

**THE REPUBLIC OF UGANDA**

**IN THE SUPREME COURT OF  
UGANDA  
AT MENGO**

**(CORAM: ODOKI, C.J., ODER, KAROKORA, MULENGA,  
KANYEIHAMBA, JJ.S.C.)**

**CIVIL APPEAL NO. 16 OF 2004**

**BETWEEN**

**TWIGA CHEMICAL INDUSTRIES :::::::::::::::::::::::::::::: APPELLANT**

**AND**

**VIOLA BAMUSEDDE (T/A Triple B. Enterprises)::::: RESPONDENT**

*[Appeal from the judgment and orders of the Court of Appeal (Mukasa-Kikonyogo, D.C.J., Kitumba and Byamugisha, JJ.A.) in Civil Appeal No. 9 of 2002, dated 3<sup>rd</sup> March, 2004].*

**JUDGMENT OF KANYEIHAMBA. J.S.C**

This is a second appeal from the Court of Appeal which dismissed the appellant's appeal. The facts of the case may be summarized as follows:

On 11<sup>th</sup> May, 2000, the appellant filed a suit under the provisions of Order 33 of the Civil Procedure Rules against the defendant for the recovery of Shs. 15, 420, 000 and costs of the suit. Apparently, the claim was founded on some contractual arrangements under which the appellant had sold to the respondent, various chemicals for which the respondent made part payment leaving a balance of Shs.

15,420,000 unpaid. The appellant claims that that balance was subsequently acknowledged by the respondent as owed in two letters dated the 18<sup>th</sup> March and 19<sup>th</sup> June of 1999, which letters were attached to the plaint in the High Court as annexures.

On 3<sup>rd</sup>, November, 2000, the respondent filed a written statement of defence in which she denied any indebtedness to the appellant in the sum claimed or any other. However, she herself counterclaimed the sum of Shs. 4,800,000 for distribution services she had rendered to the appellant. She further claimed expenses incurred for collecting debts for the appellant in the sum of Shs. 2,967,000.

The appellant did not file any reply to the averments contained in the written statement of defence and the counterclaim. The parties first appeared in court on 8/12/2000. On that day, court gave the appellant leave to file a reply to the counterclaim out of time and the case was fixed for mention on the 12/03/2001, that date turned out to be an unscheduled public holiday in that it was the date on which Presidential elections were held in Uganda. In the meantime, the appellant did not file any reply to the counterclaim. When the matter came before court again on the 12/06/2001, the respondent's counsel attended but the appellant did not appear by counsel or other representatives. On submissions by the respondent's counsel, the appellant's suit was dismissed. Judgment on the counterclaim was entered against the appellant in the sum of Shs. 4,800,000 as a liquidated sum with interest at the rate of 20% from July 1996 till payment in full. The respondent was awarded the costs of both the suit and the counter-claim.

On the 13 , November, 2001, the appellant filed an application by way of Notice of Motion seeking to set aside the court's order dismissing the suit,

stay of execution and setting aside the decree that had been entered in favour of the respondent on the counterclaim. The main ground advanced in support of the application was that the appellant was not aware of the hearing date because it had not been served with any hearing notice. The application was dismissed and the appellant appealed to the Court of Appeal which dismissed it with costs to the respondent. Hence this appeal.

The Memorandum of Appeal to this court contains nine grounds framed as follows:

1. *The learned Justices of the Court of Appeal erred in law and fact to largely base their decisions on a different ground from that relied on by the trial judge.*
2. *The learned Justices of the Court of Appeal erred in law and fact to find and hold that the appellant was aware of the hearing date of 28<sup>th</sup> June, 2001.*
3. *By holding that the learned trial judge exercised his discretion judiciously and thus declined to interfere with the same, the learned Justices of the Court of Appeal erred in law and fact.*
4. *The learned Justices of the Court of Appeal erred in law and fact by holding that the respondent's counterclaim was both a pecuniary and a liquidated one.*
5. *The learned Justices of the Court of Appeal erred in law and fact to hold that the learned trial judge acted within the law to enter judgment on the counterclaim.*
6. *The learned Justices of the Court of Appeal erred in law when they failed to decide if the court can move itself to enter summary judgment on a counterclaim.*

*7. The learned Justices of the Court of Appeal erred in law and fact to hold that a telephone call constitutes service in law.*

*8. The learned Justices of the Court of Appeal erred in law and fact to find and hold that the appellant's lawyer participated in the taxation.*

*9. The learned Justices of the Court of Appeal erred in law and fact to hold that a defendant has no burden to prove that a plaintiff who is absent when the suit is called for hearing was served with a hearing notice.*

