IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: MANYINDO, D.C.J., ODOKI, J.S.C., &ODER, J.S.C.)

CIVIL APPEAL NO. 9 OF 1993

BETWEEN

NICHOLAS ROUSSOS : : : : : :::::::::::::::::::::::::::::::::::: APPELLANT

AND

GULAMHUSSEIN HABIB VIRANI

NAZMUDIN HABIB VIRANI ::::::::::::::::::::::::::::::::::::::RESPONDENTS

(Appeal from the Order of the High Court at Kampala (Byamugisha J) dated 25th November 1992)

IN

CIVIL SUIT NO.360 OF 1982)

JUDGEMENT OF THE COURT

This is an appeal against the Order of the High Court in Kampala overruling a preliminary objection by the appellant that the application to set aside the ex parte Judgement against the respondents which was brought under 0.9 r.9 of the Civil Procedure Rules was made under a wrong rule and was therefore incompetent and should be struck out unless amended. The respondents opposed the objection. The trial Judge held that the application was properly made. Hence this appeal.

The brief facts of the case are that the appellant's mother sued the respondents for an order directing the Registrar of Titles to cancel the names of the respondents from the Leaseholder Register Volume 240 Folio 3 and the house at Plot No. 30 Windsor Crescent, Kampala, and substitute the name of the appellant's mother as the registered proprietor of the said land, on

the ground that the said title was obtained improperly and unlawfully.

As the respondents could not be served with summons because they were out of the country, the appellant obtained leave to serve the process through advertisement in the local newspapers. The respondents did not respond to the process and the suit was set down for hearing ex parte. Judgement was entered in favour of the appellant's mother against the respondents on 18th August, 1982.

When the respondents returned to Uganda in July, 1992 to repossess their property, they became aware of the ex parte Judgement. They made an application under 0.9 r.9 of the Civil Procedure Rules to set aside the Judgement on the grounds that:

(1) They were not served with summons to appear and defend the suit.

(2) They were expelled from Uganda in 1972 and went to Britain where they stayed until early 1992.

(3) The summons were wrongly advertised in the local press when the circumstances showed that the defendants had been expelled from Uganda.

(4) They had a good defence against the appellant's claim because he sold them the suit property and executed a transfer in their favour, which was registered in 1969.

On the hearing day a preliminary objection was raised that the application was made under a wrong rule. The appellant contended that it should have been made under 0.9 r.24 and not 0.9.r.9 Of the Civil Procedure Rules, because evidence had been heard. The respondents maintained that 0.9 r.9 was the one applicable because the hearing had taken place under 0.9 r.8A. The trial Judge overruled the objection on the grounds that he principles involved in applications under either rule were the same and that there was no specific legislation governing the matter. In coming to this conclusion she said,

"However there are numerous authorities which have dealt with applications for setting aside ex parte judgements or decrees. Some of those authorities are: Kimani vs. McConnell (1966) E.A. 547; Mbogo vs. Shah (1968) E.A. 93; Kafero vs. Standard Bank (1970) E.A. 429; Patel vs. E.A Cargo. Handling Services (1974) E.A. 75.

In all thee authorities and many other which I have come across, the applications were brought under either rule 9 or 24 or under both rules. the legal principles involved in applications of this nature appear to be the same. I am not prepared therefore at this stage to determine which applications should be brought under which rule especially in the absence of specific legislation or decided cases on the subject. The distinction which counsel for the plaintiff is trying to draw in my view to me (sic) to be an academic exercise. It is my finding that the application is properly before court and the preliminary objection is overruled."

The appellant has filed three grounds of appeal. They are as follows:

1. The learned Judge erred in law in holding that there was no specific legislation on the rules under which different applications to set aside ex parte judgements should be brought.

2. The learned Judge erred in law in holding that the legal principles involved in applications made under Rules 9 and 24 of Order 9 of the Civil Procedure Rules were the same.

3. The learned Judge erred in law in holding that the defendant's application for an order to set aside the ex parte judgement and decree/order in this suit was properly brought under 0.9 r.9 of the Civil Procedure Rules.

Mr. Mulenga learned Counsel for the appellant submitted on the first ground of appeal that there was specific legislation governing applications to set aside ex parte Judgements. He cited Rules 9 and 24 of order 9 of the Civil Procedure Rules as relevant to such applications. He contended that in the present case, judgement was not obtained under 0.9 nor under 0.46 but was obtained under 0.18 r.l of the Civil Procedure Rules.

