IN THE SUPREME COURT OF UGANDA
HOLDEN AT MENGO

Coram: Odoki C.J., Oder, Tsekooko, Mulenga, and Kanyeihamba JJ.S.C.

CIVIL APPEAL NO. 14 OF 2001

Between

CAPT. PHILIP ONGOM:::::::::::::::::::::::::::::::::::: APPELLANT.

And

CATHERINE NYERO OWOTA:::::::::::::::::::::::::::::::: RESPONDENT.

(Appeal from decision of the Court of Appeal (Mukasa-Kikonyogo,DCJ; Kitumba, Twinomujuni, JJ.A.) at Kampala, dated 15th June, 2001, in Civil Appeal No. 73 of 2001).

JUDGMENT OF MULENGA J.S.C.

In an ex parte judgment of the High Court, apparently delivered on 29.6.99, Capt. Philip Ongom, the appellant, was ordered to pay to Catherine Nyero Owota, the respondent, several sums of money being an amount he owed her, together with special and general damages, with interest and costs. On 9.7.99 he applied to the High Court to set aside the ex parte judgment. The application was dismissed on 18.8.99. His appeal to the Court of Appeal against that dismissal, was also dismissed, almost two years later, on 15.6.01. He has brought a second appeal to this Court.

I would summarise the background leading to this appeal as follows. In September, 1998, the respondent filed in the High Court, Civil Suit No.980 of 1998, against the appellant, for recovery of the sum of £13,000, which she had advanced to him and which he had, in breach of contract, not repaid. She pleaded that she had borrowed part of that advance (i.e. £6,000), from her bank, and was liable to pay bank charges thereon. In addition to the principal sum, she claimed special and general damages for breach of contract. After being served with summons and copy of the plaint, the appellant, through his former Advocates entered appearance, but did not file a defence

within the prescribed time. On 21.10.98, a default judgment was entered against the appellant, and the suit was subsequently fixed for formal proof hearing before the learned Principal Judge. On 22.2.99, four months prior to the fixed hearing date, the appellant through his said former Advocates, paid the sum of shs. 19,150,000/= into court, apparently as the only amount he admitted was owing to the respondent. On 17.6.99, the formal proof hearing proceeded ex-parte, because the appellant did not appear at the hearing either in person or by his Advocate, though apparently the latter had been served with a hearing notice.

In his application to the High Court for an order to set aside the ex parte judgment, through another firm of Advocates, the appellant advanced two grounds; namely -

- That his failure to defend the suit and to attend court on the hearing date, was the fault of Mr. Walter Okidi Ladwar, the advocate he had instructed to defend him, who did not file the defence, and did not inform him of the hearing date; and
- That he had a good defence to the suit.

The respondent opposed the application and maintained, in her affidavit in reply, that the appellant had no defence to the suit. In addition, her counsel submitted at the hearing of the application, that the appropriate remedy for the appellant was to sue his lawyers for professional negligence. Apparently, the learned Principal Judge accepted that submission, and dismissed the application virtually upon that consideration alone. On appeal, the learned Justices of Appeal endorsed the same consideration. They held that the learned Principal Judge had judiciously exercised his discretion, and accordingly dismissed the appellant's appeal.

Five grounds were framed in the Memorandum of Appeal to this Court. However, at the hearing, Mr.Omunyakol, counsel for the appellant, quite properly in my view, conceded that the fifth ground was untenable. It was a complaint against a holding in the ex parte judgment, when that judgment was not on appeal. In opening his submissions, counsel pointed out that the main thrust of the appeal was that the Court of Appeal erred in dismissing the appeal without having regard to

some considerations. He paraphrased the remaining four grounds as the erroneous refusal or failure, on the part of the Court of Appeal, to consider -

