

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
CIVIL APPEAL NO. 6 OF 2005

SINNABULYA LIVINGSTONE ::::::::::: APPELLANT

VERSUS

SEKIBAALA MARTIN ::::::::::: RESPONDENT

JUDGMENT BY HON. MR. JUSTICE JOSEPH MURANGIRA

1. Introduction

1.1 The appellant through his lawyers M/s Lutaakome & co. Advocates filed this appeal against the respondent based on the following grounds of appeal:-

- (a) **The trial magistrate erred when she held that the appellant had not shown sufficient cause for setting aside the exparte decree in the said original Civil suit whereas the appellant had shown that as a lay man he had taken steps to inform Court that he was a lawful occupant of the suit land protected by law and that his failure to file a defence was due to his lack of knowledge about the proper procedure to be taken for defending himself in the suit.**
- (b) **The trial magistrate failed to realize that the appellant who had indicated that he was lawful customary tenant and occupant of the suit land for over fifty (50) years, would suffer great injustice if he was not allowed to defend himself against the respondent who had unlawfully taken possession of the suit land.**

1.2 On the other hand, the respondent is represented by M/s Byenkya, Kihika & Co. Advocates. The respondent vehemently opposes this appeal.

2. The appellant's facts of the appeal.

This appeal arose from the ruling and order dated 6/12/2004 of Magistrate Grade 1 of Luwero Magistrate's court where the trial Magistrate dismissed the appellant's application for setting aside the exparte decree which had been passed against him in the main suit. The application had been brought under Order 9 rule 27 (formerly rule 24) of the Civil Procedure Rules. It was supported by the Appellant's Affidavit sworn on 2/8/2004. In paragraphs 4, 5, 6, 7 and 8 of the said affidavit the appellant stated that he acquired a kibanja on the suit land in year 1953. It was given to him by his grandmother Esteri Mmeeme. He established homestead on the said kibanja in year 1953. He established a crop and livestock farm on the kibanja. The kibanja measured about 13 acres. He was paying rent (busuulu) to the mailo land owner until the Government abolished the busuulu in year 1975. According to paragraphs 15, 16, 17 and 18 of his affidavit the appellant stated that when he received the summons to file a defence he went to the LC 5 Chairman of Luwero District who wrote a letter dated 7/11/2002 to Court. The appellant later found that as a layman he was misled by the Chairman of the District who was also a lay man as far as law is concerned. He thought that the District Chairman's intervention could help him.

He came to know about the exparte judgment on 26/3/2004 when he was served with a notice of show cause why execution should not be issued.

In paragraph 19 of the affidavit in support of the application to set aside the exparte judgment, the appellant stressed that he was not a trespasser on the suit land but he had been a lawful kibanja owner and occupant and the respondent found him already having lawfully settled on the land. For this reason if he was given a chance to defend the suit he had a high reasonable chance of success.

At page 4, fourth paragraph of the trial magistrate's ruling, the trial magistrate said it is unfortunate this **"illiterate" litigant sought the advice of a politician after by passing the court which summoned him"**. (Underlining is mine for emphasis)

The trial magistrate found that the appellant has not shown sufficient cause why he did not file the defence in the suit. She accordingly dismissed the application.

Hence this appeal.

3. Resolution of the grounds of appeal by Court.

3.1 Ground 1 of appeal

The trial magistrate erred when she held that the appellant had not shown sufficient cause for setting aside the ex parte decree in the said original Civil suit whereas the appellant had shown that as a lay man he had taken steps to inform Court that he was a lawful occupant of the suit land protected by law and that his failure to file a defence was due to his lack of knowledge about the proper procedure to be taken for defending himself in the suit.

Counsel for the respondent Mr. Byenkya Ebert submitted that the trial magistrate in her ruling addressed herself to the law and the principle governing the grant of the application for reinstatement of suits under Order 9 rule 27 of the Civil Procedures Rules. That at pages 3 and 4 of her ruling the trial magistrate extensively reviewed the law on the subject, carefully percolated and stated the principles thereof. He cited a number of authorities in support of his arguments in opposition to this ground of appeal. In essence, Counsel for the respondent is saying that the appellant in the lower court did not satisfy Court as to what amounts to sufficient cause for setting aside the ex parte judgment.

In reply, Counsel for the appellant Mr. Lutaakome Semeo does not agree. In his submissions, he argued that the appellant showed sufficient cause to warrant

the trial magistrate to have set aside the exparte judgment. He faulted the trial magistrate in her findings.

Ground one of the appeal is that trial magistrate erred for not considering the appellant's lawful occupancy of the suit land and that his failure to file the defence was lack of knowledge about the proper procedure to be followed.

