THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HIGH COURT CIVIL APPEAL NO.48 OF 2000

(ARISING FROM MPIGI CIVIL SUIT NO.10 OF 2001)

EDMOND BITALO t/a }::APPELLANT
THREE ANGELS NURSERY

VERSUS

1. MARY LUWEDDE }:::RESPONDENTS
2. GRACE NAKABITO

BEFORE: THE HON. MR. JUSTICE E.S. LUGAYIZI

JUDGEMENT

This judgment is in respect of an appeal which was lodged by the appellant against the ruling of a Magistrate Grade I (Her Worship Sarah Kolya Mponye) which is dated 8th May, 2000. In that ruling the said Magistrate dismissed the appellant's application for orders, among others, to set a side an exparte judgment and decree and to give the appellant unconditional leave to appear and defend Mpigi Civil Suit No. 10 of 2000. The appellant was aggrieved by that ruling and as a result he appealed against it.

Before Court gets into the merits of the appeal it is pertinent to understand its background which is briefly as follows. On 29th February 2000 the respondents (as administrators of the estate of the late Brandina Nalubege Maaso) filed Civil Suit No. 10 of 2000 at Mpigi Chief Magistrate's Court. That suit was against the appellant. Under it the respondents claimed a sum of shs. 900,000/= which they said the appellant owed them on account of rent for commercial residential premises at Maganjo. After filing the said suit, the respondents wrote a letter dated 14th March 2000 to the Chief Magistrate of Mpigi in which they prayed for judgment on account that when

they served the appellant with summons 'in summary suit on plaint", he did not respond by applying for leave to defend the suit. On the same day, the Chief Magistrate responded to the respondents' letter by entering judgment against the appellant in Mpigi Civil Suit No. 10 of 2000. Subsequently, the respondents' advocate Mr. Kaala extracted a decree against the appellant for the payment of sum of shs. 900,000/=, an eviction order and costs. The respondents were on the verge of executing the decree when the appellant made an application to set aside the exparte judgment and decree and for unconditional leave to defend the suit. Eventually, the learned Magistrate (Her Worship Sarah Kolya Mponye) heard the application and in her ruling dated 8th May 2000 she refused to grant it. She upheld the exparte judgment and decree-; and ordered the execution of the decree to continue. As earlier on pointed out, the appellant felt aggrieved by that ruling. On 15th June 2000 he obtained leave to appeal against the ruling. Later on, he filed the appeal which is the subject of this judgment. That is the background to the appeal.

In his memorandum of appeal the appellant cited five grounds which Court will not reproduce here because, in essence, they raised only two issues, namely,
1. Whether the learned Magistrate erred when she held in her ruling dated 8th May 2000 that the appellant was served with summary suit on plaint?
2. Whether the learned Magistrate erred in law when she held in her ruling dated 8 May 2000 that the appellant's application did not raise triable issues?

At the time of hearing the appeal Mr. Nuwagaba represented the appellant and Mr. Arthur Katongole represented the respondents. Court will now proceed to dispose of the appeal in the light of the above two issues, the submissions of counsel, the evidence on record and the law.

With regard to the first issue, Mr. Nuwagaba submitted that the learned Magistrate erred to rule that the appellant was served with summons **"** in summary suit on plaint" when the affidavit that the respondents relied upon to prove service was fundamentally defective. In Mr. Nuwagaba's opinion that affidavit bore falsehoods and inconsistencies and did not reveal its source of information. It was therefore bad in law and could not be used to prove service. He cited the cases of **Bitaitana *v* Kananura [1977] HCB 30; and Abdu Serunjogi .v. Sekitto [1977] HCB**

242 in support of his submission and called upon Court to make a finding in the appellant's favour in respect of the first issue.

Mr. Katongole was of a different view. He submitted that Mawejje's affidavit was valid; and it proved that Mawejje served the appellant with summons.

In her ruling dated 8th May, 2000 it is apparent that the learned Magistrate examined the evidence of both sides to the appeal before she came to the final conclusion on the first issue. Below is what she said.

> "When I looked at the affidavit of service, I found that one Mawejje David of Kaala & Co. Advocates proceeded to the suit premises on the 1st day of March 2000 at 9.00 am to effect service. He ... met the defendant who he did not know but was pointed out by the 1st plaintiff. After which he explained the purpose of the visit, the defendant was served though he refused to sign the summons.
>
> Counsel for the applicant argued that since the defendant/applicant does not work at the suit premises and since the process server did not know the defendant/applicant it raises doubt as to whether the person served was the defendant.
>
> In my view, I do not see any doubt raised ... as the plaintiff who is well known to the defendant was the one who pointed him out to the process server. Secondly the fact that the defendant does not work at the school but works elsewhere is not a ground on which to base the fact that the affidavit of service is false. The fact that the defendant owns the school would render any reasonable person to believe that he works there… I therefore find that there was proper service on the defendant as per the affidavit of service."

