THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, C.*J*, ODER, TSEKOOKO, MULENGA, KATO; *J. J* .S.C).

CIVIL APPEAL NO. 2/2003

BETWEEN

HORIZON COACHES LTD.....APPELLANT

AND

PAN AFRICAN INSURANCE CO. LTD.....RESPONDENT.

(Appeal from the decision of the Court of Appeal at Kampala(Okello, Twinomujuni and Kitumba *J J* .A) dated 16/9/2002 in Civil Appeal No. 78 of 2001).

***J* UDGMENT OF CM. KATO, JSC.**

This is a second appeal. It is an appeal against the decision of the Court of Appeal which upheld the ruling of the High Court judge who refused to set aside her own exparte judgment entered in the absence of the appellant.

The facts which led to this appeal are not complex. They are briefly as follows. The respondent filed a suit against the appellant to recover 36,730,000/= being an outstanding premium owed to it by the appellant. The appellant did not dispute the amount but lodged a counterclaim for 74,000,000/= being an amount which it alleged the respondent had not settled for previous claims. A rescheduling conference was held

before the trial judge. At that conference the respondent's claim was not disputed, the matter was however adjourned on a number of occasions to enable the appellant produce evidence in support of its counterclaim.

On 6/2/2001 in the presence of both counsel, after the appellant's counsel had asked for more time to produce the required evidence, the case was adjourned to 13/2/2001 at 2.30 p.m. On 13/2/2001 when the case was called up both parties were absent and it was adjourned sine die, but later on the same day counsel for the respondent, Mr. Byenkya, turned up and judgment was entered in favour of the plaintiff, the present respondent, for a sum of 33,760,000/=. The counterclaim was dismissed with costs.

On receiving the outcome of the case, the appellant filed an application to have the exparte judgment set aside. The application was heard by the same judge who had entered an exparte judgment and dismissed the counter-claim. She dismissed the application. An appeal to the Court of Appeal against the dismissal was also dismissed, hence the present appeal which is based on six grounds, namely:

1. The learned *J*udges of the Court of Appeal erred in law and in fact when they failed to properly evaluate the evidence adduced and as a result reached a wrong decision.

2. The learned *J*udges of the Court of Appeal erred in law and in fact when in reaching their decision they erroneously found that the trial court's decision on the 13th February, 2001 was a decree and that the decision operated as res judicata.

3. The learned *J*udges of the Court of Appeal erred in law and fact when in reaching their decision they erroneously failed to find that the Trial *J*udge's Court/s re-hearing the case after adjourning sine die was sufficient cause to set aside the decision of the trial court made on the 13th February, 2001.

4. The learned judges of the Court of Appeal erred in law and in fact when they misconstrued and misapplied 0.15,r.4 of The Civil Procedure Rules and Direction No. 7 of the Commercial Court (Practice) Directions, 1996 and upheld the Ruling of the

Trial Court given on the 26th October, 2001 as reason for entering Judgment and dismissal of counter claim on the 13th February, 2001.

5. The learned Judges of the Court of Appeal erred in law and fact when they held that the appellant was given all the opportunity to produce all the evidence to prove his counter-claim and he failed to do so for almost one year.

6. The learned Judges of the Court of Appeal erred in law and fact when they based their judgment on a ground not appealed on or submitted upon by either counsel.

When the appeal came up for hearing, learned counsel for the respondent raised some preliminary objections concerning the manner in which grounds 1, 3, 4 and 6 were framed. According to him grounds 1, 4 and 6 offended the provisions of rule 81(1) of the rules of this Court as the grounds did not specify the points which were allegedly wrongly decided by the Court of Appeal. As for ground 3, Mr. Byenkya argued that this same ground had been framed in the Court of Appeal as ground 1 but it was abandoned. It was counsel's view that the appellant was prohibited from raising a ground which he had earlier on abandoned.

Mr. Ndyomugabi opposed the objections. He contended that the grounds of appeal objected to by the respondent's counsel did not in any way offend the provisions of Rule 81(1) of the Rules this Court as they (grounds) clearly refer to the decision of the Court of Appeal. He, however, conceded that he had abandoned ground 1 in the Court of Appeal, which is now ground 3, and explained that he did so because he was sure that in arguing ground 7 in that court he would cover all the other grounds of appeal.

We overruled the objections and reserved the reasons for doing so to be given in the final judgment. I now give those reasons before I proceed to consider the appeal.

