THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 046 OF 2011

(Arising from Luwero Chief Magistrates Court Civil Suit No. 146 of 2010)

AGASITAFA KIGANILA ..... APPELLANT

VERSUS

KAGENDA HARUNA ..... RESPONDENT

BEFORE: Hon. Lady Justice Monica K. Mugenyi

JUDGMENT

The appellant was the registered proprietor of mailo land comprised in Bulemezi Block 19 plot 47. In April 2001 he allegedly sold the land to the respondent for a consideration of Ushs. 720,000/=. Pursuant to the said agreement the appellant vacated the land, and availed the respondent with the certificate of title in respect thereof, as well as signed transfer forms. The respondent subsequently had the land registered in his names, and in August 2008 sold 5 acres thereof to a one Israel Matobe. In July 2010 the appellant re-occupied the residual portion of the above land that the respondent had retained for himself on the premise that he had never sold the land to the respondent but merely gave him the title and signed transfer forms as collateral for a loan. It is not clear whether any such purported loan was ever repaid by the appellant.

Consequently, the respondent filed civil suit no. 146 of 2010 in the Chief Magistrates Court of Luwero. On 13th September 2010 the case was fixed for hearing on 1st October 2010 in the presence of both parties. On that day the appellant did not turn up in court therefore the matter proceeded in his absence. The respondent produced 2 witnesses and closed his case, whereupon judgment was reserved for 29th November 2010 and duly delivered. This *ex parte* judgment was subsequently set aside at the instance of the appellant. Thereafter, and in the presence of both parties, the matter was fixed for re-hearing on 16th September 2011. Again, on the scheduled date only the respondent appeared for the hearing. He successfully applied for the reinstatement of the earlier judgment that had been set aside, hence the present appeal.

The memorandum of appeal spelt out the following grounds of appeal:

1. **The learned trial magistrate erred in law and fact when he held that the appellant/ defendant was a trespasser and should vacate the suit land.**
2. **The learned chief magistrate erred in law and fact when he held that the respondent/ plaintiff had rightfully acquired the suit land.**

3. **The learned chief magistrate erred in law when he held that the appellant/ defendant could not enjoy the security of occupancy guaranteed by the constitution of the Republic of Uganda, 1995.**
4. **The learned chief magistrate erred in law when he entered ex parte judgment and awarded the respondent damages of Ushs. 4,800,000/=.**

Before delving into the merits of the appeal, this court proposes to address the question of whether or not a party against which an *ex parte* judgment has been passed has a right of appeal against the resultant *ex parte* decree. Clearly, should the appellant have no right of appeal against an *ex parte* decree the entire appeal would be rendered redundant.

Learned counsel for the appellant did not address this court on this issue but, rather, seemingly abandoned it when she stated in her submissions that she did not wish to pursue the *ex parte* aspect of ground 4 hereof. In a brief reply to the respondent's submissions Ms. Nambirige then addressed the issue as follows:

> ***"It is, however, clear from the appellant's submissions that ground 4 was re-phrased to drop the part to do with* ex parte *judgment. This is because, although the judgment had been passed* ex parte*, it had been re-instated by court for the appellant's failure to attend court. Accordingly, the appellant opted to exercise his right of appeal stipulated under section 67(1) of the Civil Procedure Act faulting the evaluation of the evidence by the trial magistrate but not against the re-instatement of the* ex parte *judgment as provided under Order 44 rule 1 of the CPR."***

Section 220 (1)(a) and (c) of the Magistrates Courts Act (MCA) make general provision for appeals from Chief Magistrates Courts to the High Court, such as the present appeal. Given that the present appeal arises from a Chief Magistrates Court in exercise of its original civil jurisdiction, the applicable provision presently would be section 220 (1) (a). However, section 220 is silent on appeals from *ex parte* decrees. Be that as it may, section 229 of the same Act would appear to provide for the application of other written laws to appeals from to the High Court. The section reads:

> "**In so far as the context allows, and notwithstanding the provisions of any other written law in force on the date of the coming into force of this Act providing for an appeal to the High Court, those provisions shall be read as providing for an appeal to the appropriate court under this Act**."

The other written laws that address the subject of appeals to the High Court are the Civil Procedure Act (CPA) and the Civil Procedure Rules (CPR). Having come into force on 1st January 1929, the CPA and the rules made thereunder (CPR) were in force when the MCA came into force on 22nd January 1971. See the commencement dates thereof. Therefore, in so far as the context allows, the provisions of the CPA and CPR may apply to appeals from magistrates' courts to the High Court.

