IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA AND KATUREEBE JJ.S.C.

CIVIL APPEAL NO. 7 OF 2005

BETWEEN

GEOFFREY GATETE
ANGELLA MARIA NAKIGONYA ::::::::::::::::::::::::APPELLANTS

AND

WILLIAM KYOBE::RESPONDENTS

(Appeal from decision of the Court of Appeal (Okello, Engwau & Byamugisha JJ.A) at Kampala in Civil Appeal No.57/04 dated 3rd November 2004).

JUDGMENT OF MULENGA JSC.

This appeal originates from a summary suit instituted in the High Court by William Kyobe, the above named respondent, in which he obtained a consent judgment against GMT Group, a business firm comprising three partners, namely Geoffrey Gatete and Angella Maria Nakigonya, the above named appellants, and one Matsiko Kasiimwe. The appellants applied to the trial court for orders *inter alia* to

set aside the said judgment and for leave to appear in and defend the suit. The trial judge dismissed their application and the Court of Appeal also dismissed their appeal, hence this second appeal.

In the suit, the respondent sues for the sum of shs.17,000,000/- he allegedly loaned to the partnership firm and for profit which was payable in case of default, at the rate of shs.50,000/- per day. Under the loan agreement dated 5th February 2002, the loan was repayable on 30th March 2002. It was not paid on the due date. In an affidavit in support of the summary suit, the respondent averred that the defendant has no defence to the claim. The suit was filed in the High Court registry on 11th April 2002. On the following day, counsel for the plaintiff and Matsiko Kasiimwe for GMT group (defendant), signed a consent judgment for the sums claimed. The consent judgment was filed in court on 15th April 2002, and was formally entered and signed by the Deputy Registrar on 18th April 2002.

Apparently, the appellants first became aware of the judgment on 6th May 2002 when they were served with a Warrant of Attachment in execution of the decree, commanding the Court Bailiff to attach and sell moveable property of GMT Group, to realise the sums of shs.17,000,000/- on account of the principal, shs.1,150,000/- on account of accrued interest up to 19th April 2002, and shs.3,000,000/- on account of costs of the suit, together with further interest at the rate of shs.50,000/- per day, and costs of the execution.

The appellants immediately filed the application, praying that execution of the decree be stayed and/or set aside; that the decree be set aside; and that they be given leave to appear in and defend the suit on the grounds that –

1. service of summons was not effected on them;

2. the consent judgment was “executed” fraudulently;
3. Matsiko Kasiimwe did not enter into the loan agreement as co-partner.

The application is supported by two affidavits deponed by the appellants. Matsiko Kasiimwe swore and filed an affidavit in reply ***“to contradict what the two partners stated in their affidavits”.*** Later, the respondent also filed another affidavit in reply and the appellants filed affidavits in rejoinder.

Ogoola J., as he then was, heard the application on 11th July 2002 and dismissed it, holding that service of summons was duly effected, that Matsiko Kasiimwe had acted with ostensible authority and that the alleged fraud had not been proved. The Court of Appeal upheld the findings of the trial judge on all issues.

The grounds of appeal to this Court are that the Court of Appeal erred –

1. by unduly relying on the consent judgment and the affidavit of Matsiko Kasiimwe who was alleged to have acted fraudulently;
2. in failing to consider the said consent judgment and Matsiko’s affidavit as evidence of conspiracy with the respondent; and
3. in failing to take cognizance of the alleged illegality of the loan agreement.

In written submissions, counsel for the appellants argue the first and second grounds together. The main thrust of their submission is that there were material before the court, which showed that Matsiko Kasiimwe and the respondent conspired to defraud the partnership and the appellants. In that respect they refer first to the conduct of Matsiko Kasiimwe in entering the loan agreement and signing the consent judgment without informing the co-partners and obtaining their consent. Secondly they refer to the terms of the loan agreement and of the consent judgment that are so unconscionable as against the partnership. They contend that in the circumstances, it was erroneous for the Court of Appeal to base its decision,

as the trial court did, solely on the fact that the same Matsiko Kasiimwe accused of fraudulent conspiracy, admitted liability and signed the consent judgment purportedly for the partnership.