Mr. Kateera learned Counsel for the respondents conceded that there was specific legislation on the subject, which in his view was 0.9 r.9. He submitted however, that 0.9 r.24 **was** inapplicable because it was limited to the two situations mentioned in the rule, and 0.18 r,1 was irrelevant because it dealt with pronouncement of judgement.

We agree with both Council that there are specific provisions in our law governing applications to set aside ex parte judgements. These provisions are contained in Rule 9and 24 of Order 9 of the Civil Procedure Rules. It is true that in the cases referred to by the learned Judge, applications had been brought either under r.9 of r.24 or both, but this proves the presence of specific legislation on the matter rather than it absence. The failure to decide which rule applies to a particular matter doses not mean that there is a lacuna in the law. The first ground of appeal must succeed.

Arguing the second ground of appeal learned Counsel for the appellant submitted that the legal principles involved in application under r.9 and r.24 are not the same because under r.9 the discretion of the court was unlimited whereas under r.24 the discretion was limited to sufficient cause. Rule of 9 Order 9 provides,

"Where judgement has been passed pursuant to any of the preceding rules of this Order or where judgement has been entered by the Registrar in cases under Order XLVI, it shall be lawful for the court to set aside or vary such judgement upon such terms as may be just."

On the other hand rule 24 states:

"In any case in which a decree is passed ex parte against the defendant, he may apply to the Court by which the decree was passed for an order to set aside; and if he satisfies the court that the summons was not duly served or that he was prevented by any sufficient cause for not appearing When the suit was called for hearing, the court shall make an order setting aside the Decree as against him upon such terms as to cost, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with suit."

There is a line of authorities which establish that the principles applicable to r.9 and 24 of 0.9 are different, and that the discretion under r.9 is wide whereas under r.24 it is limited to showing sufficient case. In Patel v. E.A. Cargo Handling Services (1974) E.A. 75, the Court to Appeal for East Africa held that 09A r.10 of Kenya Civil Procedure Rules which is equivalent to our 0.9 r.9 gave the court unlimited or unrestricted discretion. Duffus P. said,
"There are no limits or restrictions on the Judge's discretion except that if he does vary the judgement he does so on such terms as may be just."

In Sebei District Administration v. Gashali (1968) EA 300, Sheridan J., held that 0.9 r.9,

"gives the court a wide discretion and is to be contrasted with 0.9 r.24 where an applicant has to show sufficient cause for not appearing."

This distinction was also made by the High Court of Kenya in Kimani v. McConnell (1966) E.A. 547 where Harris J., said, at p. 555,

"The reference to the defendant having been prevented from taking the proper steps appears to come from r.24 but that rule makes it mandatory upon the court in a proper case to set aside the ex parte decree whereas r.10 (equivalent to r.9) makes no reference to the defendant having been so prevented, and confers upon the court what would appear to be absolute discretion to be exercised judicially in the light of the facts, circumstances and merits of the particular case."

Harris J. also formulated the test upon which the exercise of discretion under r.l0 was to be based. It was,

"Whether in light of all the facts and circumstances both prior and subsequent d of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgement if necessary upon terms to be imposed ."

This test was approved by the Court of Appeal for East Africa in Mbogo v. Shah (1968) EA, 93, and in Patel v. E.A. Cargo Handling Services (1974) E.A. where Duffus P. at page 76 said,

"I also agree with this broad statement of principle to be followed. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules."

In a recent case, the Kenya Court of Appeal had occasion to explain the distinction between r.10 and r.24 of 0.9 of their Civil Procedure rules before they were amended. In Wameru v. Ndiga (1982 — 88) 1 K.A. R. 210, at page 214, Hancox J.A., said,

"But the main distinction between those two former rules was that r.24 additionally deferred to a different situation; r.10 applied only where judgement had been passed pursuant to any of the preceding rules of the order which provided inter alia for the setting down of the suit ex parte (that is to say without notice to the defendant - See Bennet Ag. CJ in Zirabamuzaale v. Correct (1962) E.A. at 695) when the defendant had failed to enter appearance or had failed to file a defence. Rule 24 however applied to the situation where the defendant not having entered an appearance or having entered an appearance could nevertheless show that the summons had not been duly served or whether or not he had entered an appearance and failed to attend when the suit was called for hearing. The tenor of the preceding rr.17 to 23 showed that they all referred to the non- appearance, that is to say the absence of the parties, with the emphasis on the defendant and r.24 itself specifically said that he might apply to set aside 'if he satisfies the court that the summons was not duly served (meaning the summons to enter appearance) or that he was prevented by any sufficient case from appearing when the suit was called on for hearing."