A careful reading of grounds 1, 4 and 6 shows that they were actually complaining against the decision of the Court of Appeal and the way that decision was reached. It was our view that failure by the appellant to specify the wrong complained of in this particular case did not substantially offend the provisions of Rule 81(1) of the rules of this court. As for the objection to ground 3, it was clear that the complaint was in respect of the merit of the appeal so the ground could not be disposed of under a preliminary objection. Counsel for the appellant satisfactorily explained why he abandoned the same ground in the Court of Appeal but resurrected it in this court.

It was for those reasons that the objections were overruled. I now turn to the merits of the appeal.

Although this appeal directly concerns the decision of the Court of Appeal in respect to the ruling of the High Court, it would be difficult to reach a reasonable conclusion without looking at what took place in the High Court before and on 13/2/2001. It is in view of that fact that, I shall in this judgment keep on referring to the events which took place at the hearing of the suit.

Mr. Ndyomugabi, counsel for the appellant argued grounds 1 and 5 together, then grounds 2 and 4 also together and finally grounds 3 and 6.

The main complaint in grounds 1 and 5 is that the Court of Appeal did not re-evaluate the evidence or study the record of the lower court. According to counsel, if the court had studied the record it would have found out that there was nothing on the record to show that the appellant was given up to one year to produce evidence and did not produce that evidence. In his view, their Lordships' failure to re-evaluate the evidence of the lower court offended the provisions of rule 29(1)(a) of the Court of Appeal Rules 1996.

On his part, Mr. Byenkya, counsel for the respondent, submitted that there was no evidence for the Court of Appeal to re-evaluate, contending that the court in

fact studied the record of the High Court. He further submitted that the Court of Appeal was justified in its holding that the appellant had been given enough time to produce its evidence but had failed do so.

With due respect to learned counsel for the appellant, it is not true to say that the Court of Appeal did not study the record of the High Court. According to the judgment of Twinomujuni, J.A which is the lead judgment of that court, the court in fact studied the record. This view is supported by the following statement appearing in the lead judgment:

"As it can be seen, the appellant was given all the opportunity to produce evidence to prove his counter-claim. He failed to do that for almost one year"

The above statement was clearly based on the number of adjournments granted to the appellant from 11/4/2000 when the case came up for a scheduling conference. After that date there were a number adjournments on different dates and most of those adjournments were intended to enable the appellant to produce its evidence which the respondent's counsel had demanded for at the scheduling conference. This view was confirmed by Birungi, counsel for the defendant/appellant, when he stated, in that court on 6/2/2001:-

" I have duly requested from my client evidence to support its claim. It has not. I need a period of 2 days to get this evidence. If I fail, then I will report to court".

It is clear from the above account that the Court of Appeal in fact studied the record and in view of what Mr. Birungi learned counsel for the appellant, stated, the Court of Appeal was justified in holding that the appellant had been given enough time to produce evidence but did not produce it.

The question of the Court of Appeal failing to re-evaluate the evidence before the trial judge and having failed to adhere to the provisions of Rule 29 of the rules of that court does not arise because of two reasons:

(a) The court was not hearing an appeal against the decision of the Court in respect of what it did during the trial, it was dealing with an appeal against an application decided on 16/9/2002 and

(b) The appellant did not produce any evidence to be re-evaluated.

I find no merit in grounds one and five. They should fail.

Concerning grounds two and four, Mr. Ndyomugabi submitted that the Court of Appeal was wrong in holding that the decision of the High Court made on 13/2/2001 amounted to a decree and that it could only be set aside by way of an appeal. According to him, that decision did not amount to a decree as it did not conclusively decide the matter between the parties; in particular he pointed out that no reason was given as to why the appellant's counter-claim was dismissed. He distinguished the case of: Salem A.H.Zaidi -V- Fayd H. Humeiddan (1960) EA 92, upon which their Lordships based their decision, from the present case, because in that case the counsel for the appellant was in court,, unlike in the instant case where the appellant's counsel was absent. In support of his argument he quoted: William *J*ames Baker -V- *J*oseph Peter Rush (1964) E.A 602, Sugar Corperation of Uganda Ltd -V- Kanabolic Group of Companies Ltd (SCCA No.57/95) and Camile -V- Merali and Another (1968) E.A 314. The counsel contended that a document does not become a decree simply because somebody decides to call it so.

Mr. Byenkya agreed with the holding of the learned Justices of the Court of Appeal that the dismissal of the appellant's counterclaim on 13/2/2001 amounted to a judgment on merit and that it could only be set aside by an appeal against that

judgment but not by a mere application. In his view, all the rules of the Civil Procedure Rules which permit setting aside of ex-parte judgments did not apply to this case as the judgment was entered under Order 15 rule 4 of Civil Procedure Rules which does not permit setting aside of a dismissed case. He contended that the appellant had all along proceeded on the understanding that there was a valid decree.

