

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT KAMPALA
LAND DIVISION

CIVIL APPEAL NO. 37 OF 2011

(Arising from Misc. Appl. No. 611 of 2011 Chief Magistrate's Court of Mengo)

(Itself Arising from Civil Suit No. 2134 of 2010)

1. DAVID KATO LUGUZA
2. ROBERT NTUMWA.....APPELLANTS

VERSUS

1. EVELYN NAKAFEERO
2. TONY MPALANYI.....RESPONDENTS

BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

JUDGMENT

This was an appeal from the ruling of Her Worship Esther Nambayo chief magistrate Mengo, Mengo Chief Magistrate's Court delivered on 17th October 2011.

The background is that the appellants filed application no. 611 of 2011 at Mengo Chief Magistrate's court to set aside the judgement, decree and execution passed *ex parte* against the applicants, and to allow the applicants to file a defence so that the matter is heard *inter partes*. The grounds of the application were that the applicants, on being served with summons to file their defence, instructed their lawyer to file the defence. The lawyer did not do so, as a result of which the matter was heard *ex parte*. The learned chief magistrate dismissed the application with costs.

The appellants being dissatisfied with the judgment appealed against it on the following grounds:-

1. *The learned trial magistrate erred in law and in fact when she held that the appellants never instructed M/s Ssengooba & Co Advocates to file a defence on their behalf.*
2. *The learned chief magistrate erred in law when she held the appellants responsible for the negligent acts of their advocate.*

3. *The learned chief magistrate failed to judicially evaluate the evidence on record and thereby came to a wrong conclusion.*

The appellants prayed that the appeal be allowed and the ruling and orders of the chief magistrate in miscellaneous application no. 611/2011 be set aside, the judgement decree and execution passed *ex parte* against the appellants be set aside, and the appellants be allowed to file a defence out of time. At the hearing of this appeal, this court gave time schedules within which counsel filed written submissions.

Ground 1: The learned trial magistrate erred in law and in fact when she held that the appellants never instructed M/s Ssenooba & Co Advocates to file a defence on their behalf.

Ground 2: The learned chief magistrate erred in law when she held the appellants responsible for the negligent acts of their advocate.

The appellants' counsel argued grounds 1 and 2 together. He submitted that the learned trial chief magistrate completely disregarded the evidence in form of a letter where the appellants' lawyer indicated that they were given instructions by the defendant to file a defence but that the defence was not filed as the clerk who was given the job fell sick. Counsel referred to page 2 of the chief magistrate's ruling and submitted that the magistrate disregarded this evidence and instead relied on the 2nd respondent's affidavit which stated that the 2nd respondent consulted with counsel Ssenooba and the clerk and they all confirmed to him the applicants had never instructed Ssenooba & Co Advocates to file a defence. He submitted that the learned chief magistrate should have addressed section 58 of the Evidence Act which states that all facts, except contents of documents may be proved by oral evidence. In his opinion the learned chief magistrate, in ignoring the letter in preference of hearsay evidence, misdirected herself on the issue. He cited **Eric Tibegega V Narsencio Begumisa & 3 Others SCCA No. 18/2002** to support his position. He also submitted that the negligence of counsel should never be visited upon a litigant as was held in **Banco Arabe Espanol V Bank of Uganda SCCA 8/1998** cited with approval in **Central Electricals International & Another V Prestige Investments Ltd MA 625/2011**.

The respondents' counsel submitted in reply that the letter by the appellants' lawyer was smuggled in court by counsel Nzige at the level of his submissions and the same was nonexistent at the time MA 611/2011 was filed on 25/05/2011; that it was introduced to the trial court as an attachment to the appellants' submissions of 26/09/2011 and was not exhibited or annexed to the counsel Ssenooba's affidavit, which affidavit was not duly commissioned. He contended that the purported letter from counsel Ssenooba contravened the Commissioner for Oaths (Advocates) Act, cap 5 which renders it inadmissible and unreliable, and that it ought to be expunged from the record. He also contended that the submission of the letter by the appellants' counsel during submissions tantamount to giving evidence from the bar. He contended that counsel Nzige was not competent to produce the said letter before court because he was not party

to the suit, and his evidence was hearsay and unreliable under Order 19 rule 3 of the Civil Procedure Rules.

He also submitted that there is no cogent evidence adduced by the appellants to prove that they duly instructed counsel to file a defence for them. He submitted that the only cogent proof of retaining or employing an advocate is by way of a receipt of payment of instructions or legal fees. He argued that the appellants did not adduce evidence by way of receipt attached to Mr. Ssenkooba's affidavit to prove payment of legal fees to defend them in civil suit no. 2134/2010; and that they therefore failed to prove that they actually instructed Mr. Ssenkooba to defend them.

