

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0017 OF 2013
(Arising from the Arua Chief Magistrates Court Civil Application No. 009 of 2013)

CONTINENTAL TOBACCO (U) LIMITED APPELLANT

VERSUS

GLOBAL HARDWARE COMPANY LIMITED RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

This is an appeal arising out of the decision of the Chief Magistrate’s Court of Arua when it dismissed the appellant’s application to set aside an ex-parte judgment. The background to the appeal is that sometime during the year 2012, the respondent sued the appellant for recovery of shs. 28,408,800/=, general damages for breach of contract and costs. The trial proceeded ex-parte against the appellant and judgment was on 10th December 2012 entered for the respondent against the appellant in the sum of shs. 28,408,800/= as special damages, shs. 5,000,000/= as general damages and costs. The respondent proceeded to execute the decree by way of attachment of the appellant’s stock in trade of fertilizers but before the sale could take place, the appellant secured an order of stay of execution pending its application to set aside the ex-parte judgment and decree.

At the hearing of the application, counsel for the applicant / appellant Mr. Medard Lubega Seggona argued that the applicant had been prevented by sufficient cause from attending court on the day the suit was heard ex-parte. Counsel argued that although service of the hearing notice had been effected on the then counsel for the applicant, Mr. Ondimu, he failed in his duty to

transmit that information to his client, the applicant who thereby was unaware of the date fixed for trial of the suit. The applicant had learnt of the decree on 22nd February 2013 and had filed the application for setting it aside on 28th February 2013, without inordinate delay. The applicant had admitted indebtedness to the respondent only in the amount of shs. 19,000,000/= which it had deposited in court but had a defence against the rest of the respondent's claim. He prayed that counsel's mistake should not have been visited on the applicant and the ex-parte judgment be set aside to enable the applicant present its defence to the rest of the applicant's claim. He cited *Haji Nasur Matovu v. Ben Kiwanuka, S. C. Civil Appeal No. 12 of 1991*, *Mulindwa G. v. Kisubika, H.C. Civil Suit No. 689 of 1991* and *Fr. Francis Pager v. Kiwanga Mwebe and other, H.C. Civil Suit No. 194 of 1994*, in support of his submissions.

In response, counsel for the respondent, Mr. Samuel Ondoma argued that through their counsel, the applicants had been effectively served with a hearing notice and had absented themselves from the proceedings. The applicants were negligent themselves in failing to make a follow-up of their case with their advocate. The respondent had proceeded to execute the decree by attachment and sale of the applicant's fertiliser and therefore prayed court to dismiss the application.

In its ruling, the court below stated that when the court decided to proceed ex-parte, there was an affidavit of service on record as proof of the fact that the applicant had been duly served with a hearing notice. Citing Order 3 r 4 of *The Civil Procedure rules*, the court held that any process served on the advocate of any party or left at the office or ordinary residence of the advocate, whether the process is for the personal appearance of the party or not, is presumed to be duly communicated and made known to the party whom the advocate represents, and, unless the court otherwise directs, is effectual for all purposes as if the process had been given to or served on the party in person. The trial magistrate expressed concern that litigants who engage "negligent" advocates unnecessarily prolong trials and then stated that; "I therefore choose not to follow the case law but the rule which provides that service on an advocate shall be effectual for all purposes as if the process had been given or served on the party in person." He therefore dismissed the application with costs to the respondent.

Being dissatisfied with the decision, the appellant appeals on four grounds, namely;

1. The learned Chief magistrate erred in law and fact in dismissing the application on the basis that there must be an end to litigation.
2. The learned Chief magistrate erred in law and fact in dismissing the application without properly evaluating the evidence thereby coming to a wrong conclusion.
3. The learned Chief magistrate erred in law and fact in dismissing the application without considering the binding authorities placed before him.
4. The learned Chief magistrate erred in law and fact when he exercised his jurisdiction without due regard to the justice of the case thereby reaching a wrong conclusion.

Submitting in support of and in opposition of the appeal, both counsel reiterated more or less the submissions the made before the court below and therefore there is no need to repeat them here. I observe that in the instant appeal, two binding precedents regarding what now is more or less settled law in respect of the impact of mistakes of counsel on the direction of their client's litigation were cited to the court below but were not followed.

The doctrine of binding precedent requires that the rule in a relevant previous decision must be followed "because it is a previous decision and for no other reason...." (See M. Radin, "*Case Law and Stare Decisis: Concerning Priijudizienrecht in Amerika*", (1933) 33 Columbia Law Review 200-201). Through the acquisition of "the accumulated experience of the past" and by binding later courts, precedents provide for uniformity to a large extent, which is one of the most basic demands of justice. It is for that reason that in *Smith v Allwright (1944) 321 US 644, at 669*, Roberts J. commented; it of paramount importance that judicial decisions should not be like "a restricted railroad ticket, good for this day and train only." Failure to follow binding precedent creates "the inconvenience of having each question subject to being re-argued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real final court of appeal," (see *London Tramways v. London County Council [1898] AC 375at Per Lord Halsbury at p 380*).