The Judge concluded,

"Under that rule therefore the defendant could apply to set the judgement aside only on two grounds,

"1. That the summons had not been duly served,

2 That he was prevented by sufficient cause from physically appearing when the case came on for hearing."

Hancox J.A. also pointed out that the confusion had arisen to the indiscriminate use in Rule 24 of the word appearing when in fact physical appearance was meant. We respectfully agree with the above observations.

As regards the principles upon which the discretion under r.24 may be exercised, the courts have attempted to lay down some of the grounds or circumstances which may amount to sufficient cause. A mistake by an advocate though negligent may be accepted as a sufficient cause. See: Shabin Din v. Ram Parkash Anand (1955) 22 EACA 48. Ignorance of procedure by an unrepresented defendant may amount to sufficient cause Zirabamuzaale v. Correct (1962) E.A. 694. Illness by a party may also constitute sufficient cause: Patel v. Star Mineral

Water and Ice Factory (1961) E.A. 454. But failure to instruct an advocate is not sufficient cause: See Mitha v. Ladak (1960) E.A. 1054. It was also held in this case that it is not open for the court to consider the merits of the case when considering an application to set aside an ex parte judgement under this rule.

From the foregoing authorities it seems to us and we hold that the legal principles applicable to r.9 and r.24 of 0.9 are clearly different and the learned Judge erred in holding that they were the same. We are aware that some decisions have tended to regard the two rules as if they were interchangeable or applicable to the same situations, as in Kafero v. Standard (supra), or as if rule 24 was superfluous as said in FortHall Bakery Supply Co.v F.M Wangoe (1958) EA 118. To be on the safe side some advocates have in case of doubt sought to bring applications to set aside ex parte judgements under both rules.

The wording of the two rules seems to be unsatisfactory and needs review. In Kenya, the two rules have been amended with the result that the discretion under either rule is unlimited, the requirement for showing sufficient cause having been dropped under r.24. The new provisions in Kenya are set out and explained by the Kenya Court of Appeal in Pithon W. Mama v, Mugiria (1982 — 88) 1 K.A.R. 171 and Waweru v. Ndinga (1982 — 88) 1 K.A.R. 210 where Hancox J.A. said at p.215:

"Rule 3 of Ord. .9B replaced r.17 of the former Ord.9 and substitutes 'attends' for 'appears'. Moreover the requirement that a person who does not attend shall show sufficient cause has disappeared and the court is now given the same unfettered discretion by r.8 of Ord.9B to set aside as it is by r.10 of Ord.9A for failure to enter appearance or file a defence."

There is merit in these reforms which we could consider adopting in order to streamline the rules. But until our rules are changed they should continue to apply to different situations and on different principles. We therefore uphold the second ground of appeal.

It was submitted for the appellant on the third ground of appeal that the trial Judge erred in holding that the application to set aside the ex parte judgement was properly brought under 0.9 r.9. Learned Counsel for the Appellant contended that the ex parte judgement in this case was not made under 0.9 or 0.46 because it was neither for liquidated sum which could be entered under r.4 no pecuniary damages which could be entered under r.6 nor was it entered by the Registrar under 0.46. It was his submission that Judgement in this case was made

under 0.18 r.1 after a hearing. He submitted further that none of the authorities relied on by the learned Judge decide the point at issue.

Learned Counsel for the respondents conceded that judgement in this case could not be entered under r.4 or r.6. He submitted, however, that 0.18 r.1 was irrelevant because it was about pronouncing judgement. He also submitted that 0.9 r.24 does not apply because it was limited to two situations. The first is where the defendant has been served with summons and this did not apply because the respondents were served by substituted service. The second is where the defendant is prevented by sufficient cause for not attending at the hearing, and this did not apply because the respondents were not aware of the case. It was his contention that 0.9 r.9 was applicable because the case was heard ex parte under r.8A(2) and judgement obtained. He argued that the authorities cited by the learned Judge supported her decision.