The respondents' counsel contended that the trial magistrate was correct to disregard the suspect letter and instead rely on the affidavit evidence of the 2nd respondent as the said evidence was based on information whose source was disclosed under Order 19 rule 3(1) of the Civil Procedure Rules. He submitted that sections 58 and 59 of the Evidence Act are not applicable to the instant situation. He cited **Life Insurance Corporation of India V Panesar [1967] EA 615** which held that unless otherwise provided for in a written law, the rules of evidence do not apply to affidavits. He submitted that it is settled law in Uganda that affidavits are governed by Order 19 of the Civil Procedure Rules. He argued that the 2nd respondent disclosed the source of her information in paragraph 4 of her affidavit and this was not controverted by the appellants; and that according to **Massa V Achen [1978] HCB 297**, such facts are accepted, the trial magistrate was correct to rely on them.

The respondents' counsel further submitted that even if the letter was to be admissible the reason given that the clerk who was given the job fell sick is weak and unconvincing since it does not answer questions as to whether there exists a defence drawn and signed by the advocate. He noted that the advocate could not state the date when he received the instructions and submitted that this shows the letter is a fabrication. He prayed this court to find that the appellants never instructed M/s Ssenkooba & Co Advocates to file a defence for them and as such the learned trial magistrate was to find and hold the way she did.

On ground 2 the respondents' counsel submitted in reply that the learned trial magistrate correctly found that the appellants deceived the trial court that they instructed an advocate when actually they did not, and that their lawyer Nzige helped them make such a lie. He repeated his submissions in ground 1 that the letter from the lawyer was not an exhibit and was highly suspect. The respondents' counsel also submitted, without prejudice, that the appellants were responsible for their counsel's negligence and laxity to file a defence. He referred to the trial record which shows that the appellants were duly served with the summons on 12/11/2010 as per the affidavit of service. They were arrested on 13/05/2011, meaning for five months they had not bothered to find out whether their counsel had filed a defence or whether their case had been fixed for hearing. He argued that there is no evidence on record that between the time they were served and the time of their arrest, the appellants telephoned their counsel or visited him in his

chambers to verify whether he had filed their defence. He contended that such conduct amounts to dilatory conduct and negligence on the part of the appellants. He invited this court to make a finding to that effect.

The appellants' counsel submitted in rejoinder however that counsel for the respondents' submissions on payment of an advocate are misleading as the definition of a client does not make it mandatory that a client must first pay an advocate before carrying out his instructions, and that payment is not always necessarily in monetary terms. He contended the letter ignored by the trial magistrate was proof of such instructions. He submitted that the case of **Life Insurance Corporation of India V Panesar** is not relevant in the contemporary Uganda jurisprudence, since the case of **Eric Tibegega V Narsencio Begumisa & 3 Others** was a Supreme Court decision that was made much later. He contended that the Uganda Evidence Act does not provide for the section alluded to by the court in the **Life Insurance Corporation of India V Panesar** case. He submitted that the letter is validly on the court record and that any irregularities prior to its admission did not prejudice the respondents as their counsel did not object to the same or oppose its contents. He stated that the letter does not occasion any miscarriage of justice on the respondents and should not hinder the administration of substantive justice. He further submitted that the appellants trusted their lawyer after giving him instructions to carry out a professional duty, and that it is speculative to conclude that they were never in touch with their lawyer; and that the case cited by the respondents' counsel was out of context with the instant situation.

I have perused the record of proceedings, including the judgement of the trial magistrate and the submissions of counsel. The learned trial magistrate on page 2 of the judgement stated as follows:-

“...the evidence of the applicants that they had instructed Mr. Ssenooba to file a defence is not convincing because I believe if the only reason why the defence was not filed is that the clerk fell sick, then the defence should have been attached to show that actually the defence had been drawn but the clerk fell sick.”

As correctly observed by the learned trial magistrate, no defence was attached to the applicant/appellant's affidavit in reply in the trial court to show that the defence was indeed prepared, nor was it exhibited during trial. The letter by the applicant/appellants' lawyer stating that they prepared the defence was also not attached to the affidavits filed in the trial court. Instead the record reveals that it was introduced to the trial court by the applicant/appellant's counsel as an attachment to his submissions. The letter was nonexistent at the time MA 611/2011 was filed on 25/05/2011. Counsel Nzige who attached the letter to his submissions was not competent to produce the said letter before court. He was not party to the suit. His attempts to submit it during submissions tantamounted to giving evidence from the bar. It was also an attempt by learned counsel to adduce hearsay evidence before court since he was not the author of the letter purportedly written by counsel Ssenooba. Hearsay evidence is unreliable under Order 19 rule 3 of the Civil Procedure Rules. The respondents' counsel referred to an

uncommissioned affidavit by counsel Ssenooba. I have not seen this affidavit on the court record. I accordingly refrain from commenting on it. The affidavits in support of the application which are on record are those deposed to by the two applicants David Kato Luguza and Robert Ntumwa.