A quick look at the evidence from which the learned Magistrate made the above finding tends to leave the impression that the appellant's denial of service of summons was pitted against the claim of service of summons by two persons, that is to say, Mawejje (the process server) and Luwedde (the 1st respondent). If that was the truth, then it would be quite understandable for the learned Magistrate to have preferred the respondents' claim of service as against the appellant's

denial of service. However, in Court's opinion that first impression does not represent the truth. When one carefully examines Mawejje's and the respondent's affidavits one would discover that although Mawejje may have truly served the summons on 1st March 2000, it is only the respondent who could vouch for the identity of the person served. Mawejje could not do so because he did not know that person. For that reason, in the absence of additional evidence on record (from Mawejje) to the effect that the person he served with summons on 1st March 2000 was the same person who appeared as the applicant in Mpigi Miscellaneous Application No.100E of 2000, it remains only the 1st respondent's word that the said person was the appellant. Consequently, it is the 1St respondent's word (that the appellant was served with summons on March 2000) against the appellant's word that he was not served. Therefore, it is impossible to tell from the record of the lower court which of the said two witnesses (the respondent or the appellant) was telling the truth or was lying on the question of service of summons. In the circumstances, that means that the evidence on record falls short of proving, on a balance of probabilities, that the person whom Mawejje served with summons on 1st March 2000 was the appellant. In the result, Court has no choice but to find that the learned Magistrate erred when she held in her ruling dated 8th May 2000 that the appellant was served with summons "in summary suit on pliant". The first issue is therefore resolved in favour of the appellant.

In Court view, that finding completely disposes of the appeal because it means that the exparte orders that were subsequently entered against the appellant cannot be valid. However, for the sake of addressing all the issues which are the subject of this appeal, Court must continue with the discussion. With regard to the second issue, Mr. Nuwagaba submitted that the learned Magistrate erred when she held in her ruling dated 8th May 2000 that the appellant's application did not raise triable issues. He pointed out that the said application raises at least, three triable issues. The first one is whether in view of section 98(7) of the Land Act the Magistrate who entered the exparte judgment and decree which are the subject of this appeal had jurisdiction to do so. The second one is whether the suit in Mpigi Civil Suit No. 10 of 2000 can be sustained against the appellant when it does not reveal the particulars of the tenancy and the rent in question. The third issue is whether in view of his claim that he is the owner of the suit premises

the appellant has a good defence to Mpigi Civil Suit No. 10 of 2000. On the strength of the foregoing Mrs. Nuwagaba prayed court to resolve the second issue in favour of the appellant.

Mr. Katongole disagreed with Mr. Nuwagaba's submission above. On his part, he submitted that the tenancy in question is a matter that is shown by the annextures to the pleadings in Mpigi Civil Suit No. 10 of 2000 to be agreed upon by the parties herein. However, he pointed out that the only claim that the above suit is intended to address is one of outstanding rent; and the appellant has no good defence to that claim.. Mr. Katongole therefore called upon Court to resolve the second issue in favour of the respondents.

Whether or not the learned magistrate erred in holding that the appellant's application did not raise triable issues depends on the contents of the affidavit that accompanied that application. If that affidavit reveals that there is a reasonable ground of defence to the respondents' claim in Mpigi Civil Suit No. 10 of 2000 or that there is a question in dispute between the parties in that suit that ought to be tried then it raises triable issues, otherwise it does not. (See **Mukula Interglobal Trade Agency Ltd v Bank of Uganda (1983) HCB 64; Souza Figuerido & Co Ltd; Moorings v Hotel Co. Ltd (1959) E.A. 425; and Coffee Marketing Board v Transocean (U) Ltd High Court Civil Suit No. 96 of 1991.** The underlying question now is whether the appellant's affidavit in Mpigi Miscellaneous Application No. 100F of 2000 reveals that there is a reasonable ground of defence to the respondents' claim in Mpigi Civil Suit No 10 of 2000 or that there is a question in dispute between the parties to that suit that ought to be tried? The appellants' affidavit in respect of Mpigi Miscellaneous Application No. 100F of 2000 reads as follows in paragraph9:-

> "That I have a strong defence on the merits as the premises in question belong to me together with others jointly. Indeed there is no tenancy agreement between me and the respondents/plaintiffs."

In court's opinion that affidavit which shows that the appellant is a joint owner of the suit premises together with others indeed reveals that he has a reasonable ground of defence to the respondents' claim of rent in Mpigi Civil Suit No. 10 of 2000. It further reveals that there is a question in dispute between the parties to the suit that ought to be investigated by way of hearing

the suit on merit. For those reasons the learned Magistrate erred in law when she held in her ruling dated 8th May 2000 that the appellant's application did not raise triable issues. The second issue has also been resolved in favour of the appellant. All in all the appeal which is the subject of this judgment has succeeded and for that reason, Court hereby makes the following orders.

1. The learned Magistrate's ruling dated 8th May 2000 is set aside.
2. The exparte judgment and decree in Mpigi Civil Suit No. 10 of 2000 are also set aside.

3. The appellant is granted unconditional leave to defend Mpigi Civil. Suit No. 10 of 2000; and he must file his defence within 15 days of this judgment.

4. The respondents shall bear the costs of this appeal.

5. Costs of Miscellaneous Application No. 100F 2000 shall abide the outcome of Mpigi Civil Suit No. 10 of 2000.

E.S. LUGAYIZI

(JUDGE)

2/10/2001