**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**CASE NO. HCT-00-CV-CS-31 OF 2003**

**(MISC. APPL. 320 OF 2003)**

**OKOTH ALEX ::::::::::::::::::::::::::::::::::::::::::: PLAINTIFF**

**VERSUS**

**LWANYAGA EDWIN ::::::::::::::::::::::::::::::::: DEFENDANT**

**BEFORE: HON. MR. JUSTICE J.B.A. KATUTSI:**

**JUDGMENT:**

This is an appeal against the ruling of a magistrate GI refusing to set aside exparte judgment that had been entered against the appellant.

By his plaint dated the 14th day of May 1999 Respondent sued appellant by summary procedure under O xxx of the Civil Procedure. The plaint was what can be called "home made" as it was drawn as it appears by the plaintiff personally.

On 26th May 1999 Appellant filed a home made written statement of defence.

On 29th July 1999 a decree was signed by the court. The relevant part of that decree stated.

> "UPON failure by the defendant to apply for leave to appear and defend the suit within the period allowed by the law under order 33 Rule 3 of the Civil Procedure Rules and judgment having been entered against the defendant:"

Appellant applied to the trial magistrate to have the exparte judgment set aside. In his affidavit in support of the application the Appellant inter alia deponed that:

> "2. THAT on the 29th July 1999 I an exparte decree was entered against me with costs upon failure to apply for leave to defend the suit.
>
> 3. THAT on the 26th May 1999 I notified court that I was not indebted to the respondent in the sum claimed or at all.
>
> 4. THA I am surprised the court went ahead to enter judgment against me yet no affidavit of service was filed on the court record."

In the lower court appellant was represented by Mr. Abubakar Kawesa the same counsel that is representing him here, Mr. Kawesa submitted inter alia that:

> "The respondent claimed he served the applicant with the summons for leave to appear and defend. There was no effective service upon the applicant. Mpima the court clerk claimed that he served the summons upon the wife of the Applicant but the name of the wife is not mentioned. Order 5 r 14 CPR any adult member of the family be served if the applicant cannot be found.
>
> This is not the case in this matter. The defendant/applicant was absent at home at the material time and the court process server should have gone again to the home of the applicant to personally serve the applicant to personally serve the applicant."

In his ruling the learned trial magistrate wrote:

> "The Applicant/Defendant was duly and effectively served with the summons and the affidavit in support thereof. This was confirmed by the affidavit of service sworn by Mpima J. …

Instead of applying for unconditional leave to appear and defend the suit, the applicant/defendant filed his written statement of defense contrary to the provisions laid down under order 33 of Civil Procedure Rules."

Appellant now appeals against that ruling. There is only one ground of appeal which is that:

"1. The Learned Trial Magistrate erred in law and fact when he refused to set aside the exparte judgment of 2nd July 1999."

Before me Mr. Kawesa complained that the learned trial magistrate did not consider conditions by which exparte judgments can be set aside under O.33 r 11 of the Civil Procedure Rules. He went on to submit that the appellant had shown that there were goods causes for setting aside the decree. It appears that Mr. Kawesa was submitting that since Appellant was claiming that the claim had been settled, that constituted a good cause for setting aside the exparte judgment. According to the appellant he was no longer indebted to the respondent.

Under O.33 r 11 of the Civil Procedure Rules the exparte judgment after a decree has been extracted as it had been in this case, can be set aside if court is satisfied

that the service of the summons was not effective, or for any other good cause, which court is to record. It was therefore incumbent on the appellant to satisfy the trial magistrate that either the service of the summons was not effective or that there was good cause in case service of the summons was effective to set aside the expart judgment.

The ruling by the learned trial magistrate that there was effective service of the summons basing himself on the affidavit of the process server was with respect a misdirection on a point of law.

In the case of WAWERU v. KIROMO (1969) EA 172 the defendant applied to set aside the service on him of a summons. The affidavit of the process server stated that the summons had been left with the defendants' wife, (just as the affidavit in this case stated,) with instructions that she should keep it for her husband as he was not present at the time (just as the appellant was not present at home). TREVELYAN J. held that as the process server made no inquiry about the defendant's whereabouts it could not be said that he could not be found, so as to allow service on his wife under O.5, r 12 of the Civil Procedure (Revised) Rules 1948 – (our O.3 r.14 CPR).

But there was another reason for holding that the summons was effectively served. Proof of effective services of the summons was supplied by the appellant himself. On 26th May 1999 appellant filed a written statement of defense. In paragraph I of that statement of defense he averred as follows:

> "On 21st May, 1999 I received a summons signed on 17th May, 1999 in which the plaintiff one Edwin Lwanyuga brings a suit to recover a sun of U.shs.260,000/= (Two hundred and sixty thousand only) from the defendant; one Alex Okoth his money owed to him after a bouncing cheque."

After that averment appellant is estopped from denying effective service of the summons to him. That means that appellant had to give a good cause to satisfy the magistrate why the exparte judgment should be set aside. Merely stating that he was no longer indebted to the respondent was not a good cause. It was a good cause in as far as it related to the application for leave to appear and defend. It would have been a triable issue. The fact is that he did not apply for leave to appear and defend the suit.

As I said before in this judgment both appellant and respondent filed "home made" pleadings. Under O.33 r.2 CPR a suit may be instituted by presenting a plaint in

the form prescribed endorsed “Summary Procedure Order XXXIII”  In this case respondent filed a plaint endorsed:  “PLAINT.

> (Under O.33 CPR)”.  This plaint did not answer the requirements of O.33 r.2 CPR.  Yet the magistrate accepted the suit as one coming under O.33 r.2 CPR.

The last paragraph of the written statement of defense filed by the appellant averred as follows:

> “If he insists that I, Alex Wod Okoth still owes him any money I honestly beg that I be allowed to defend myself as regards this suit before court.”

If the learned magistrate accepted a defective plaint, I don’t see why he could not equally treat the so called written statement of defence as un an application for leave to appear and defend in light of the last paragraph produced herein above. Better still the learned trial magistrate should have treated the suit as coming by ordinary procedure and not one under O.33 r.2 CPR.

I am entitled to treat this appeal as an application for revision. If I am right in that, then I order that the suit goes back to the trial magistrate to be tried as an ordinary suit. Each party is to bear his own costs of this appeal and of

the proceedings in the lower court that gave rise to this appeal. I order accordingly.

J.B.A. Katutsi

**JUDGE**

**14/7/2004**

Kawesa for applicant.

Both parties present.

Nabatanzi clerk.

Judgment read.

J.B.A. Katutsi

**JUDGE**

**14/7/2004**