THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CIVIL APPEAL NO. 0014 OF 2015

(Arising from FPT – 00 – CV – LD – MA – 016 OF 2014)

(Arising from FPT – 00 – CV – LD – CS – 0049 of 2010)

KYAMANYWA PATRICK

ABEL MUSISI

BYEKWASO JACKSON

AGABA GODFREY

KATENDE HERBERT

MUJUNI ROBERT **.....APPELLANTS**

GERESON KWESIGA

WUKA DEVIS

KATO CHRISTOPHER

ERYASI BARYAHAIGURU

VERSUS

BYARUHANGA JOHN.....RESPONDENT

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

Judgment

This is an appeal arising from the ruling of His Worship Oji Philip Magistrate Grade 1 of Chief Magistrate's Court of Fort Portal dated 16th June 2014 in FPT – 00 – CV – MA – LD – 016 – of – 2014.

Brief facts

The Respondent instituted a civil suit against the 1st Appellant for recovery of land and later on added the other 9 Appellants claiming that the 1st Appellant had sold to them part of the suit land. The 9 Appellants however, never filed their defence even after substituted service was ordered by Court. The matter proceeded exparte. An Exparte judgment was entered

against the Appellants whereof the Appellants made an application under **Order 9 Rule 27** and **Order 52 Rules 1&3** of the Civil Procedure Rules for orders that the exparte judgement entered against the Appellants be set aside and execution be stayed and the 2nd and 10th Appellants be allowed to file their defence and costs of the Application be provided for.

The trial Magistrate found that the affidavits in support of the application were defective, misconceived, and bad in law. That, there was no good cause shown by the Appellants as to why, the exparte judgment should be set aside and execution stayed. The application was dismissed with costs.

The Appellants being dissatisfied with the decision of the trial Magistrtae lodged this appeal whose grounds are;

1. That the learned trial Magistrate erred both in law and fact when he ruled that the Appellants had not shown sufficient cause for non-attendance of Court and thereby came to a wrong conclusion by declining to set aside the exparte judgment and stay execution.
2. That the learned trial Magistrate erred both in law and fact when he ignored the illegalities and irregularities on the Court record and thereby causing a miscarriage of justice to the Appellants and thus came to a wrong conclusion.

M/s Barungi Baingana & Co. Advocates appeared for the Appellants and Counsel Musinguzi Bernard for the Respondent. Both parties made written submissions.

Ground 1: That the learned trial Magistrate erred both in law and fact when he ruled that the Appellants had not shown sufficient cause for non-attendance of Court and thereby came to a wrong conclusion by declining to set aside the exparte judgment and stay execution.

The duty of the first Appellant Court is to evaluate the evidence on record a fresh as a whole and draw its own conclusions bearing in mind that it neither saw nor heard the witnesses at trial. The guiding principle was well stated by Law J. A. (as he then was) in the case of **Karanja Kago vs Karioki Njenga and Edward James Mungai, Civil Appeal No. 1 of 1979 (K-CA)** where he held that;

"A first appeal is by way of re-trial and the Appellate Court is in as good a position as the Trial Judge to make findings of fact and to draw inferences from those facts but to bear in mind that it has neither seen nor heard the witnesses and should make due allowance of this fact."

In the instant case the Respondent instituted a Civil Suit against the 1st Appellant who put in his written statement of defence. The Respondent then filed an amended Plaint with 9 more parties to the suit without leave of Court and these 9 Defendants (Appellants) did not file their defences claiming that they were never served. Court heard the matter and passed exparte Judgment against all the Appellants.

Counsel for the Appellants submitted that the Appellants were not aware of the ongoing suit and even the substituted service was not effective given the fact that the Appellants could not read let alone the fact that the news paper was not widely read in their village. And in the case of **Geoffrey Gatete and Angela Maria Nakigonya versus William Kyobe,Supreme Court Civil Appeal No. 7 of 2005**, it was held that;

"There can be no doubt that the desired and intended result of serving summons on the Defendant in the Civil Suit is to make the Defendant aware of the suit brought against him so that he has the opportunity to respond to it by either defending the suit or admitting liability and submitting to judgment. The surest mode of achieving that result is serving the Defendant in person. Rules of procedure, however, provide for such diverse modes for serving summons that the possibility of service failing to produce the intended result cannot be ruled out in every case.