Mr. Mutaawe subsequently argued all the grounds in the memorandum of Appeal together. He contended that the learned Justices of Appeal failed in their duty to rehear the case as is expected of them under S.12 (1) of the Judicature Act and Rule 29 (1) of the Rules of the Court of Appeal. He further contended that in failing to reappraise the facts and reevaluate the evidence as a whole, the learned Justices of Appeal's decisions were erroneous in both law and fact and constitute a miscarriage of justice. Mr. Mutaawe submitted further that had the learned Justices of Appeal reevaluated the evidence, they would have been satisfied that the learned trial judge had erred in failing to appreciate that no hearing notice existed and therefore could not be served and was not served on the appellant by the time the case came to be heard by the trial judge. Counsel criticized the Court of Appeal for basing its judgment mainly on the delays and lack of diligence attributed to the appellant or her counsel. He contended that in civil trials there are well known and established rules of procedure which must be adhered to and followed and service by telephone is not one of them. He contended that therefore, the appellant could not appear since he was not served at all.

Counsel for the appellant contended further that both the trial court and the Court of Appeal ignored binding authorities of the Supreme Court decision and in so doing, they erred both in law and fact. Finally, counsel contended that the fact that counsel for the appellant may have attended the meeting for taxation of costs would not, in any way, validate the errors committed during the trial proceedings. Counsel cited: **The Evidence Act, Cap 6, Banco Arabe Espanol Vs. Bank of Uganda, SCC A. No. 8 of 1998 and Orders 9 and 45 Rule of the Civil Procedure Rules;** in support of his submissions.

For the respondent, Mr. Oponyo opposed the appeal and also argued the grounds together. In his view, the Court of Appeal correctly and independently reevaluated the evidence and reheard the case afresh. He contended that it was clear that the learned Justices of Appeal rightly and diligently performed their duty properly and in accordance with the provisions of the Judicature Act and the Rules of Court. Counsel for the respondent submitted further that the reasons given by the Court of Appeal when confirming the judgment and the decisions of the trial judge cannot be faulted because they are sound in both law and fact.

Submitting on the counterclaim, Mr. Oponyo contended that in law, it is not necessary to fix a different date for hearing a counterclaim which is heard at the same time as the plaintiff's claim which is always the main cause for fixing a hearing date in the first instance. He contended further that the purpose of serving a hearing notice is solely to inform parties of the fact that their case will be heard on a named date and such knowledge can equally be transmitted through a telephone conversation. He submitted that the attendance of the taxation of costs meeting by the respondent's counsel is proof enough of the fact that they were aware that

the case had been heard and finalized. Finally, Mr. Oponyo contended that there is no obligation on a respondent in a civil case to notify the plaintiff of the hearing date. Counsel cited provisions of **Orders 4(3) and 19(4) of Civil Procedure Rules** in support of his submissions.

In my view, this appeal raises two main issues to be resolved by the Court. The first is whether the Court of Appeal erred in confirming the *ex parte* High Court judgment. The second is whether that Court was incorrect in its decision to uphold the learned trial judge's decision refusing the appellant's application to set aside the *ex parte* judgment and orders notwithstanding the reasons given in support thereof. I will deal with the second issue first which I regard as one of procedure and discretion.

The respondent who was then the defendant having denied liability of the claims contained in the appellant's plaint, the plaintiff which is now the appellant did not file a reply to the averments contained in the written statement of defence, nor did it reply to the averments contained in the counterclaim. The case was to have been heard on the 12.06.2001 which turned out to be a public holiday. The case was subsequently fixed for 28.6.01. On that day, the appellant and its counsel were absent and as a result, the court dismissed the claim on the plaint and gave judgment on the counterclaim in favour of the defendant who is now the respondent. It is clear that the trial court was satisfied that the appellant had failed to prosecute the claim or defend the counterclaim. In my opinion, on the evidence before the court, the learned trial judge acted correctly and in accordance with the law.

On the 13<sup>th</sup> November, 2001 nearly five months later, the appellant filed an application by way of Notice of Motion, seeking an order to set aside

the judgment, orders and decree of the High Court as well as to grant stay of execution of the judgment of the trial court and set aside the judgment in the counterclaim in favour of the respondent. The main ground advanced in support of the application was that the appellant was not aware of the hearing date as no hearing notice was served on it. As already noted, both the trial court and the Justices of Appeal dismissed these reasons as being insufficient to enable them allow the appellant's prayers.