- the appellant's "strong defence" which was disclosed in his affidavit supporting the application to set aside the judgment;
- the appellant's explanation of his absence from court at the hearing of the suit in the High Court;
- compensating the respondent in costs for any inconveniences. Mr.Omunyakol stressed the fact that after being served with the plaint, the appellant had promptly instructed an Advocate to defend him, and thereafter had paid into court the amount he admitted as owing. Counsel submitted that this was evidence of diligence, which showed that the appellant's desire to defend was not intended to delay or obstruct the course of justice. The appellant had only been let down by his former Advocate. Counsel argued that it was an error for the Court of Appeal to reject the former Advocate's default as sufficient reason for setting aside the judgment, on the premise that it constituted gross professional negligence. He submitted that the Court of Appeal ought to have followed the decision of the Supreme Court in ***Sepiria Kyamulesire vs Justine Bikanchurika Bagambe,*** Civil Appeal No.20 of 1995 (SC) (unreported), to the effect that a party should not be penalised for the errors of its Advocate. Lastly counsel reiterated the argument he put up in the Court of Appeal, that an award of adequate costs would compensate the respondent for any inconvenience that might be caused to her by setting aside the ex parte judgment, and that thereby no injustice would be occasioned. He criticised the Court of Appeal for ignoring that argument altogether.

Mr.Walubiri, counsel for the respondent, submitted that in determining if the lower court exercised its discretion judiciously, an appellate court takes all circumstances into consideration, noting what the lower court considered and what it did not. He conceded that, as part of such circumstances, the court may consider if the defendant has a defence, but maintained that it was not a legal requirement to do so. Counsel argued that in the instant case, the Justices of Appeal, after due evaluation, had found that the learned Principal Judge exercised his discretion judiciously, and so, on authority of the decision in ***Mbogo and Another vs Shah*** (1968) E.A. 93,

they rightly refused to interfere with his discretionary decision. He submitted that in the instant case, the Court of Appeal had taken into account -

- the fact that the misconduct and professional negligence on the part of the appellant's former Advocate, was very gross;
- the fact that the respondent lives out of jurisdiction; and
- the fact that execution had been substantially carried out;

and was persuaded that in those circumstances, the appropriate course was for the appellant to sue his former lawyers, irrespective of any defence he might have had ***of counsel, which he was entitled to do. He came to the conclusion that if anybody was to suffer for the counsel's negligence it was his client the appellant and not the respondent.*** ***<u>It is worth noting that counsel for the appellant was guilty of a high degree of professional negligence for which his client could successfully sue him.</u>*** ***<u>There was no injustice, in my view, caused to the appellant</u>."*** (emphasis is added) It is apparent from this passage, that in addition to the view that the appellant should bear the consequences of his former advocate's defaults, the learned Justices of Appeal were persuaded that his prospects of successfully obtaining relief from suing that advocate for gross professional negligence, was an added consideration for rejecting the application. On that account they distinguished the decision in **<u>Sepiriya Kyamulesire vs Justine Bakanchurika Bagambe</u> (supra),** on the ground that in that case the advocate's default had been a minor mistake. The third consideration which the Court of Appeal took into account, was that *"setting aside the ex parte judgment would cause a lot of inconvenience to the respondent who lives in London".*

It is apparent that neither court below considered whether or not the grounds advanced by the appellant in support of his application, were sufficient, or for that matter insufficient. In order to determine if the courts were right, or if in omitting that consideration, they erred, it is necessary to examine what the law requires the court to take into account in an application such as the one in the instant case.

The appellant made two applications in one motion, one for stay of execution of the ex parte judgment dated 29th June, 1999, and the other for setting aside the same judgment. The motion was stated to be under S.101 of the Civil Procedure Act, Order 9 Rule 9, and Order 48 Rules 1&3 of the Civil Procedure Rules.

to the suit against himself. Counsel conceded that the negligence of an advocate can, in some circumstances, be ground for setting aside an ex parte judgment. He however, forcefully argued, albeit without citing any authority for the proposition, that where, as in the instant case, the professional negligence is so gross that the advocate would, if sued, be found liable, such negligence cannot be set up by the client as such a ground. The client's only recourse is to sue the advocate in negligence. Furthermore, according to counsel, to allow the appellant to re-open the case at this stage would be unjust, as it would unduly inconvenience the respondent who had acted diligently. It would also cause unreasonable delay and multiply the costs. In the alternative Mr.Walubiri submitted that if this Court was disposed to remit the case to the High Court for re-trial, then the appellant should be ordered to deposit into court, the unpaid balance of the decretal sum, and to provide security for costs of the re-trial.