For example, in appropriate circumstances service may be lawfully made on the Defendant's agent. If the agent omits to make the Defendant aware of the summons, the intended result cannot be achieved. Similarly, the Court may order substituted service by way of publishing the summons in the press. While the publication will constitute lawful service, it will not produce the desired result if it does not come to the Defendant's notice. In my considered view, these examples of service envisaged in order 36 rules 11 as "service (that) was not effective". Although the service on the agent and substituted service would be "deemed good service" on the Defendant entitling the Plaintiff to a decree under order 36 rule 3, if it is shown that the service did not lead to the Defendant becoming aware of the summons, the service is "not effective" within the meaning of order 36 Rule 11."

Secondly Counsel for the Appellant submitted that the Court process server swore a defective affidavit mentioning a wrong person to whom she had served on behalf of Agaba Godfrey. That the process server should have exercised due diligence and served the parties personally and only in exceptional circumstances is it allowed to serve somebody else other than the Defendant. Further, that the Court process serve in her Affidavit of service did not state that she carried out any due diligence in search for the Defendant which ended up being futile. Thus, there was no proper service on the Appellants in the instant case.

Counsel went ahead to submit that the Appellants were not able to make their defence because there was no effective service and the substituted service did not meet its objective.

Under **Order 5 Rule 18 (2)** of the Civil Procedure Rules it states that;

"*Substituted service shall be as effectual as if it had been done on defendant personally*."

According to **Order 5 Rule 18 (2)** of the Civil Procedure Rules substituted service is as good (effectual) as if it has been made on the defendant personally.

In my opinion there was effective service and this was through the substituted service that was done through a publication in the 'Entasi' Newspaper. I believe this paper was purposely selected because of its nature and the language in which it is published as compared to other

Newspapers such as; New Vision or Monitor Newspapers. Substituted service has been held to be as good as serving the Defendant personally. Thus, trial Magistrate did not err both in law and fact when he ruled that the Appellants had not shown sufficient cause for non-attendance of Court and thereby did not come to a wrong conclusion by declining to set aside the exparte judgment and stay execution.

Ground 2: That the learned trial Magistrate erred both in law and fact when he ignored the illegalities and irregularities on the Court record and thereby causing a miscarriage of justice to the Appellants and thus came to a wrong conclusion.

Counsel for the Appellants submitted that the Respondent filed an amended plaint without leave of Court and this was in contravention of the provisions of **Order 6 Rule 20** of the Civil Procedure Rules that provides that;

"A Plaintiff may, without leave, amend his or her plaint once at any time within twenty one days from the date of issue of the summons to the Defendant or, where a written statement of defence is filed, then within fourteen days from the filing of the written statement of defence or the last of such written statements."

That there is nothing on record indicating that the Respondent applied for leave of Court to amend his Plaint.

That the second irregularity is where the Court proceeded as though the 1st Appellant had not filed a written statement of defence. That the trial Magistrate should not have ignored these irregularities once pointed out to him.

In the case of **Uganda Railways Corporation versus Ekwaru D. & 5104 others, CACA No. 185 of 2007,** it was observed that;

"It is settled law that a higher Appellate Court would not allow an illegality that escaped the eyes of the trial Court to liner and cause undesirable consequences. A trial judge has a duty to use a judicial microscope to see all those illegalities that may not be seen by the ordinary eyes of the parties, including those of their counsel who may not have seen it."

Also in the case of **Makula International LTD versus His Eminence Cardinal Nsubuga [1982] HCB 11** it was held that;

"An illegality once brought to the attention of Court, it over rides any form of pleading and cannot be sanctioned by a Court of law."

That the trial Magistrate in not considering these irregularities caused a miscarriage of justice.

In my opinion, indeed the trial Magistrate erred both in law and fact when he ignored the illegalities and irregularities on the Court record and thereby causing a miscarriage of justice to the Appellants such as the fact that the Respondent did not apply for leave to amend the Plaint. And also failed to put into consideration the fact that the 1st Appellant had put his written statement of defence.

This appeal is therefore allowed and all the orders of the lower Court are hereby set aside.

.....

OYUKO. ANTHONY OJOK

JUDGE

18/10/2016