The trial magistrate in her ruling also conceded that the appellant was illiterate and that instead of going to Court he went to the Luwero District Chairman who was a politician. It should be recalled that Government had set up a system in the Local Council Courts Act 2006 under which Local Government Committees could hear land disputes and also Section 74 of the land Act under which tribunals could hear land disputes. Therefore by going to the District Chairman the appellant mistakenly believed that he could get justice. The confusion about the different legal systems to hear land disputes coupled with the illiteracy of the appellant constituted sufficient cause for the appellant's inadvertent omission to file a defence in the suit. This would justify the trial magistrate to exercise her discretion under Article 126 (2) (e) of the Constitution and Order 9 rule 27 of the CPR to set aside the exparte Decree which had been passed against the innocent illiterate old man. Also see the case of Jesse **Kimani vs MC Connell and another [1966] E.A 547**.

It was injustice for the trial magistrate for declining to set aside the exparte decree.

In the premises, I answer ground 1 of appeal in the affirmative.

3.2 Ground 2 of appeal:

The trial magistrate failed to realize that the appellant who had indicated that he was lawful customary tenant and occupant of the suit land for over fifty (50) years, would suffer great injustice if he was not allowed to defend himself against the respondent who had unlawfully taken possession of the suit land.

Counsel for the respondent argued on this ground of appeal that the trial magistrate was bound by the decision of the Supreme Court; **Nicholas Roussos vs Gulamhusein Habib Virani & anor SCCA 9 of 1993** whereby it was held that:

“It is not open to Court considering an application for setting aside an exparte judgment to consider the merits of the case”.

That the trial magistrate could not have done more than what she did.

Counsel for the appellant in reply in his arguments faulted that trial magistrate in her findings as complained in ground 2 of the appeal in the terms stated above.

I evaluated the proceedings of the lower Court and in ground two of appeal, the appellant indicated that he has a reasonable chance of success on the merits of the case that because he had been in lawful occupation of the suit land for over 50 years and he had thereon his house and crops. The appellant was protected by Section 29 of the land Act (as amended) and Section 64 (2) of the registration of titles Act. The respondent found the appellant having lawfully established his homestead on the suit land. The trial magistrate should have realized that by shutting the appellant out of court when he had realized his mistake and he had shown serious interest to defend the suit by first setting aside the exparte decree, he would be unfairly and unlawfully deprived of this property, the kibanja in dispute. The trial magistrate should not have ignored the reasons and points that were stated by the appellant (applicant) in his application and affidavit evidence in support of his cause to have the exparte decree and judgment set aside. His refusal to uphold his prayers sought caused great injustice to the appellant.

Further, the trial Court never visited the locus in quo of the suit land, and one wonders how the trial court and the respondent determined that the appellant

only occupies one (1) acre of the suit land. There is no way a person (appellant) who had occupied the suit land for over 50 years, that is from 1953, his defence for suit land to be thrown out by the trial Court. From the set of facts available on the court record, the appellant is protected by the Constitution of the Republic of Uganda, 1995 and Section 29 of the Land Act, 1998, as amended. Certainly therefore, the trial magistrate ought to be faulted in all the circumstances of the case.

Ground 2, too, is answered in the affirmative.

4. Conclusion

4.1 In conclusion the two grounds of appeal have merit as resolved hereinabove in this judgment. This appeal succeeds.

4.2 In the result and for the reasons given in this judgment, judgment is entered in favour of the appellant in the following orders:-

1. The exparte judgment and decree of the trial magistrate are set aside.
2. All the orders and executions arising from the said exparte judgment and decree are hereby set aside.
3. In the event the appellant was evicted from the suit Kibanja by the respondent and/or his agents, the appellant shall return to his kibanja immediately, after the delivery of this judgment utilize it the way he used to do but not selling it. That the status quo aforesaid created shall remain until further orders from Court after the process of the entire trial of the dispute between the parties.
4. The Local Council I, II and III of the area and the police where the suit land is located shall render assistance to the appellant to re-occupy the suit kibanja in the event he was evicted from it by the respondent immediately after the delivery of this judgment.

5. The appellant is allowed to file a written statement of defence in Civil Suit NO. 35 of 2002, a suit at Luwero Chief Magistrate's Court within 10 (ten) days from the date of this judgment.
6. The Assistant Registrar of this Court shall ensure that the original court file is taken back to Luwero Chief Magistrate Court within 5 (five) days from the date of this judgment.
7. Civil Suit No. 35 of 2002 between the parties shall be tried by another magistrate Grade I or the Chief magistrate immediately after the filing of the written statement of defence, within thirty (30) days from the date of this judgment.
8. This suit shall be given a special session in the month of March, 2013 for the speedy disposal and ensuring that justice is not delayed.
9. Costs in this appeal and in the application to set aside the exparte judgment and decree in the lower Court are awarded to the appellant.

Date at Kampala this 12th day of March, 2013

sgd
Murangira Joseph
Judge