The vital question in this matter is under what rule of Civil Procedure Rules was the decision of the judge on 13/2/2001 based, when she dismissed the appellant's counterclaim. This question is important because it determines the issue of whether the decision of the High Court dated 13/2/2001 should be set aside by the same judge on application or by the Court of Appeal by way of an appeal. Different rules have different provisions regarding suits dealt with exparte, some rules provide that suits may be reinstated, such rules include: Order 9 rules 17, 19, 20, and 24 and Oder 15 rule 3 of Civil Procedure Rules, but there are rules like Order 15 rule 4 which do not permit reinstatement of the suits which have been heard exparte.

In the instant case the trial judge did not state the law under which she dismissed the appellant's counter-claim although in her ruling, which is the subject of this appeal, she mentioned Order 15 rule 4 of Civil Procedure Rules and rule 7 of the Commercial Court (Practice) Directions 1996 as the law under which she acted. The omission put the appellant in a dilemma in deciding whether to proceed by way of an appeal or an application to have the decision set aside. It is possible that the failure by the trial judge might have misled the appellant's counsel to base his application on Order 9 rule 20 of Civil Procedure Rules when he filed his application to set aside the dismissal of the counter-claim instead of lodging an appeal.

In my opinion, failure by the trial judge to state the law under which she proceeded on 13/2/2001 to dismiss appellant's counter-claim was improper. The judge's belated explanation in her ruling that she had acted under the above provisions of the law could not save the situation, since the appellant did not know of that position until on the day the ruling was delivered. The judge's explanation that she proceeded under

Order 15 rule 4 cannot be correct since she had already adjourned the suit sine die by the time Mr. Byenkya came. She must have misdirected herself on the application of the rule. It was because of the misconception that the judge acted on those provisions of the law that led the Justices of Appeal to base their judgment on the decision in the case of: Salem A. H. Zaidi -V- Faud H. Humeidan (supra). It is not a principle of the law that a judge must always mention the law under which he or she proceeds. Where there are a number of provisions of the law under which the same decision may be made but with different consequences depending on which provision you proceed, like in the present case, it would be desirable to mention the law. Their Lordships were not justified in holding that the matter was decided under Order 15 rule 4 and therefore it could not be set aside by a mere application, when the record of 13/2/2001 did not say so. The issue whether the dismissal of the counterclaim was a final judgment or not could only be conclusively decided if the rule under which it was dismissed was known. I find merit in grounds 2 and 4. They should succeed.

Mr. Ndyomugabi did not submit anything new in respect of grounds three and six as he felt that he had dealt with the two grounds when submitting on grounds two and four. He, stressed that the Justices of Appeal were wrong to consider Order 15 rule 4 of Civil Procedure Rules when the parties had not addressed the court on the matter. Mr. Byenkya, however, contended that Hon. Justices of Court of Appeal were entitled to consider the issue of whether or not they had jurisdiction to hear the appeal and in so doing they had to consider Order 15 rule 4.

My finding on grounds 2 and 4 sufficiently covers the issues raised in these last two grounds. In view of my earlier holding on grounds 2 and 4, grounds 3 and 6 must also succeed. The Court of Appeal was not justified to dismiss the appeal.

In the result, I would allow this appeal in respect of the counterclaim but I would dismiss the appeal in respect of the main claim in which judgment was entered in favour of the respondent.

I would order that the case be remitted to the High Court for the determination of the appellant's counter-claim after the appellant has paid all the amount decreed in favour of the respondent in the main claim. I would further order that the appellant gets half of the costs in this appeal and in the Court of Appeal.

JUDGMENT OF TSEKOOKO, JSC:

I have read in advance the draft of the judgment which has been delivered by my learned brother, the Hon. Mr. Justice Kato, JSC, and I agree with his conclusions that the appeal should partially succeed in respect of the counterclaim.

The facts of the case have been set out in the said judgment. The appellant set out six grounds of objection to the decision of the Court of Appeal. These have been set out in the judgment of my brother and I need not reproduce them here.

Grounds 1 and 5 were argued together and they raised two complaints. In the first ground the complaint is that the Justices of Appeal erred in law and in fact when they failed to properly evaluate the evidence adduced and as a result reached a wrong decision. The complaint in ground five is that the Justices erred in law and fact when they held that the appellant was given all the opportunity to produce evidence to prove his counterclaim and failed to do so for almost one year.