The decisions of both courts below, revolved on the premise that it was fairer for the appellant, rather than the respondent, to bear the consequences of his former advocate's defaults. In his very brief ruling, all that the learned Principal Judge said was:-

> ***"This application will be dismissed. If anyone is to suffer for the negligence or defaults of the lawyers, it is their client and not the opposing party. The applicant would better sue his former lawyers for atoning for his loss."***

The decision of the Court of Appeal was based on three considerations. First, the court relied on, and upheld the trial court's said consideration. Kitumba J.A., in the leading judgment, with which the other members of the court concurred, said in part:-

> ***"I am of the view that the learned Principal Judge judiciously exercised his discretion. He took into account the nature of the case and the conduct***

Presumably, Rule 9 of Order 9 was cited in respect of the application for setting aside the ex parte judgment, which is the subject matter of this appeal. However, that rule applies only where

judgment has been passed pursuant to any of the rules preceding it, (i.e. rules which permit hearing without giving notice to the defendant), and to default judgments entered by the Registrar without any hearing. It does not apply to a judgment passed in the manner in which the judgment in the instant case was passed. The rule which provides for setting aside a judgment pronounced after a hearing in respect of which the defendant was given notice but did not attend, is Rule 24 of Order 9. Indeed, considering the grounds upon which the application to set aside the ex parte judgment in the instant case was based, it appears that the appellant/applicant had Rule 24 in mind. He sought to explain not only why he did not file a defence, but also why he did not attend court on the day the case was called for hearing. There is, between the two rules, a significant distinction which unfortunately is all too often overlooked. It is that the court has much more unfettered discretion under Rule 9, than under Rule 24, with the result that the considerations under one, are not the same as those applicable under the other. This distinction was recognised and upheld in **Nicholas Roussos vs Gulamhussein Habib Virani & Another,** Civil Appeal No.9 of 1993 (SC) (unreported), where, after reviewing diverse authorities, this Court held:-

"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...." Be that as it may, since no controversy was raised on this point, I shall proceed on the premise that the application was made, and should have been considered under Rule 24, though it was not so expressly stated. Rule 24, so far as is relevant, provides:-

> ***"24. In any case where a decree is passed ex parte against a defendant he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court, or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:***" (emphasis is added)

It is evident from this provision, that for an application under this rule to succeed, the court must be satisfied about one of two things, namely -

- either that the defendant was not properly served with the summons,

- or that the defendant failed to appear in court at the hearing, due to sufficient cause.

It is also evident from the same provision, that once the defendant satisfies the court on either, then the court is under duty to grant the application and make the order setting aside the ex parte decree, subject to any conditions the court may deem fit. The modes of effecting service of summons are clearly set out in the rules of procedure, so that a defendant who is not served in accordance with one of the modes, will be entitled to an order under the rule. However, what constitutes "sufficient cause", to prevent a defendant from appearing in court, and what would be "fit conditions" for the court to impose when granting such an order, necessarily depend on the circumstances of each case.

In the instant case, the appellant (defendant) did not dispute service of summons. In his application, he sought to satisfy the court that for "sufficient cause" he did not file a defence and was prevented from attending court on the hearing day. It follows that the primary concern of the court in considering that application was to determine whether the "cause" put forward by the appellant, was "sufficient cause".

