

IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: MANYINDO , D.C.J .., ODER , J.S.C & PLATT ,J.S.C.

CIVIL APPEAL NO. 5 OF 1990

BETWEEN

J. HANNINGTON WASSWA SEMUKUTU & CO. LTD
APPLICANT

AND

MARIA OCHOLA & 3 OTHERS
DEFENDANT

(Appeal from Order of the High court of
Uganda at kampala (Mr. Justice ouma), dated 10 / 5/1990)

IN

CIVIL APPEAL NO. 37 OF 1985

REASONS FOR ORDERS

On 3rd October 1990, this court decided to allow the appeal, with costs, setting aside the rulings of the High Court, as well as the exparte judgment, and restored the appeal to the hearing list. Reasons were to be given later and these are the reasons for these orders.

The immediate cause of this appeal was the order of the High Court, dated 10th May 1990 rejecting the application before it, which was to restore an appeal for hearing.

On 29th November 1985, the Chief Magistrate gave judgment against Maria onyango ochola and others, holding that the suit property had been sold by Hannington Wasswa quite properly to Ssemukutu and Co. Ltd. Notice of Appeal was given on 11th December 1985. On 10th September 1987 a copy of the Memorandum was served by the Appellants, and the first appeal was fixed for

hearing on 24th September 1987. On that day Mr. Serwanga asked for an adjournment as he had lost an aunt, and Mr. Kateera volunteered the information that he appeared to have lost a client; at any rate he had no instructions to appear. so the first appeal was put down for hearing on 22nd October 1987 and the Respondent Hannington Wasswa and Ssemukutu & Co. Ltd. Were to be served personally.

The appellants on the first appeal attempted to serve the Respondents personally and the first Appellant court concluded that they had done so successfully. The appeal was heard **ex parte**, and judgment was given adversely to the Respondents. The latter then sought to set aside the **ex parte** proceedings. It was however Ssemukutu & Co Ltd. Who brought the application to move the Court to set aside the **ex parte** appeal and allow the appeal to be reheard on the grounds of non service of the Notice of hearing on the Company. For good measure Mr. Hannington Wasswa joined in the proceedings by swearing an affidavit that he had not been served. It is clear from the affidavit of Mr. Augustine Matovu, dated 31st March 1988 (paragraph 17) that his company Ochieng & Co. Advocates , had not intended to serve messrs Hunter & Greig , for whom Mr. Kateera appears , since Mr. Kateera had told the court that his firm had no instructions to represent Ssemukutu & Co. However, it was messrs Hunter & Greig that undertook to put forward the motion dated 5th April , 1988 , to set aside the **ex parte** appeal.

When the motion was opened before Mr. Justice Ouma , it was Dr. Byamugisha who appeared for Ssemukutu & Co. and Mr. Kateera who appeared for Maria Onyango Ochola & Others. Dr. Byamugisha (and perhaps Mr. Kateera also) expressed himself as astonished at the terms in which Ouma, J. declined to accede to the motion, and therefore appealed to this Court. The short answer to the appeal was that:-

- a) If Mrs Ssemukutu was not served in accordance with order 5 Rule 17 of the **Civil Procedure Rules** ; and
- b) If Mr. Wasswa was served on a Sunday; then there was no service at all, whatever the nature of the evidence given by the witnesses.

As far as we understood the situation, after reflecting upon the views expressed by the Court, Mr. Kateera concluded that the proper meaning of order 47 Rule 9 was that service could not be effected on a Sunday. That is apparent from the rules regarding service on a weekday, except a

Saturday, and the rules concerning service on a Saturday whereby service after 1 p.m on Saturday is deemed to be service on Monday. There is no room for service on Sunday. Consequently as Mr. Wasswa was alleged to have been served on Sunday, the alleged service was void.

Secondly, the affidavit of Mr. Kanya did not comply with Order 5 Rule 17 of the **Civil Procedure Rules**. It is clear that he did not know Mrs. Ssemukutu personally and did not know exactly where she worked in the Bank of Uganda. Certainly, Mr. Kanya did not claim such knowledge. It was a case of service under Order 5 Rule 15, and therefore annexed to the affidavit of service, there ought to have been the name and address of the person who identified Mrs Ssemukutu to Mr . Kanya . Mr Kateeba acknowledged that this was so, and therefore the first appellate Judge could not proceed on to hear the first appeal.

It may well be that the method of serving the duplicate and original was also wrong; (see order 5 Rule 9).

When one bears in mind these technical failures, the denial of service by Mrs. Ssemukutu and Mr. Wasswa are strengthened. Mr. Kateeba acknowledged that the learned judge had found inconsistencies in the evidence where there were none. The merits of the case lay with the applicants. There were some subsidiary points taken:-

- 1) There is no rule requiring an applicant to state on the face of his motion that it is grounded on affidavit supporting the motion. It is wise to do so. Failure to serve affidavits to be used in support of the motion is a fault, as will be seen from Order 48 Rule 3. But the latter rule provides for motions not necessarily grounded on evidence by affidavit.
- 2) This Appeal could include the interlocutory ruling as it **became part of the main ruling**, which disposed of the whole application. The reason for this view was expressed admirably, if we may say so with respect by Forbes V.P. In **GURDIAL SINGH DAHILLONS Vs SHAM KAUR** (1960) EA 795 & 795.

“To hold otherwise might lead to a multiplicity of appeals from incidental orders made in the course of a hearing, when such matters can more conveniently be considered in an appeal from the final decision”.

As a result, the orders given above disposed of this appeal , and permitted the first appeal to be reheard by consequential orders.

Delivered at MENGO this 27th day of February 1991

S.T. MANYINDO
DEPUTY CHIEF JUSTICE

A.E.O... ODER
JUSTICE OF THE SUPREME COURT

H.G PLATT
JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS A TRUE
COPY OF THE ORIGINAL

B.F.B. BABIGUMIRA
REGISTRY SUPREME COURT