I do not agree with the respondents' counsel's submissions that the only cogent proof of retaining or employing an advocate is by way of a receipt of payment of instructions or legal fees. As correctly argued by the appellants' counsel, the definition of a client does not make it mandatory that a client must first pay an advocate before carrying out his instructions. Secondly, payment is not always necessarily in monetary terms. Nonetheless, in this case, there is no cogent evidence adduced by the appellants to prove that they duly instructed counsel Ssenooba to file a defence for them.

It is clear from the judgement of the learned trial magistrate that she relied on the 2nd respondent's affidavit evidence to decide that the applicants never instructed counsel Ssenooba to file the defence. The 2nd respondent deposed in paragraph 4 of his affidavit in reply that he consulted with counsel Ssenooba and the clerk in that firm and they all confirmed to him that the applicants have never instructed Mr. Ssenooba to file the defence. It is clear that the 2nd respondent's averments in paragraph 4 of his affidavit in reply were based on information and he disclosed the source of the information. This is in line with Order 19 rule 3(1) of the Civil Procedure Rules which governs affidavits. Sections 58 and 59 of the Evidence Act cited by the appellants' counsel are not applicable to the instant situation. It was held in **Life Insurance Corporation of India V Panesar [1967] EA 615** that unless otherwise provided for in a written law, the rules of evidence do not apply to affidavits. The case of **Eric Tibegega V Narsencio Begumisa & 3 Others SCCA No. 18/2002** cited by the appellants' counsel is, in my opinion, not applicable to this situation. It was cited out of context since the 2nd respondent's averments in paragraph 4 of his affidavit in reply were not hearsay. They were based on information the source of which was disclosed by the deponent.

The 2nd respondent's affidavit evidence that the applicants have never instructed Mr. Ssenooba to file the defence was not controverted by the appellants. According to **Massa V Achen [1978] HCB 297**, the burden to deny such facts sworn in an affidavit lies on the other party. If such party does not deny or rebut them, they are presumed to have been accepted, and the deponent need not raise them again, but if they are disputed then he has to defend them again. In this case, since the applicants never rebutted the facts as deposed to in the 2nd respondent's affidavit in reply, the trial magistrate was correct to rely on them.

In my opinion, as is deducible from the court record, and for reasons given, the appellants never instructed M/s Ssenooba & Co Advocates to file a defence for them. The learned trial magistrate therefore was right to find and hold the way she did.

The appellants' counsel submitted that the negligence of counsel should never be visited upon a litigant. This was opposed by the respondents' counsel who insisted that the appellants were responsible for their counsel's negligence and laxity to file a defence. The appellants' counsel argued in rejoinder that the appellants trusted their lawyer after giving him instructions to carry out a professional duty, and that it is speculative to conclude that they were never in touch with their lawyer.

The trial record shows that the appellants were duly served with the summons on 12/11/2010 as revealed by the affidavit of service. They were arrested on 13/05/2011. There is no evidence on record that between the time they were served and the time of their arrest, the appellants telephoned their counsel or visited him in his chambers or contacted him to verify whether he had filed their defence. The appellants' conduct between 12/11/2010 when they were served with the summons and 13/05/2011 when they were arrested leaves a lot to be desired, considering that they had the yoke of a civil suit filed against them. They were fully aware of the same since they had been duly served.

In such circumstances prudence would demand that even a litigant who has instructed a lawyer to defend him/her would inquire or remind him/her about the case, or demand to know its progress, and not just to sit passively. The litigant ought to be reasonably expected to follow the case up with his lawyer to make him/her swing into action or wake from his/her slumber. Contrary to the submissions of the appellant's counsel, it would not be speculative to expect a prudent litigant to follow up his/her case. There is no plausible explanation as to why the appellants in this case sat back only to be arrested almost seven months later. Their conduct shows that they did not exercise any vigilance or diligence in pursuit of civil suit no. 2134/2011 which had been filed against them. In my opinion, such conduct amounts to dilatory conduct and negligence on the part of the appellants.

