporation qualifies as such must be determined on basis of the nature of the duties the person performs in the corporation. It is a functional determination. Interpreting the provision on *ejusdem generis* basis, it includes such persons in the corporation who are authorised to exercise substantial executive or managerial powers, such as signing contracts and making major business and administrative decisions as distinguished from regular employees. In the instant case, the person served was identified as Stephen, the Administrator of the applicant. It is not clear to me that the position of Administrator involves exercise of substantial executive or managerial powers in the applicant corporation. In his determination of the status of the person served, the trial magistrate stated as follows;

“Principal Officer of a company” in my own opinion refers to any person holding a principal position in a company. This in my opinion includes a wide range of officials including a finance manager as used by the applicant as deponent to the affidavit in support and an administrator. In the applicant’s affidavit in support and submissions thereof, the applicant doesn’t deny the said Stephen being an administrator of the applicant neither does it deny knowledge of the said summon being brought into the company’s attention. The ultimate purpose of effecting service on a litigant is to bring to the attention of that party of the pending claim in court so that he or she may respond to the allegations brought against him or her. In this particular case, annexure “B” to the affidavit in support is an affidavit of service of summons..... where service was effected to Stephen, as an officer of the applicant on 09.11.2015. (Emphasis added).

The learned trial magistrate engaged in a circulatory argument at the beginning of his analysis in the determination of who may be categorised as a “principal officer of the corporation” and ended up misdirecting himself at the conclusion of the analysis with a finding that service on “Stephen, as an officer of the applicant” satisfied the requirement of service on a “principal officer” of the applicant. Had he properly directed himself, he would have found that there was no basis, without disclosure of the functional role of an administrator in the applicant company, for a finding that service was effected on a Principal Officer of the company.

In *Remco Ltd. v. Mistry Jadva Parbat and Co. Ltd. and others* [2002] 1 EA 233, service of summons intended for a corporation were served on the receptionist of the company. Regarding

the issue whether such service was effective on the company, the court held that it was not in dispute that the receptionist was neither a director nor a secretary nor a principal officer of the Defendant Company. Thus although there was service on an employee, the receptionist, the court decided that such was not proper served on the Defendant corporation as contemplated by the rules. That being the case, the judgment obtained in default of appearance was an irregular judgment and had to be set aside *ex debito justitiae*.

In exercise of the court's discretion to set aside, the court must act judiciously in order to do justice between the parties where there is no proper service, the resulting default judgment is an irregular one and the court's discretion whether or not to set aside such judgment is not required. Such Judgment should be set aside *ex debito justitiae*. In the final result, the two grounds of appeal succeed. The ex-parte judgment and decree entered against the applicant is hereby set aside. The applicant is granted leave to file its defence to the suit within fourteen days from today and the trial should proceed *inter parties* thereafter. The costs of this application shall abide the costs of the re-trial.

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Stephen Mubiru
Judge
27th April 2017.