The appellant presented his former advocate's defaults as the cause that prevented him from filing defence, and from appearing in court on the hearing day. In a nutshell, what the appellant averred in the affidavit in support of his application, was to the effect that he instructed one Walter Okidi Ladwar, an advocate, to defend him in the suit, but that despite assurances by the said advocate to the contrary, the advocate did not file the defence, and though the advocate was served with a hearing notice, he did not tell him of the hearing date. These averments were not disputed, and both courts below believed them, hence their common view that the appellant could obtain relief from the former advocate for professional negligence. For the purposes of Order 9 Rule 24, the cause that prevented the appellant from appearing at the hearing was that he was not aware of the hearing date, because his former advocate who was served with the hearing notice did not disclose the date to him. Although in law service of the notice on the advocate constituted valid service on the appellant, I would not consider the advocate's failure, in the instant case, to comply with the notice, as failure by the appellant who did not know the contents of the notice. It is an

elementary principle of our legal system, that a litigant who is represented by an advocate, is bound by the acts and omissions of the advocate in the course of the representation. However, in applying that principle, the court must exercise care to avoid abuse of the system and/or unjust or ridiculous results. To my mind, a proper guide in applying the principle is its premise, namely that the advocate's conduct is in pursuit of and within the scope of what the advocate was engaged to do. In light of that, in my view, a litigant ought not to bear the consequences of the advocate's default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give to the advocate due instructions.

There is no reason to suggest that the appellant in the instant case was privy or otherwise responsible for his former advocate's default. On the contrary, throughout, the advocate misled him that he was defended when he was not, and ultimately failed to inform him when the suit was due for hearing. Obviously, he could not appear in court (in person or by advocate) when he did not know the hearing date, and his advocate neglected to appear for him. He was therefore prevented from appearing by "sufficient cause". In my view, that "cause" cannot be any less sufficient by reason of the fact that it also resulted from the advocate's gross professional negligence, as appears to be implicit in the judgment of the Court of Appeal and in Mr. Walubiri's submissions in this appeal. Whether or not the appellant has a cause of action against his former advocate, is immaterial and irrelevant to the issue whether he was prevented by "sufficient cause" from appearing in court.

In **Sepiria Kyamulesire's** case (supra), Karokora JSC said -

> ***"In my considered opinion, considering the decided cases of this Court and other courts on this point, it is now settled that errors of omission by counsel (are) no longer considered to be fatal to an application under Rule 4 of the Rules of this Court unless there is evidence that the applicant was guilty of dilatory conduct in the instruction of his lawyer.."***

Later in the same ruling the learned Justice said -

"In all fairness, I think this being the final court of appeal, we would not be dispensing justice if a citizen's right of appeal were blocked on the ground of his lawyer's negligence, when he failed to take essential steps necessary under the law, to lodge the appeal; and especially when the lawyer had been instructed in time."

I respectfully agree with both statements. I would in a similar vein say, for emphasis, that a litigant's *"right to a fair hearing in the determination of civil rights and obligations",* which is enshrined in Article 28 of the Constitution should not be defeated on ground of his/her lawyer's mistakes. In **Nicholas Roussos vs Gulamhussein Habib Virani & Another** (supra) this Court said:-

> ***"As for 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: 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 judgment under this rule."*** (emphasis is added)

It seems to me, that if the learned Principal Judge and Justices of Appeal had adverted to the principle under Rule 24, and to the judicial precedents, they would have been satisfied, as I am, that the appellant was prevented by sufficient cause from attending court when the suit came up for hearing. In the circumstances, I would respectfully hold, that failure to have regard to what in effect was supposed to be the primary consideration under the relevant law, was an error on the part of the courts below. To that extent, the holding by the Court of Appeal that the learned trial judge had judiciously exercised his discretion, cannot be sustained.

I have already indicated my view, with respect, that the Court of Appeal's second consideration, namely the appellant's prospects of obtaining relief from his former Advocate, was immaterial and irrelevant to what was in issue. I now turn to its third consideration, namely the inconvenience that would be caused to the respondent if the judgment is set aside.