Submitting on these grounds, Mr. Ndyomugabi, counsel for the appellant, contended that had the Court of Appeal studied the trial court record including the record in respect of the notice of motion from which this appeal springs, the court would have set aside the order dismissing the counterclaim and would have restored the counterclaim to be tried and decided on merits.

Mr. Ebert Byenkya, counsel for the respondent, submitted that the Justices of Appeal reviewed the record as reflected in the lead judgment of Twinomujuni, J.A. Learned counsel, quite properly and candidly, admitted though, that on 13/2/2001 he entered court late, after the time the case had been called up for hearing and it had been adjourned. He however pointed out that because the procedure in the Commercial Court is flexible and, in this case, the trial judge was available, the case was called again after he appeared whereupon the learned trial judge heard him after which

she entered judgment for the respondent as claimed. She then dismissed the appellant's counterclaim. Learned counsel justified the procedure adopted by the learned trial judge on the basis of the provisions of the Commercial Court (Practice) Directions, 1996.

With respect to Mr. Byenkya, I am not persuaded by his arguments. The record of the proceedings regarding what transpired on 13/2/2001 is very brief and it reads as follows: -

13/02/2001

Parties absent.

Order: This matter is adjourned sine die.

Singed

C.K. Byamugisha, Judge

13/02/2001.

Later.

Byenkya for the plaintiff. Birungi absent.

Byenkya: My learned friend had said that he would bring some evidence. I do not mind if judgment is entered.

Order: ***"Judgment is entered for the plaintiff in the sum of shs 33,760,000/= with interest of 25% p.a from the date of filing the suit - 16/8/99 till payment in full. Costs of the suit. The counter claim is dismissed with costs."***

That is all that there was on the record. Therefore, other than the pleadings, there was no evidence to be evaluated by the Court of Appeal. It could have re-evaluated the affidavit evidence in the notice of motion, perhaps.

Mr. Byenkya did not cite the law under which he asked the judge to enter judgment nor is he recorded to have asked for the counterclaim to be dismissed. The record does not indicate the rule under which the learned judge proceeded to dispose of the case. It was only on 26/10/2001, some 8 months later, when the learned judge dismissed the application, seeking to set aside the judgment of 13/2/2001, that she explained in her ruling that the judgment was entered under 0.15 R.4 of the Civil Procedure Rules read together with Rule 7 of the Commercial Court (Practice) Directions, 1996. There is no

imputation on the judge but the note of 13/2/2001, bare as it is, must have left the appellant, when checking later, wondering as to which law was applied. Rule 7 of the Directions reads as follows: -

> ***"Failure by any party to comply in a timely manner with any order made by a commercial judge in a commercial action shall entitle the judge at his own instance, to refuse to extend any period of compliance with the order; or to dismiss the action or counterclaim, in whole or in part; or to award costs as the judge thinks just."***

I cannot construe this provision to mean that it is the authority for the procedure adopted by the learned judge or the manner the proceedings were conducted in this case. In my opinion, the learned judge would have been perfectly acting within her powers had she dismissed the case when it was first called up and she then realised that at that time none of the parties was present. At that stage, she had started court in time and parties were absent without cause. But having presumably considered, when the case was first called up, that dismissal initially was unwarranted and having opted to adjourn the matter sine die on her own motion, it was not proper for her to reopen the case when only one of the parties arrived later and worse still when that other party who arrived later apparently assigns no reasons for that late coming. Here is where the saying that justice must not only be done, but must be seen to be done, applies.

Indeed I would have accepted the course adopted by the learned judge had she initially not formally dealt with the file till Mr. Byenkya appeared and then had the case called up for hearing. In such event, I think, the judge would have been acting within the scope of the provisions of the rule. I cannot accept the argument that because of rule 7, a commercial judge is free at any time to call for any case file which has been adjourned sine die, and take any action. This is possible where the case falls within rule 6 of order 15. Nor do I agree that Rule 4 of that Order was, in the circumstances, applicable. That rule applies when a party to be adversely affected

by court decision based on the rule, is present in court but refuses to do any of the acts stipulated in the rule.

For these reasons. I think that though the entering of judgment for the plaintiff on admitted facts by the defendant is justifiable, on the basis that eventually that would have been the end result of the case any way since at the scheduling conference on 11/04/2000 the respondent's claim for shs 33,760,000/= as unpaid premium was not disputed. Indeed at the conference the presiding judge could have entered judgment for the plaintiff for that sum. That is what appears to be envisaged by Rule 1 (2) of Order XB which reads: -

"(2) where the parties reach an agreement, orders shall immediately be made in accordance with rules 6 and 7 of order 13."