By virtue of that doctrine, the Court of Appeal "has a duty to apply (that is, is bound to follow) any decision of the House of Lords which ... actually settles or covers the particular dispute before the Court" (see C. Rickett, "*Precedent in the Court of Appeal*", [1980] 43 *Modern Law Review* 136, at 137). In the hierarchical system of courts which exists in this country, "it is necessary for each lower tier to accept loyally the decisions of the higher tiers" (see *Cassell v. Broome* [1972] AC 1027 at 1054).

For that reason, due regard is to be paid to the essential role of binding precedent, which in *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 was explained thus;

Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules. Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

Whereas the highest court in the hierarchy has the liberty to depart from its earlier decisions or to overrule its own decisions, where such decisions are likely to occasion an injustice in a particular case, or where it appears right to do so, and to modify the previous pronouncements when they cease to conform with the social philosophy of the day, the courts below do not have such a liberty. They are bound to follow such decision unless they can be distinguished. The rule is so strict that even for the highest court, mere discovery that an earlier decision was wrong does not of itself justify a departure from it (see *Jones v. Secretary of State for Social Services* [1972] 1AC 944).

To avoid an inconvenient but otherwise binding precedent, a court below has several options available to it; - to distinguish it by confining it to its narrow facts, thereby limiting the scope of

its authority; to find that it was *per incuriam*, that is, the Court had overlooked an existing decision or statute relevant to the decision; where the reasons for the rule have ceased to exist (*Cessante ratione legis cessat ipsa lex*); refuse to follow any statement in the decision which is not the ratio; freely choose which of two clearly inconsistent binding decisions to follow. A court is otherwise not justified to dismiss a binding precedent simply because it does not agree with *ratio discendi*.

In this appeal, the reasons given by the Chief Magistrate to depart from what was otherwise binding precedent were most unsatisfactory. In his view, “the case law that supports the “negligence” of advocates in such matters will bring double burden on the other party i.e. to serve the advocate as well as the party whom the advocate represents.” The learned Chief Magistrate was unable to distinguish the authorities cited to him on acceptable grounds but instead chose to effectively “overrule” decisions of the Supreme Court. One legitimate way he could have avoided following those precedents was if he had found that counsel for the applicant was not negligent or that the applicant was complicit in that negligence. The moment he found negligence on the part of counsel, in which the applicant was not complicit, he was bound to follow the precedents since they were binding on him. He erred in not doing so.

The ground relied on for seeking to set aside the ex-parte judgment and decree is essentially mistake of counsel. A mistake of counsel occurs where due to some inadvertent act or omission, the advocate duly instructed by a litigant does or omits to do something that prejudices the litigant’s interest in circumstances where the litigant is not a party to or aware of the act or omission until the detriment is suffered (see *Byansi Elias and anther v. Kiryomujungu Tofasi, H.C. Misc. Application No. 29 of 2010*). The act or omission must be solely attributable to the professional negligence and / or conduct of the advocate.

I have reviewed the pleadings and submissions by both parties. I am unable to attribute any negligence to the appellant in his failure to attend court on the material day. I instead find that the failure is attributable to the negligence of his advocate, who failed to transmit that information to him. Without such information, there is no way the appellant would have been able to attend court as required. Counsel for the respondent argued that the appellant had not

furnished any evidence of lack of notification. However, in *Jovelyn Bamgahare v. Attorney General S.C. C.A. No 28 of 1993*, it was decided that he who asserts must affirm. The onus is on a party to prove a positive assertion and not a negative assertion. It therefore means that, the burden of proof lies upon him who asserts the affirmative of an issue, and not upon him who denies, since from the nature of things he who denies a fact can hardly produce any proof. The burden on this issue lay on the respondent to adduce such evidence as would satisfy court that the appellant's then advocate, had notified it of the hearing date. The respondent did not discharge that burden.

On basis of that finding, I am bound to follow the decisions in *Sepiria Kyamulasire v. Justine Bikanchunka Bagambe S.C. Civil Appeal No. 20 of 1995*, *Kasaala Growers v. Kakooza and another [2001] 1 HCB 44*, and *Dong Yun Kim v. Uganda [2008] HCB 15*, where it was held, inter alia, that the mistake or negligence of Counsel should not be visited by the court on his client. For those reasons, the appeal succeeds and the judgment and decree of the court below are hereby set aside with orders that the suit should be heard *inter parties*. The goods attached in execution of the decree that has now been set aside, should be released to the appellant forthwith.

Considering that this order is made nearly four years after the respondent had commenced execution of the ex-parte decree, and that the appellant contests only part of the respondent's claim, the appellant should deposit in the trial court a sum of shs. 15,000,000/= on top of and in addition to the sum already deposited in court (which sum represents more than half of the amount claimed) within thirty days from today. The costs of this appeal shall abide the result of suit upon the trial *inter parties* that has been ordered.

Dated at Arua this 1st day of December 2016.

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Stephen Mubiru
Judge