

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(CIVIL DIVISION)

**CIVIL APPEAL NO. 17 OF 2021**

(Arising From MA No. 55 of 2020 and Civil Suit No. 083 Of 2018)

AZAM ROBERT ===== APPELLANT

VERSUS

ANGUMA MOSES ORUMA ===== RESPONDENT

**BEFORE; HON. JUSTICE EMMANUEL BAGUMA**

**JUDGMENT**

**Background.**

The appellant/defendant was sued under summary procedure in the lower court by the Respondent/plaintiff for recovery of 15,883,500/= (Fifteen million eight hundred and eighty three thousand five hundred shillings). The Appellant/defendant was allegedly served with the specially endorsed plaint but he did not file an application for leave to appear and defend. The matter proceeded *ex parte* and judgment was entered against the appellant/defendant. The appellant/defendant filed an application to set aside *ex parte* judgement and be granted unconditional leave to appear and defend. However, the trial court dismissed the application for setting aside the *ex parte* judgment on the basis that the appellant/defendant was duly served with summons.

The Appellant/defendant being dissatisfied with the ruling and decision of the *ex parte* judgment in the lower court appealed to this court on the following grounds;

**Grounds of appeal.**

- 1. The learned trial Magistrate erred in law and fact when she held that the appellant was effectively served which occasioned a miscarriage of justice.*

- 2. The learned trial Magistrate erred in law and fact when she failed to consider the issue/fact that the appellant was not indebted to the Respondent.*
- 3. The learned trial Magistrate erred in law and fact when she failed to evaluate evidence on record thus arriving at a wrong decision which occasioned a miscarriage of Justice.*

### **Representation.**

Mr. Mudhola Denis represented the appellant while Mr. Mugisha Akleo represented the Respondent.

At the hearing of this appeal both counsel agreed to file written submissions and their details are on record.

### **Duty of first Appellant Court.**

The duty of the first appellate court was stated in the case of **Kifamunte Henry Vs Uganda SC, (Cr) Appeal No. 10 of 2007**, where it was held that;

*“...the first appellate court has a duty to review the evidence of the case, to reconsider the materials before the trial judge and make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it...”*

This Court therefore has a duty to re-evaluate the evidence to avoid a miscarriage of justice as it mindfully arrives at its own conclusion. I will therefore bear these principles in mind as I resolve the grounds of appeal in this case.

### **Submissions by Counsel for the Appellant.**

Counsel for the appellant in his written submissions raised two issues from the 3 grounds of appeal to wit;

- 1. Whether the learned trial Magistrate erred in law and fact to hold that the appellant was effectively served.*
- 2. Whether the learned trial Magistrate erred in law and fact when she failed to consider the fact that the appellant was not indebted to the Respondent.*

However, counsel for the appellant submitted on the two issues collectively.

Counsel for the Appellant submitted that the Appellant was never served with summons in civil suit No. 83 of 2018. That the affidavit of service sworn by Muwonge Wasswa Allan dated 12<sup>th</sup> December 2018 shows that the appellant's wife was served and allegedly with the authority of the appellant which was not true.

Counsel submitted that the Respondent has not adduced any evidence to prove that the appellant directed him to his home, or that the person in the picture is the appellant's wife.

Counsel submitted that **Order 5 Rule 10 of the CPR** provides that service has to be made on the Defendant in person, unless he/she has an agent empowered to accept service.

He submitted that the alleged person in the picture is not known to the Appellant and she did not acknowledge receipt of any document, if at all she was authorized to receive. Counsel also made reference to **order 5 rule 16 of the CPR**.

Counsel submitted that the Appellant is not indebted to the Respondent. There was no evidence adduced in the lower court to prove that the Appellant is indebted to the Respondent to any more money as alleged, all the Respondent is alleging in paragraph 7 is not backed up with any proof. That according to the evidence on record, the appellant has paid UGX 20,050,000/= exclusive of the value of the sold motor vehicle.

Counsel submitted that the record of proceedings on 4<sup>th</sup> July 2019 page 14, 15, 16 and 17 shows that the Respondent in his own testimony stated that the balance of 4,250,000/= was paid hence the Respondent's debt was cleared.

Counsel further submitted that the transaction between the appellant and Respondent happened in Kawanda, however the Respondent filed the suit in Entebe court Contrary to section 15 of the CPA.

### **Submission by counsel for the Respondent on the preliminary objection.**

Counsel for the Respondent in his written submissions raised a **preliminary objection** that the appeal is incompetent for being filed out of time. Counsel referred to section 79 of the Civil Procedure Act which provides for the limitation of an appeal and requires every appeal to be filed within 30 days from the date of issue of the decree or order.

Counsel submitted that the ruling which the appellant seeks to appeal against was delivered on 23<sup>rd</sup> day of March 2021 yet the appeal was lodged before this court on 23<sup>rd</sup> August 2022 way out of time.

**Section 79 of the CPA** is to the effect that appeals from decrees and orders shall be lodged in court within 30 days from the date of issue of the order or decree.

In this case counsel for the respondent in his written submissions raised a PO that the appeal was filed out of time, however upon perusal of the lower court record. I have established that the ruling in issue was delivered on 23<sup>rd</sup> March 2021, the proceedings were certified on 3<sup>rd</sup> August 2021. The appeal was lodged in this court on 15<sup>th</sup> April 2021 hence the appeal against the ruling was still within time.

Equally the judgment was delivered on 30<sup>th</sup> August 2019 and the Appellant filed an application to set aside the exparte judgment where the ruling was delivered on 23<sup>rd</sup> March 2021 and the proceedings were certified on 3<sup>rd</sup> August 2021 and the appeal was filed on 15<sup>th</sup> April 2021 hence the appeal against the exparte judgment was still within time. The preliminary objection is accordingly dismissed.