Mr. Mutaawe's contention that the court below failed to appraise material facts in this case is unjustified. In his ruling on the application by the appellant to set aside, the learned trial judge said, "*The argument for this is that there is no proof that the plaintiff had been served and made aware of the hearing during which the suit was dismissed and a decree entered on the counterclaim. First, I want to point out that as it is the practice, the advocate for the plaintiff did indicate that they would undertake to effect service of process on the defendants. In this case, the summary plaint in paragraph 2 is quite explicit. It state; 'The defendant is an adult female person of sound mind and trading as Tripple B. Enterprises and the plaintiff's advocates undertake to effect service of court process upon the defendant'. I think that the rule that parties are bound by their pleadings has remained the same and that in view of this pleading, it is not correct that a defendant who has appeared in court should be the one to prove that he was served with court process.*"

In my opinion, the learned trial judge was correct since no reasonable justification was advanced on behalf of the appellant for its absence or that of its counsel.

In the case of **Departed Asians Property Custodian Board v. Issa Bukonya**, CA No. 18/91, (S.C), (unreported) it was held that an application to set aside an *ex parte* judgment cannot succeed if no good or substantial reasons are given to justify setting it aside. This is in conformity with **Order 9 rules 20 and 24 of the Civil Procedure Rules**. Rule 20(1) governs applications by plaintiffs who wish to have suits which are already disposed of revisited again. The subrule provides as follows:

*"Where a suit is wholly or partly dismissed under rule 19 of this Order, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set aside and, if he satisfies the court that there were sufficient cause for non-appearance when the suit was called for hearing, the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit and shall appoint a*

*day for proceeding with the suit."* In the Court of Appeal, Byamugisha JA. who gave the lead judgment of that court agreed with the findings and of reasons given by the trial court for refusing to set aside the judgment and her fellow Justices on the panel concurred. I agree with them. Since the appellant failed to defend the counterclaim and to appear at the trial the courts below were amply justified in dismissing it.

It is to be noted also that counsel for the appellant participated in the taxation proceedings in the High Court which implied knowledge of what



had occurred before. In the Court of Appeal, the learned Justice who gave the lead judgment stated the law accurately when she observed; "*When the trial judge discussed (sic.) the application, he was exercising his discretion. It is well settled that an appellate court will not interfere with the exercise of discretion unless there has been a failure to take into account a material consideration or taking into account an immaterial consideration or an error in principle was made.*" Her judgment cannot be faulted. Accordingly, I would dismiss grounds 1, 2 and 3 of this appeal.

On the matter of the counterclaim, counsel for the appellant submitted that the courts below were wrong to allow it since the amounts of money claimed were unascertainable. He contended further that the respondent's claim was for pecuniary damages which were not liquidated damages and therefore the counterclaim should have been set down for hearing. For the respondent, Mr. Oponyo contended that the counterclaim which was in the sum of Shs. 4,800,000 was a liquidated sum which was contained in paragraph 5 of the counterclaim. He further contended that as there was no reply to this averment. The High Court was correct to award it *ex parte* as liquidated damages. Counsel submitted correctly in my view, that the respondents' prayer for general damages and other sums of money was not favourably considered by the lower courts neither of which awarded those damages or sums of money in this regard. The Court of Appeal confirmed the decision of the trial court to enter judgment in the counterclaim and I agree with the learned Justices of Appeal. In my opinion, there is no merit in the grounds of this appeal challenging the judgment of the trial court in as much as they deal with the counterclaim. I

would therefore dismiss grounds 4, 5 and 6 of this appeal. In light of my decisions on grounds 4,5 and 6, I do not think it is necessary to consider grounds 7, 8 and 9.

All in all, I would dismiss this appeal with costs to the respondents in this court and in the courts below and I would confirm the orders made in both the Court of Appeal and the High Court.

#### **JUDGMENT OF ODOKI, CJ:**

I have had the advantage of reading in draft the judgment prepared by my learned brother, Kanyeihamba, JSC, and I agree with him that this appeal should be dismissed with costs in this Court and the Courts below.

As the other members of the Court also agree, this appeal is dismissed with costs to the respondent in this Court and the Courts below. ,

#### **JUDGEMENT OF ODER, JJSC**

I have had the benefit of reading in draft the judgment of my learned brother: Kanyeihamba, JSC, and I agree with him that the appeal should be dismissed with costs to the respondent in this Court and in the Courts below. I would confirm the orders made by the High Court and by the Court of Appeal.

#### **JUDGMENT OF KAROKORA, JSC:**

I have had the benefit of reading in draft the judgment prepared by my learned brother, Kanyeihamba, JSC, and I agree with him that this appeal should be dismissed with costs here and in the courts below.

#### **JUDGMENT OF MULENGA, JSC**

I have had the benefit of reading in draft the judgment prepared by my learned brother, Kanyeihamba, JSC, and I agree that this appeal should be dismissed with costs here and in the courts below.

***Dated at Mengo this 27th day of June 2005.***