

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT SOROTI

CIVIL APPEAL NO. 51 OF 2013.

**(ARISING FROM MISC. APPLICATION NO. 18 OF 2013 AND FROM
CIVIL SUIT NO. 64 OF 2008)**

1.OBULULU MARTIN

2. OLUPOT ISMEAL.....APPELLANTS

3. OLILA JULIOUS

V

OGARAM JOHN CHRISOSTOM.....RESPONDENT

BEFORE HON. LADY JUSTICE H. WOLAYO

JUDGMENT

In this appeal, the appellant through their advocate, Mr. Magirigi formulated three grounds of appeal as follows.

1. The trial magistrate erred in law and in fact when she denied the appellants a right to give evidence in court , thereby occasioning a miscarriage of justice.
2. The trial magistrate erred in law and in fact thereby occasioned a miscarriage of justice when she dismissed the appellants' application for leave to give their defence.
3. The trial magistrate erred in law and in fact and thereby occasioned a miscarriage of justice when she dismissed the appellants' application without strict proof of proper service of court process.

At the hearing of the appeal, Mr. Erabu represented the respondents. Both counsel filed written submissions which i have carefully studied.

The main complaint in this appeal is that the trial magistrate erred in dismissing the application to set aside an ex parte judgment thereby occasioning a miscarriage of justice.

An examination of the ruling of the trial magistrate shows that she exercised her discretion to dismiss the application on the grounds that the present appellants were served hearing notices several times but

‘stubbornly refused to acknowledge service that amounted to a blatant disregard of court process’.

The magistrate made reference to affidavits of service of Olobo Simon Peter dated 6.2.2012 and 27.2.2012 in which he deponed that appellants declined service.

In an appeal against exercise of discretion, the appellate court should not interfere with exercise of discretion unless satisfied that the lower court misdirected itself on some matter and thereby arrived at a wrong decision or it is manifest from the case as a whole that the lower court made a wrong decision. **Mbogo & anor v Shah (1968) EA 93.**

An examination of the lower court record shows that the trial magistrate HW Wandera who heard the case was alive to the need for the case to proceed inter parties as evidenced by several adjournments between 19th October 2009 and 27th February, 2012 when hearing of the case commenced. This was a claim in trespass to land to which the defendants filed a written statement of defence denying the plaintiff’s claim to the land.

Although the conduct of the appellants in declining service is deplorable, i am mindful that this being a land dispute and owing to the great value attached to land, it is in the interests of the respondent that the case is disposed of inter parties. In **Sebei District Administration v Gyasali & others (1968) EA 301**, it was held that factors to consider by the trial court in an application to set aside an ex parte judgment include the nature of the case and possible defence to the suit.

Turning to the grounds of appeal, grounds one and two will be considered together. These two grounds assert that the trial magistrate erred in law and in fact when she dismissed the application to set a side the ex parte judgment. I have found that this being a land dispute, it is in the interests of both parties that the case is disposed of inter parties.

With regard to ground three, on lack of proper service, the court record shows that there had been prior attempts to effect service most of which were found to be ineffective. On 27th February 2012, the trial magistrate found that service was effective and proceeded ex parte.

I have found that the resolution of a land dispute inter parties overrides the consideration that a party declined service especially when that party filed a written statement of defence, and is diligent in pursuing his right to be heard, first by applying to set aside the ex parte judgment and second, by appealing the refusal to set aside .

In the premises, i allow the appeal, and set aside the ex parte judgment of HW Wandera whose date of delivery is not known as the judgment does not bear a date and the date of delivery is not indicated anywhere on the record.

The Chief Magistrate is directed to assign a magistrate to hear the case as speedily as possible given that it has been in the system since 2008.

DATED AT SOROTI THIS 21ST DAY OF OCTOBER 2013.

HON. LADY JUSTICE H. WOLAYO