THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

HCT-00-CV-CA-0007-2009

Arising from Miscellaneous Application No. 797 of 2008

And from Original Mengo Civil Suit No. 971 of 2008

BAMANYE FAZIL ::APPLICANT

VERSUS

NANKUNDA ROSE ::RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT

This is an appeal against the decision of His Worship Kavuma Mugaga dated 9th February 2009 in which the learned trial Magistrate Grade I dismissed an application seeking to set aside an ex-parte judgment entered against the appellant herein on the Counter-claim on 22/09/2008.

It is contended that the appellant's appeal is incompetent, irregular and barred by law in as far as the appellant herein never sought leave to appeal from the court below as mandatorily required by law, and such appeal should be struck out/dismissed.

From the pleadings, an ex-parte judgment was entered against the applicant/defendant in the counter claim on 22/09/2008. He applied under Miscellaneous Application No. 797 of 2008 to have the decree entered against him set aside.

In a ruling delivered on 9/02/09, the learned Magistrate Grade I disallowed the application. This appeal is against the said decision. It is clearly a first appeal. Under Section 220 (1) of the Magistrates Courts Ac and O.44 (1) (c) of the Civil Procedure Rules, a first appeal does not require any leave of Court as learned Counsel for the respondent would wish this court to believe. O.9 r.27 of the Civil Procedure Rules is

very clear on setting aside decree ex-parte against the defendant. Where the application is refused, an aggrieved party is entitled to appeal to this court by virtue of O.44 r.1 (c) of the Civil Procedure Rules.

There is therefore no objection in the objection raised against this appeal.

Turning now to the substance of this appeal, it was the appellant's contention in the lower court that he had not been served with a Written Statement of Defence and Counter claim in Civil Suit No. 971 of 2008. Hence his failure to lodge a reply to the counter-claim.

In support of his claim, he demonstrated to court that there was no supporting affidavit of service lodged to show proof of service of the Written Statement of Defence and counter-claim on him.

On the basis of the facts before him the learned trial Magistrate observed:

> ***"From all that time the plaintiff would have filed a defence to the counter-claim because it was already on court file all that time ……."***

He then continued:

> ***"……..so it is utterly ludicrous and incomprehensible for applicant to argue that he was not served with Written Statement of Defence actually he was served and appeared in court on two occasions ready to move his case, but just chose not to follow the right procedure in the circumstances."***

As fate would have it, there was no proof of service by way of an affidavit of service returned to the lower court. I have perused the entire certified record of the lower court, none exists thereon. The presumption is that there was no personal service of the Written Statement of Defence and counter-claim on the appellant/plaintiff. The presumption is

fortified by paragraph 6 of the respondent's reply to appellant's written submissions where learned counsel concedes:

> ***"6) Your Lordship, in reply to paragraphs 6, 7, 8 and 9 of the appellant's written submissions, it is not in contention that the appellant was not practically served the counter-claim……"***

In view of this concession, court makes a finding that the appellant was never served as the law requires. Learned Counsel for respondent has further submitted:

> ***"……..it is now settled law that where a plaintiff institutes a claim, it is their obligation to prosecute the claim and not the defendant. It is submitted that the appellant's reason that they were not served is not sufficient enough to set aside a judgment in default and/or cause this court to allow this appeal."***

I think this is an inexcusable misdirection on a point of law.

It is obligatory on the part of the defendant to serve a copy of his Written Statement of Defence on the plaintiff, particularly so where the Written Statement of Defence contains a counter-claim which legally is a suit in its own right. Accordingly, contrary to learned counsel's submission that non-service is not sufficient enough ground to set aside a judgment in default, it was fatal in this case. It is in my view beyond question that failure to serve the process where service is no doubt required, is a failure which goes to the root of any conception of proper procedure in litigation. ***See: Nicholas Roussos vs G. H. Virani & Anor HCCS No. 360 of 1982*** where court observed:

> ***"Apart from proper ex parte proceedings the idea that an order can validly be made against a man who had no notification of any intention to apply for it is one which has never been adopted in this country. To treat that an order of this kind made in this case should***

> ***be treated as a mere irregularity, and not something which is affected by a fundamental vice is an argument which in my opinion cannot be sustained."***

I would indeed not sustain any such argument. It seems to me therefore that the ex parte judgment entered against the appellant in ***Civil Suit No. 971 of 2008*** was affected by a fundamental vice in that he was never served with a copy of the Written Statement of Defence and the counter – claim. The service the defendant/respondent purported to effect, that is, of leaving a copy in the court file for the appellant's collection on his own was wrong in law and was no service at all. The resultant ex parte judgment was therefore a nullity.

Lord Greene M. R. considered the authorities on this print in ***Greig vs Kanseem [1943] 1 ALL ER 108*** and concluded as follows at 113:

> ***"Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled ex-debito justitiae to have it set aside. So far as the procedure for having it set aside is concerned, it seems tome that the court in its inherent jurisdiction can set aside its own order; and that an appeal from the order is not necessary."***

In the instant matter the appellant has gone that extra mile of seeking to have the ex parte judgment set aside only to be over ruled by the learned trial Magistrate. He misdirected himself on the law to dismiss the application. Having held that the improper mode of service adopted by the respondent/defendant rendered the resultant ex parte judgment a nullity, I hold as I must that the appellant is entitled ex debito justitiae to have it set aside and I do so.

The appeal shall therefore be allowed, the impugned order of dismissal set aside and an order made that ***Civil Suit No. 971 of 2008*** be heard and determined on its merits. The

file shall be sent back to the Chief Magistrate's Court of Mengo at Mengo to be placed before the same Magistrate, or in his absence, another Magistrate Grade I, to continue with it as by law established.

The appellant shall have the costs of this appeal and in the lower court.

Orders accordingly.

Yorokamu Bamwine
JUDGE
18/12/09

18/12/09
Enoth Mugabi for appellant
Parties absent

Court:
Judgment delivered.

Yorokamu Bamwine
JUDGE
18/12/09