The main issue is therefore whether the ex parte judgement was obtained under r.8A(2) This rule provides,

"Where the time allowed for filing a defence or, in a suit in which there is more than one defendant, the time allowed for filing the last of the defences has expired and the defendant or defendants, as the case may be, has or have failed to file his or their defences, the plaintiff may set down the suit for hearing ex parte"

The purpose of this provision, as the marginal note indicates, is to provide a procedure for setting down the hearing of the suit ex parte when the time allowed for filing the defence has expired. There is no mention of passing judgement or any other outcome of the hearing. This contrasts sharply with the wording of r.4 which expressly gives the court power "to pass judgement for any sum not exceeding the sum claimed in the plaint with interest……. "Or of r.6 where the Court "may proceed to pass judgement for the amount found to be due in the course of such assessment." Judgement may also be passed under r.5 and r.7 where several defendants are involved.

It seems to us that the preceding rules referred to in r.9 pursuant to which judgement may be entered are r 4, 5, 6, 7, only. Rules 8 and 8A are not included because no judgement is passed by the court under these rules. It was not claimed that judgement has been entered by the Registrar under 0.46. He therefore held that the application to set aside the ex parte Judgement in this case could not be brought under 0.9 r.9.

It was submitted by learned Counsel for the Appellant that the ex parte judgement was passed under 0.18 r.1 which provides,

"In a suit where a hearing is necessary the Court after the case has been heard, shall pronounce judgement in open Court, either at once or on some future day, of which due notice shall be given to the parties or their advocates."

Although on the face of it, the rule may be taken to deal with delivery of judgement, when 0.18 is read as a whole, it is clear that the court is given power to pass judgement under r.1 and the subsequent rules provide for matters relating to the form and content of judgments and decrees. Since it is common ground that there was a hearing before the ex parte judgement was passed, we are of the view that judgement in this case was passed under 0.18 r.1.

It was contended for the appellant that since 0.9 r.9 did not apply, the proper rule under which the respondent should have made the application to set aside the ex parte judgement was r.24. Learned Counsel for the respondents argued that r.24 could not apply to this case.

Considering the grounds upon which the application to set aside the judgement were based which are set out at the beginning of this judgement, it appears that the respondents had r.24 in mind when framing their application.

Their grounds included the claim that they were not served with the summons to appear and defend the suit, because the summons were advertised in the local press when circumstances showed that they were abroad, and secondly, that they were out of the country because they had been expelled from Uganda in 1972. These claims echo the requirement of sufficient cause which must be shown under r.24 before the court can exercise its discretion to set aside an ex parte judgement.

There is authority for holding that where the plaintiff sets down the suit for hearing ex parte under r.8 or r.8A, and obtains judgement, the proper rule under which to bring an application for setting aside the ex parte judgement is r.24: See Patel V. Star Mineral Water and Ice Factory (supra) Zirabamuzaale v. Correct (supra) Otanga v. Nabunjo (1965) EA 384 and Kafero v. Standard Bank (supra).

In Kafero v. Standard Bank (supra) where the application had been made under rr.9 and 24, and Section 101 of the Civil Procedure Act, Youds J held that the more appropriate rule to consider was r.24. He criticised the trial Magistrate for failing to "apply his mind to what r.24 states and whether good cause had been shown by the appellant for non-appearance at the hearing of the suit." He held that the cause of the first defendant's non-appearance when the suit was called for hearing was his failure to give proper instructions for his defence to his advocates, and this did no constitute sufficient cause.

In Otanga v. Nabunjo (supra) the defendant who was acting in person entered appearance but did not take any further steps in the matter under the mistaken belief that the procedure in the High Court was the same as in Buganda courts and that he would be summoned by court to attend the hearing. As no defence was filed, the suit was set down for hearing ex parte pursuant to 0.9 r.8A (2). No notice to the defendant was given and judgement was entered in his absence. Subsequently the defendant applied under 0.9 rr.9 and 24 and s.101 of the Civil Procedure Act, to set aside the judgement. Considering the application under r.24, Russell J held,

"I find that owing to ignorance of the Rules of Procedure of the High Court, the defendant was prevented by sufficient cause for not appearing when the suit was called on for hearing"

Accordingly, we find merit in the third ground of appeal. We hold that the learned Judge was wrong in holding that the application to set aside the ex parte judgement was properly brought under 0.9 r.9.

In the result, we allow this appeal, set aside the ruling and order for costs of the trial Judge and substitute an order upholding the objection with costs to the appellant here and in the lower court.

DATED AT MENGO THIS 25TH DAY OF NOVEMBER 1993.

S.T. MANYINDO
DEPUTY CHIEF JUSTICE

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B.J. ODOKI
JUSTICE OF THE SUPREME COURT

A.H.O. ODER

JUSTICE OF THE SUPREME COURT