Mr. Omunyakol's submission, that the respondent could be compensated in costs for any such inconveniences, is quite legitimate and the Court of Appeal ought to have taken it into consideration. When the court is satisfied with an application under Rule 24, it has discretion to grant it *"upon such terms as to costs, payment into court or otherwise as it thinks fit".* The courts below could have invoked that provision to order the appellant to pay the respondent's thrown away costs and even to make additional payment into court to cover the total decretal amount. Neither court decided to do so, let alone to disclose its reason **for** not doing so. However, having considered the peculiar circumstances of this case, **I** think that it would not be sufficient to only consider if the omission was an error of discretion, and simply rectify that error. Notwithstanding the principle enunciated in **Mitha vs Ladak** (supra) and reiterated by this Court in **Nicholas Roussos' case** (supra), that in an application under Rule 24, it is not open to the court to consider the merits of the case, I think those circumstances make it necessary, to consider at least the extent of the dispute in order that technicality may not unduly obscure substantive justice. I would summarise the pertinent peculiar circumstances of the case as follows -On the one hand,

- the appellant did not dispute the principal claim of £13,000; instead, when sued, he made payment into court thus admitting his liability to repay.
- the trial court, holding that the appellant *should be taken to have admitted liability,* gave judgment to the respondent for the principal claim, plus -
    1. the profit claimed;
    2. special damages; and
    3. general damages.
- the respondent, in or about September 1999, recovered a substantial part of the decretal amount through execution proceedings;

On the other hand,

- on the face of it, the appellant's admission of liability did not extend to the "the profit" and damages, because upon becoming aware of the *ex parte* judgment, he promptly sought to defend, and *inter alia* expressly denied any agreement on profit;
- the assessment of special damages appears to have been done on a wrong principle.

It appears to me that despite his persistence, the appellant would have very little to defend in the suit, even if he was given another chance to do so. First, despite his denial of the agreement on profit, the evidence, (including his own letters) supporting the respondent's contention that the transaction was a business venture is overwhelming. The most probable intention of the parties was for the respondent to earn profit from the venture. Secondly, the award of damages is by way of compensation for loss incurred or damage suffered by the respondent as a result of the respondent's irrefutable breach of contract in failing to repay the loan within the agreed period. Having regard to the matters the learned Principal Judge took into consideration in assessing the general damages, it is unlikely that any significant change would result from a reassessment of the same item. In my opinion therefore, setting aside the judgment, in order to enable the appellant to contest liability in respect of the profit and the general damages, would be a futile exercise that would lead to virtually the same results, after undue delay in disposal of the case, and unnecessary increase in costs.

However, I am troubled by the award of special damages, and in particular, the way the quantum thereof was arrived at. Admittedly, this is not an appeal against the *ex parte* judgment. What is before this Court is whether that judgment should be set aside. In my view, however, having regard to the peculiar circumstances, I have referred to, it is quite proper to examine whether the award should be upheld along with the rest of the awards, bearing in mind the principle that special damages must be specifically pleaded and strictly proved.

In her plaint dated 15.9.98, the respondent pleaded among the particulars of special damages an item of £300 described as "Halifax bank charges for arrears". Annexure F to the plaint, received in evidence as Exh. P2 is an undated and unsigned Halifax bank document itemising "charges for arrears collection" totalling up to £300. In her evidence, however, she made no reference to the

amount claimed in the plaint or to Exh.P2. Instead, she stated that by 2.7.98 her indebtedness to the bank was £3,759.30, and that at the time of giving evidence on 17.6.99, it had increased to over £4,000. In support of that statement, she referred to Annexure G to the plaint received in evidence as Exh.P3. It is a letter dated 2.7.98 addressed to her by the bank, showing inter *alia* that the "Arrears Amount" on her loan account was £388.18 and that the "Balance" was £3,759.30. It is noteworthy that though Exh.P3 was annexed to the plaint, the amount claimed in the plaint as special damages was £300, not the larger sum. Be that as it may, the plaint was not at any time amended to conform to the respondents' testimony on the issue. In his judgment, the learned Principal Judge, after referring to her evidence on the indebtedness said:-

"That may well be. However, special damages must not only be specially pleaded. They must also be specifically proved. Although she pleaded pound sterling 300.00 at the time of filing suit which was on 16.9.98, I take judicial notice of the fact that bank charges of this kind increase with time and since she has adduced (sic) that on 2.7.98 she was being debited with pound sterling 3,759.00 I award it to her and the defendant shall pay it to her also."

