THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – CV – LD – CA – 0033 of 2016

(Arising from Civil Application FPT – 00 – CV – MA – 0012 of 2015)

(Original Civil Suit No. FPT – 00 – CS – LD – 0015 of 2015)

1. MWESIGE WILSON

2. EDITH NYARUHUMA

3. YOWERI KISEMBO .....APPELLANTS

4. PATRICK KYONGERIIRE

5. MOLLY MBABAZI BANKOBEZA

VERSUS

MARY KAJOINA.....RESPONDENT

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

JUDGMENT

This is an appeal against the decision of His Worship Omalla Felix; Chief Magistrate at Fort Portal delivered on the 18th of May 2016.

Background

The Respondent instituted a Suit against the Appellants and her claim was in tort, in equity, in trusts and in Succession Law, special damages, general damages, pecuniary damages, exemplary and punitive damages, costs and commercial interest on the decretal sum.

The case proceeded exparte as against the Appellants. It was alleged that the Applicants were effectively served whereas not as per the Appellants and it was only the 2nd Applicant that was served. The exparte judgment was in favour of the Respondent.

The Appellants then filed Miscellaneous Application No. FPT – 00 – CV – MA – LD – No. 0012/2016 seeking Court Orders setting aside the said *ex parte* judgment and allowing all the Appellants to file their Written Statements of defence so that the suit could proceed on merit it being a land matter. However, in his ruling delivered on the 18th May 2016, the learned trial Chief Magistrate dismissed the Appellants' application with costs hence the instant appeal.

The Grounds of the appeal as per the Memorandum of appeal are;

1. That the learned trial Chief Magistrate erred in law and fact when he held that the Appellants were effectively served with summons to file a written statement of defence and hearing notices but that they failed to file their defences denying themselves the right to access Court.
2. That the learned trial Chief Magistrate erred in law and in fact when he failed to consider that the subject of the suit is a land matter which is sensitive in nature and ought to be heard on merit.

Representation:

Counsel Musinguzi Bernard appeared for the Appellants and Counsel Atuhaire Timothy for the Respondent. By consent both parties agreed to file written submissions.

Duty of the Appellate Court:

This Court has a duty to re-evaluate the evidence to avoid a miscarriage of Justice as it mindfully arrives at its own conclusion as per the case of **Banco Arab Espanol versus Bank of Uganda, Supreme Court Civil Appeal No.8 of 1998.**

The powers of the High Court as an appellate Court are stipulated in **Section 80** of the Civil Procedure Act Cap 71**.** The High Court accordingly has power to determine the case finally, to remand the case, to frame issues and refer them for trial, to take additional evidence or to require such evidence to be taken and to order a new trial.

According to **Section 80 (2)** of the Civil Procedure Act, the High Court has the same powers and nearly the same duties as are conferred on courts of original jurisdiction in respect of suits instituted in it.

Thus, the duty of this court as a first appellate court is to re-evaluate the evidence, give it a fresh scrutiny and reach its own conclusions. **(See: Pandya versus R. (1957) EA 336*).***

Resolution of the Grounds:

Ground 1: That the learned trial Chief Magistrate erred in law and fact when he held that the Appellants were effectively served with summons to file a written statement of defence and hearing notices but that they failed to file their defences denying themselves the right to access Court.

Counsel for the Appellants submitted that there are affidavits of service sworn by Precious Ampaire and Kazimoto Erisa stating that they had served all the Appellants in the presence of the LCI Chairperson of Kyamuhemba Village one Isingoma Robert who signed the return copy.

In the affidavit of Kazimoto, he stated that the Appellants all refused to sign on the return copy. That from the affidavits it is very clear that only the 2nd Appellant was duly served with the summons to file her Written Statement of Defence and she did file hers.

However, from the affidavit of Kazimoto it is clear that the 2nd Appellant was not served with the hearing notice that is why she did not attend Court. The 2nd Appellant denied receiving the hearing notice and in her affidavit stated that the LCI stated in Kazimoto's affidavit of service does not come from where she stays so it was not true that she refused to receive the hearing notice.