### **Submissions by counsel for the Respondent on the merit of the appeal.**

#### **Issue 1**

***Whether the learned trial Magistrate erred in law and fact to hold that the appellant was effectively served.***

Counsel submitted that order 5 rule 10 of the CPR allows service to be effected on an adult member of the defendant's family. He referred to order 5 rule 13 and the case of **Betty Owaraga Versus GW Owaraga HCCA No. 60 of 1992**.

Counsel submitted that the appellant was not known to the process server and there is no way he could have known the appellant's residence except he was directed by

the appellant. The affidavit of service shows that the appellant was properly served through his wife at his home in Kawanda.

## **Ground 2.**

***Whether the learned trial Magistrate erred in law and fact when she failed to consider the fact that the appellant was not indebted to the Respondent.***

Counsel for the Respondent submitted that the Appellant is indebted to the Respondent. That PW1 testified that the appellant contacted him that he had people to supply with grafted mango seedlings but he did not have money and asked him to give him money and that he would double the money on repaying back whereby the respondent accepted and gave him UGX 14,000,000/= (Fourteen Millions Shillings) in installments of 6,100,000/= (Six million one hundred shillings). PW1 stated that when the Appellant refused to pay the money he reported a matter to police and the Appellant was summoned where he agreed to pay and made a down payment of 2,000,000/= and accepted to pay the balance of 15,883,500/= (fifteen million eight hundred eighty three thousand five hundred shillings) within 30 days and he also left his car as security at police.

## **Ground 3**

***The learned trial Magistrate erred in law and fact when she failed to evaluate evidence on record thus arriving at a wrong decision which occasioned a miscarriage of Justice.***

Counsel for the respondent submitted on ground 3 however the same had been abandoned by the appellant when he raised 2 issues for court's determination from the 3 grounds hence the submissions on ground 3 will not be considered.

## **Analysis of court**

### **Ground One.**

***The learned trial Magistrate erred in law and fact when she held that the appellant was effectively served which occasioned a miscarriage of justice.***

According to **O.5 r. 13 of the Civil Procedure Rules**, service of summons must be **personal**, but where it is not possible to serve the defendant service can be done on

his/her agent or adult member of his/her family. See: ***Betty Owaraga v. G.W. Owaraga HCCA No. 60 of 1992.***

In the instant case, I have perused the affidavit of service on record on which the trial Court based to proceed exparte. The affidavit of Muwonge Wasswa Allan paragraph 3, 4 and 5 stated that when he received summons to serve the defendant/appellant, he was given his telephone number by the plaintiff, that he called the defendant on 0702127272 and the Defendant/Appellant directed him to his home in Kawanda where he told him to serve his wife.

However, in paragraph 6 he stated that the wife refused to acknowledge receipt of the documents.

On the contrary, the Appellant/defendant in his affidavit in support of miscellaneous application No. 55 of 2020 to set aside the exparte judgment in paragraph 11 and 14 stated that he was never served with summons and was not aware of the suit against him.

In the ruling of the trial court in MA 55 of 2020, court observed that the alleged wife of the appellant refused to acknowledge receipt of summons.

From the above analysis of circumstances of service of summons, what needs to be established in this case is whether the alleged service was proper and effective

It is my considered view the issue of service in this particular case is based on the oath of the process server against the oath of the appellant. It is not in dispute that there was no evidence whatsoever to show that the alleged wife was indeed the agent of the Appellant, In any case the alleged agent or wife refused to acknowledge service of court summons.

It is a requirement of law that service should be personal or to an authorized agent. However in this case there is nothing to suggest that the appellant was served personally or through an authorized agent hence it is my finding that the service was not proper and effective.

From paragraph 3 of the plaint the Respondent /Plaintiff was claiming for recovery of 15,883,500/=. However, in the affidavit in support of the application for setting aside, the appellant/defendant in paragraph 13 claimed that he had paid all the monies due and given a chance he would prove the same which on the face of it suggests that there were triable issues.

In the case of **National Enterprises Corporation vs Mukisa Foods, Court of Appeal Civil Appeal No. 42 of 1997**, it was observed that denying a party a hearing should be the last resort.

In **Banco Arabe Espanol v Bank of Uganda [1999] UGSC 1**, the Supreme Court **held** that the administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits; and lapses or errors should not necessarily debar a litigant from pursuit of his rights.

It is my finding that the appellant/defendant was not duly served with summons hence the service was not proper and effective.

Ground 1 of the appeal succeeds.

## **Ground 2**

*The learned trial Magistrate erred in law and fact when she failed to consider the issue/fact that the appellant was not indebted to the Respondent.*

Having resolved issue No. 1 which dealt with service of summons, and this court has found that there was no proper and effective service, court will not go into analysis of ground No. 2 since it concern the merits of the case.

In the final analysis it is my considered view that basing on the principles of natural justice and fairness coupled with interest of justice, this appeal succeeds.

## **Conclusion.**

This appeal succeeds with the following orders;-

1. The ruling of the trial court in MA No. 55 of 2020 delivered on 23<sup>rd</sup> March 2021 is set aside.
2. The exparte judgment and orders in CS No. 83 of 2018 delivered on 30<sup>th</sup> August 2019 are set aside.

3. Article 28 of the 1995 constitution provides for the right to be heard, in view of this provision, the appellant is granted unconditional leave to file Written statement of defence within 15 days from the date of this Judgment.

4. Let this matter be placed before a different Judicial officer to be heard on its own merit.

Dated, signed, sealed and delivered by email this **4<sup>th</sup> day of August 2023**

Emmanuel Baguma

Judge.