(emphasis is added). In the lead judgment in the Court of Appeal, Kitumba J.A., addressed the complaint against the award of an amount in excess of what was pleaded without amendment of the plaint. She held:-

"I find no merit in this complaint. There was no amendment to the plaint by the trial judge as alleged. In paragraph 5(a) of the plaint the respondent pleaded special damages of Halifax bank charges for arrears 300 pounds. In prayer (f) she prayed *"for any other relief that this Honourable Court may deem fit."* ***There was annexure "F" to the plaint which showed how bank charges would increase. There was no need to amend the plaint before judgment. The learned Principal Judge awarded what was prayed for and proved at the trial."***

With the greatest respect to the learned Justice of Appeal, there are a couple of misdirections here. First, Annexure "F" (Exh.P2) does not show "how bank charges would increase". It only lists charges for given actions in debt collection. Secondly, the amount of £3,759, was not awarded under the general prayer "*for any other relief.* It was awarded as special damages, for bank charges incurred, which the learned Principal Judge concluded had increased over time,

after the suit was filed. Bank charges was pleaded as the "damage suffered" for which the relief of special damages was sought. It had to be strictly proved as such. That leads to the more critical issue whether the damage was strictly proved.

To prove the damage, the respondent had to show that the indebtedness to the Halifax bank was a result of the appellant's failure to pay within the agreed time. In my considered opinion, her evidence fell far short of showing that. Exh.P2 is in effect information on "itemised charges for debt collection". It is not a demand note or invoice. In her oral testimony she did not allude to it, let alone say that she paid or was debited with any of those charges. The substance of her oral testimony and Exh.P3, is that on 2.7.98 there was, on her bank account, a debit balance of £3,759.30. There is no suggestion that the activities on that account related exclusively to the loan she secured for her transaction with the appellant. Nor is there indication of what comprises that balance. If that balance includes part of the original loan, which it most probably does, then to order the appellant to pay that balance, on top of repaying the advance in full, would be ordering him to make double payment, at least in part. In conclusion, I would hold that the item of bank charges awarded as special damages in the sum of £3,759.30, was not specifically pleaded, nor strictly proved to be bank charges incurred as a result of the appellant's breach of contract. I would have been inclined to ignore the matter if the sum involved was minimal, but I think the sum of £3,759.30 is substantial. The award ought not to be upheld. Similarly, I think it would not serve the interests of the parties or of substantive justice, to remit the case to the High Court for retrial of that issue.

In the result, I would uphold grounds 1 and 3, and reject grounds 2 and 4. Accordingly, for the reasons I have indicated, I would not interfere with the *ex parte* judgment save for the special damages. I would order that only the award of special damages in the sum of £3,759, and the unproved and unspecified cost of air ticket, be set aside. Needless to say, however, the respondent will be at liberty to prove and recover the cost of the air ticket as part of the costs of the suit.

Clearly, although the appeal succeeds in part, it substantially fails. I would uphold the orders for costs in the lower courts, and order that each party bears its costs of this appeal.

JUDGMENT OF ODOKI, CJ.

I have had the benefit of reading in draft the judgment of Mulenga JSC, and I agree with him that this appeal should partially succeed. I agree with the orders he has proposed as to costs.

As other members of the Court also agree with the judgment of Mulenga JSC and the orders he has proposed, there will be judgment in the terms proposed by Mulenga JSC.

JUDGMENT OF ODER, JSC.

I have had the benefit of reading in draft the judgment of Mulenga, JSC. I agree with him that the appeal should partially succeed. I also agree with the orders proposed by him.

JUDGMENT OF TSEKOOKO. JSC:

I have had the benefit of reading in draft the judgment prepared by my learned brother, Mulenga, JSC, and I agree with his conclusions. I agree with the orders proposed by him.

JUDGMENT OF KANYEIHAMBA, JSC.

I have had the benefit of reading in draft the judgment of Mulenga, **JSC,** and I agree with him that this appeal should partially succeed. I agree with the orders he has proposed as to costs.

Dated at Mengo this 21st day of March, 2003.