I do not therefore agree with the appellants' counsel's submissions that the appellants trusted their lawyer after giving him instructions to carry out a professional duty, or that it is speculative to conclude that they were never in touch with their lawyer. The cases of **Banco Arabe Espanol V Bank of Uganda SCCA 8/1998** cited with approval in **Central Electricals International & Another V Prestige Investments Ltd MA 625/2011** are not applicable to this situation, since in this case the appellants' conduct was clearly dilatory and should share the blame with their counsel.

Grounds 1 and 2 of the appeal are not allowed.

Ground 3: The learned chief magistrate failed to judicially evaluate the evidence on record and thereby came to a wrong conclusion.

Counsel for the appellants submitted that the chief magistrate did not properly evaluate the evidence adduced before her and instead relied on hearsay evidence of the 2nd respondent's affidavit in reply, which was in complete disregard of sections 58 and 59 of the Evidence Act.

He contended that land matters are intricate and should be heard *inter parte*, that it is an injustice when only one party is heard, as the other party, through no fault of his, is condemned unheard. He also submitted that had the learned chief magistrate addressed the fact, which was clear, that the parties are related, she would have let the matter to proceed *inter partes* instead of disposing the whole suit in an interlocutory application.

The respondent's counsel submitted in reply that the entire application was devoid of merit. He invited this court to analyse the affidavit evidence of the 2nd respondent which ably challenged all the averments of the 2nd appellant. He also argued that though the 2nd appellant deponed in paragraph 8 of his affidavit that they had a very good defence to the allegations in the plaint, he did not attach a copy of the alleged defence or at all. He referred to the 2nd respondent's affidavit evidence which justified the respondents' claim to the land as opposed to the appellants who failed to show a plausible defence to the respondents' claim or controvert the respondents' affidavit evidence. He argued that the appellants' counsel's arguments that land matters are intricate requiring to be heard *inter partes* are not legally persuasive or backed by cogent evidence. He contended that the application did not disclose a plausible defence to warrant its being set aside as was held in **Kyobe Ssenyange V Naks Ltd [1980] HCB 30** and **Megera & Another V Kakungulu [1976] HCB 30**. He prayed this court to come to the same conclusion as the learned trial magistrate and dismiss the appeal with costs.

The appellants' counsel submitted in rejoinder that the respondents' counsel's skepticism of the appellants' plausible defence simply because of there being no written statement of defence attached to the application does not hold. He submitted that paragraphs 8 to 13 of the 2nd applicant's affidavit in support of the application to set aside the *ex parte* enlists the defence of the applicants which could only be proved at full trial.

This court as a first appellate court has powers under section 80 of the Civil Procedure Act to determine a case finally, or to frame issues and refer them for trial, or to take additional evidence or require such evidence to be taken, or to order a new trial, among others. Courts have also held that an appellate court has a duty to rehear the case appeal by reconsidering all the materials which were before the trial court and make up its own mind. See **Bogere Moses V U [1996] HCB 5**.

In the course of addressing grounds 1 and 2 of this appeal, I made a finding that sections 58 and 59 of the Evidence Act were not applicable to this situation as the 2nd respondent's affidavit in reply was not hearsay. It is also evident the application did not disclose a plausible defence to warrant its being set aside. The appellants did not attach the defence they claimed to have prepared and forwarded to a clerk for filing in their application to have the *ex parte* judgement against them set aside. It was held in **Kyobe Ssenyange V Naks Ltd [1980] HCB 30** and **Megera & Another V Kakungulu [1976] HCB 30** that before setting aside an *ex parte* judgement, the court has to be satisfied not only that the defendant has some reasonable excuse

for failing to appear, but also that there is merit in the defence to the case. They failed to show the lower trial court that they had a plausible defence to the case.

I made the findings in grounds 1 and 2 of this appeal after reconsidering all the materials which were before the trial court and making up my own mind as an appellate court. I do not have to repeat the analysis of evidence I made while addressing the said grounds of appeal. I can only state that for the same reasons I advanced while considering grounds 1 and 2 of this appeal, I do not find merit in the appellants' counsel's submissions that that the learned trial magistrate did not properly evaluate the evidence adduced before her.

Having reconsidered the entire evidence on the record afresh, I am of the opinion that the learned trial magistrate properly analysed the evidence while handling miscellaneous application 611/2011 arising from civil suit no.2134/2010. I have come to the same conclusion as the learned trial magistrate.

Ground 3 of the appeal fails.

All in all this appeal fails. It is dismissed with costs.

Dated at Kampala this 11th day of July 2013.

Percy Night Tuhaise.

JUDGE.