I think that in the circumstances of this case, the trial judge erred in dismissing the counterclaim. As the learned judge had, on her own motion, adjourned the case sine die in the absence of both parties, the appropriate course was to fix a fresh date and serve the appellant with a hearing notice. The order of dismissal was therefore improper and was prejudicial to the appellant. Therefore grounds 1 and 5 ought to succeed.

In ground three, the complaint is that the justices erred in law and fact when they erroneously failed to hold that the trial judge erred when she heard the case after she had adjourned it sine die. Discussions of grounds 1 and 5 have, in away, disposed of this ground.

In the Court of Appeal, the learned Justices relied on **Zaidi Vs Humeidan** (1960) EA 92, for the view that the decision of the trial judge under 0.15 Rules 4 precluded the judge from setting aside her judgment. The learned Justices of Appeal held that the application to set aside the judgment of the same judge was invalid and whatever order the judge made after hearing the application was superfluous and of no

consequence. Therefore no appeal would validly spring from that order. Because of the reasons I have given while discussing grounds 1 and 5, I do not, with great respect, accept this view. On 13/2/2001, the learned judge never mentioned the law under which she entered judgment for the respondent and dismissed the appellant's counterclaim. In any case, my view is that the learned trial judge decided that case exparte since the appellant and its counsel were absent. It seems to me that the appellant acted properly when it instituted a notice of motion seeking to have the judgment set aside. I think that the decision in **Zaidi Vs Humeidan** (supra) is distinguishable especially since in that case the respondent was actually represented by an advocate who was present in court, but he refused to proceed with the case. With the greatest respect to the learned Justices of Appeal, I think that they erred when they held that the trial judge had no jurisdiction to entertain the notice of motion. Indeed in Zaidi case, the East African Court of Appeal appear to suggest that the type of application made before Byamugisha J., was possible when the Court stated at page 94 A to B, (per Forbes V.P) that: -

....., The earlier suit had been dismissed because when it came on for hearing, the respondent was not personally present, though he appeared by his advocate, and his advocate stated that by reason of the respondent's absence, he could not go on. There was no appeal against this dismissal, nor any application for re-instatement of the suit." (underlining supplied).

I think that a decision under 0.15 Rules 4 can give rise to either an application for setting aside an expate judgment followed by an appeal or to an appeal direct where judgment is entered in the presence of a party.

Consequently, the learned Justices of Appeal erred when they held that the ruling of the trial judge could not be a foundation for instituting an appeal. I think that ground three ought to succeed.

Ground four's complaint is in effect similar to ground 3. It states that the Justices of the Court of Appeal erred in law and in fact when they misconstrued and misapplied 0.15 Rules 4 of CPR and Direction 7 of the Commercial Court (Practice) Directions

1996 and upheld the ruling of the trial court. As a matter of fact the Justices did not uphold the ruling of the trial court because they held that it was invalid as it was made without jurisdiction. Thereafter the learned Justices glossed over the ruling. For the reasons I have given already, this ground ought to succeed.

In conclusion, I would allow the appeal in part. I would uphold the trial court judgment awarding the respondent shs 33,760,000/= with interest at 25%. However I would set aside the order dismissing the counterclaim. I would remit the record to the trial court for the trial of the counterclaim to proceed. In view of the partial success of the appeal, I would award the appellant half the costs here and in the Court of Appeal. Because of the nature of the case, I would order that the appellant

pays the decretal amount plus costs before the counterclaim is tried.

JUDGMENT OF ODOKI, CJ

I have had the advantage of reading in draft the judgment of my learned brother, Kato JSC, and I agree with it and the orders he has proposed.

As the other members of the Court also agree, with the judgment and orders proposed by Kato JSC, this appeal partially succeeds. The appeal in respect of the counter claim is allowed. The appeal in respect of the main claim in which judgment was entered in favour of the respondent is dismissed. It is ordered that the case be remitted back to the High Court for the determination of the appellants counter claim after the appellant has paid all the amount decreed in favour of the respondent in the main claim. It is further ordered that the appellant recovers half of costs in this appeal and in the Court of Appeal.

***J* UDGMENT OF MULENGA *J* SC**

I had advantage of reading in draft the judgment prepared by my learned brother Kato, JSC. I concur in the judgment and the orders he proposes. I have nothing to add.

JUDGMENT OF ODER, JSC

I have had the benefit of reading in draft the judgment of my learned brother, Hon. Justice Kato, JSC. I agree with him that the appeal should partially succeed. I also agree with the orders proposed by him.

I have nothing useful to add.

Dated at Mengo this 23rd day of October 2003.