Further that in regard to the 1st, 3rd, 4th and 5th Appellants the affidavit of service of Precious Ampaire offends **Order 5** of the Civil Procedure Rules on proof of service. The said affidavit only states that the said Appellants were served and refused to sign. However, the affidavit does not disclose if each of the Appellants were served personally, the time they were served, place where they were served, and the LC Chairperson that was present during this time also never swore an affidavit of service. The same also applies to Kazimoto's affidavit of service of the hearing notice; the LCI Chairperson did not prove that he witnessed the service. Thus, the above casts doubt as to whether the Appellants were effectively served.

Counsel for the Respondent on the other hand submitted that the issue of ineffective service was not tenable. That the Chief Magistrate made the Respondent do service two more times because he was aware that this is a land matter. That this Court cannot be made to sanction an illegality. The Appellants sold the suit land belonging to the Respondent and thus their whole case and defence stands on a nullity and Court cannot give undue regard to a technicality which will also amount to an abuse of Court process.

Further that apart from abuse of Court process, there is nothing legal or maintainable that the Appellants are going to answer. That the Appellants sold off the land before the Respondent could obtain Letters of Administration. The Respondent being the Administrator will be occasioned a miscarriage of justice if the lower Court's orders are reversed. Thus, the Appellants who did not file a defence were served and that is why the 2nd Appellant put in her defence with whom they were jointly liable for their legal acts of alienating the land of the Respondent.

I have carefully looked at the arguments of both Counsel and I find that the affidavits of service as sworn by Ampaire Precious and Kazimoto Erias are lacking in substance and both contravene the provisions of **Order 5** of the Civil Procedure Rules on proof of service. The affidavits should have been detailed in regard to how each of the Appellants was served and where among others.

I am also inclined to believe that the Appellants were not properly served thus failure to file their Written Statements of Defence and the trial Chief Magistrate erred in holding otherwise.

In the case of **Remco Ltd versus Miistray Jadbra Ltd (2002) (1) E.A Page 233** it was held that;

"*If there is improper service of summons to enter appearance, the resultant exparte judgment is irregular and must be set aside by court*."

This ground succeeds.

Ground 2: That the learned trial Chief Magistrate erred in law and in fact when he failed to consider that the subject of the suit is a land matter which is sensitive in nature and ought to be heard on merit.

Counsel for the Appellants submitted that this being a land matter it ought to have been heard on merit and cited the case of **Chad Nyakairu versus Edrisa Nyakairu and Steven Williams, CACA No. 128 of 2011**, where the Court of Appeal agreed that the case being a land matter must have been heard on its merits.

Counsel for the Appellants prayed that the matter be heard on its merits being a land matter. That the appeal be allowed with costs, *ex parte* judgment set aside and the Appellants put in their Written Statements of Defence.

Counsel for the Respondent on the other hand submitted that the authority as cited above had a different principal and not as submitted by Counsel for the Appellants. That this Court has power to make any order it finds fitting for the ends of justice, but the idea that a land matter can never be heard *ex parte* is bad law. That it is very clear that the first Appellant acting with others, arrogated to himself powers to dispose of the suit property while Letters of Administration which were acquired by the Respondent a year after the illegal sale, had not yet issued to anyone. That upon the law of illegal intermeddling with the property of the deceased, there are no merits whatsoever which the trial Court would need to delve in. That the illegality of the pre-administration sale disposes any suit.

I do concur with the submissions of Counsel for the Appellants that the instant case being one that is on land is very sensitive since it touches on people's livelihood. Much as it is a land matter, people should not take advantage that land matters must be heard interparty, if there is proper and effective service it can be heard *exparte*. Having established that the Appellants were not effectively served, thus their failure to file their Written Statements of Defence, the Appellants promptly put in an application to set aside the *exparte* judgment. I do not see what way the Respondent will be prejudiced if the matter is heard interparty and on its merits if the ex parte judgment is set aside.

It was held in **Kyobe Ssenyange versus Naks Ltd [1980] HCB 30** and **Megera & Another versus 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.

I find that there was justifiable reason why the Appellants failed to attend Court even though the 2nd Appellant with whom the other Appellants are jointly being sued filed a Written Statement of Defence but failed to turn up during the hearing of the case. The service of summons in the instant case was not effective.

I therefore allow this appeal with costs and the *exparte* judgment is set aside. Let the Appellants file their Written Statements of Defence and the case be heard on its merits.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE

20/09/2017