Section 67(1) of the CPA stipulates that 'an appeal may lie from an original decree passed *ex parte*.' This section confers a general right of appeal against *ex parte* decrees. To that extent it would seemingly confer a right of appeal upon a defaulting defendant against whom an *ex parte* judgment has been passed, as is the case presently. In this regard, the provisions of section 67(1) would appear to suggest that a defendant that does not appear to defend him/herself may benefit from the right of appeal against the resultant judgment/ decree. It was argued by appellate counsel herein that such appeal may be premised on a trial court's improper evaluation of the evidence adduced before it. I do agree that a trial court faced with evidence from a plaintiff only is, nonetheless, required to evaluate the evidence before it and ascertain whether or not it sufficiently proves the cause of action in issue. However, the question is whether an appeal is the designated remedy available to a defaulting defendant in such circumstances or whether, indeed, there is a more applicable remedy available to such party.

It is well established law that the standard of proof in civil matters is proof by balance of probabilities. See **Sebuliba vs. Cooperative Bank Ltd (1982) HCB 130**. In my considered view, this standard of proof essentially entails 3 aspects: a determination as to whether or not the evidence adduced by a plaintiff in proof of the cause of action is more likely *or probable* than not to be true; a similar evaluation of the defence evidence to determine whether it is more likely than not to be true and thus rebut the plaintiff's evidence, and finally, on the basis of the foregoing evaluation, a finding by a trial court as to which of the parties before it has adduced the more cogent *or probable* evidence thereby tilting the *balance of probabilities* in its favour.

The question then is, in the absence of such due process, what remedies would be available to a defaulting defendant who, on appeal, successfully questions the lower court's evaluation of the plaintiff's evidence? Would an appellate court that agrees with him/ her be at liberty to enter judgment for such defendant on the merits of the case in the absence of any evidence in support of his/ her case? As is the argument presently, would the allegedly improper evaluation of the plaintiff's evidence by the trial court render the defence case more probable or cogent so as to warrant judgment in favour of the defence on appeal in the absence of any evidence whatsoever? These questions are particularly pertinent in a matter such as the present one where the ownership of land is at the heart of the dispute before a court. Should improper evaluation of the plaintiff's evidence be sufficient reason to find in favour of a defaulting defendant on appeal in the absence of proof of any interest in the land? I would think not. In my view, it is this mischief that Order 9 rule 27 and Order 44 rule 1(c) of the CPR seek to address. These provisions are quite instructive on the appropriate course of action. For ease of reference I reproduce the pertinent parts of the said rules below:

> **Order 9 rule 27**
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> **"In any case in which a decree is passed *ex parte* against a defendant, he or she may apply to the court by which the decree was passed for an order to set it aside ..."**

Order 44 rule 1(c)

"An appeal shall lie as of right from the following orders under section 76 (h) **of the** (Civil Procedure) **Act:-**

(c) An order under rule 27 of Order IX rejecting an application for an order to set aside a decree passed *ex parte*."

Order 9 rule 27 explicitly spells out the remedy available to a defendant against whom an *ex parte* decree has been passed. The remedy prescribed therein is an application to set aside the *ex parte* decree. Order 44 rule 1(c) then confers a right of appeal upon such defendant with regard to an order rejecting his/ her application to set aside the *ex parte* decree. These legal provisions give adequate opportunity to a defaulting defendant to have a matter re-heard *inter parte* without recourse to an inconclusive appeal process.

The question then would be what is the import of section 67(1) of the CPA that was cited by learned counsel for the appellant. It is my considered view that the general right of appeal prescribed in section 67(1) of the CPA should be construed together with the appropriate rules of procedure applicable to the CPA, which are the Civil Procedure Rules. As propounded hereinabove, the said rules provide an elaborate procedure available to a defaulting party that wishes to have its matter heard and determined *inter parte*, such as the present appellant. If such party sufficiently proves that they were prevented for good reason from attending court the *ex parte* judgment would be set aside. However where, as appears to be the case presently, a defendant simply stays away from court proceedings despite being present when the matter was fixed for hearing an attempt by such party to be heard on appeal would appear to me to be an abuse of court process. It would then follow that section 67(1) is not applicable to such party; but rather to a party (such as the present respondent) which, having been heard in *ex parte* proceedings, is nonetheless dissatisfied with the resultant *ex parte* judgment. I so hold.

I, therefore, find that the present appeal is incompetent and improperly before this court. I do accordingly dismiss it and award costs in this and the lower court to the respondent.

Monica K. Mugenyi
JUDGE

24th October, 2013