In the written reply, on the two grounds, counsel for the respondent contend that both courts below rightly relied upon the consent judgment because they found as a fact that it was not forged but was lawfully entered by the Registrar. Counsel argue that the allegation that Matsiko Kasiimwe intended to use that judgment to defraud the appellants was immaterial as that was not an issue before the courts for determination. Both courts had no duty to inquire if the judgment would subsequently be used to defraud the appellants as that was beyond what was before them. While on authority of ***Brooke Bond Liebig (T) Ltd. vs. Mallya*** (1975) EA 266, a consent judgment may only be set aside for fraud, collusion or for any reason which would enable the court to set aside an agreement, the appellants' allegation is not that any fraud took place prior to or after the consent judgment. What they allege is only conspiracy to defraud. Much as they may have a right to proceed against Matsiko Kasiimwe, they cannot use that to avoid the partnership liability to the respondent.

The suit was instituted under O.33 of the Civil Procedure Rules, which provides *inter alia* that a defendant shall not appear and defend in a summary suit except with leave of court granted either under r.4 prior to judgment or under r.11 after the decree. The appellants' application is under r.11 which reads –

> ***" After the decree the court may, if satisfied that the service of summons was not effective, or for any other good cause, which shall be recorded, set aside the decree, and if necessary stay or set aside execution and may give leave to the defendant to appear to the***

summons and to defend the suit, if it seems reasonable to the court so to do, and on such terms as the court thinks fit."

Both courts below held that in the instant case the service of summons was effective, by virtue of the provisions of O. 27, which governs suits against partnership firms and which provides in r.3 –

> ***"(1) Where persons are sued as partners in the name of their firm, the summons shall be served –***
>
> (a) ***upon any one or more of the partners;***
>
> (b) ***at the principal place at which the partnership business is carried on … upon any person having … the control or management of the partnership business there; or***
>
> (c) ***as the court may direct.***
>
> ***(2) The service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without Uganda…."***

(The two Orders are reproduced in the 2000 Revised Edition of the CPR and re-numbered as O.36 and O.30 respectively. For avoidance of confusion, I shall hereafter refer to the Orders as so re-numbered).

O.36 r. 11, gives the court very wide discretion to grant leave if is satisfied –

- either that service of the summons was not effective;
- or that there is any other good cause.

In either case, however, the court should grant leave only if it seems to it reasonable to do so. In the instant case, however, the courts below rejected the appellants' application not so much in exercise of that wide discretion but rather because they held (a) that there was effective service of summons; and (b) that there was no good cause for setting aside the consent judgment. I will consider the two holdings separately.

In the trial court, counsel for the respondent simply submitted: ***"Service was duly effected under*** [O.30 r.3]***"***. In his ruling the learned trial judge held:

> ***"Court is satisfied that indeed service was duly effected under*** [O.30 r.2] (sic) ***of the CPR on Matsiko, a partner in the GMT Group."***

In the Court of Appeal, the appellants attacked that holding contending that it was not based on any evidence before the trial court. The Court of Appeal considered the issue at length. In the lead judgment, Okello J.A. noted that the applicable rule provides for three modes of service of summons on a partnership, one of which is service upon any one or more of the partners. He found that although there was no direct evidence that any of the partners was served, the following was sufficient material on which the trial judge satisfied himself that there had been effective service, namely –

> ***"- the consent judgment executed by Matsiko Kasiimwe and counsel for the respondent after the summons had been issued;***
> ***- affidavit sworn by Matsiko Kasiimwe on 17.5.02 in which he***
> ***(a) admitted he had taken on behalf of the partnership (the) loan from the respondent;***
> ***(b) his failure to deny in the affidavit that he had been served with the summons."***

The learned Justice of Appeal then concluded –

> ***"In the circumstances, I am satisfied that <u>the trial judge was justified to find that there was effective service</u>. Failure to file an affidavit of service was not fatal, particularly as <u>Matsiko Kasiimwe, the partner served, responded by executing a consent judgment in favour of the respondent. It meant that he had no defence to the suit as he was properly served.</u>"*** (Emphasis is added)

In the view of the learned Justice of Appeal, service on one partner who then submits to judgment binds the other partners notwithstanding that those others knew nothing about the suit and did not agree to submit to judgment. With due respect, I do not find any legal support for this view.

O.30 sets out rules governing suits by or against partnership firms or persons operating under business names. Rules 3, 6 and 7 of that Order relate to service of, and appearance to summons. Rule 3, which I have already reproduced, provides that service of summons in the manner prescribed ***"shall be deemed good service upon the firm sued"***. Rules 6 and 7 read –

> ***" 6. <u>Appearance of partners</u>.***
> ***Where persons are sued as partners in the name of their firm, <u>they shall appear individually in their own names</u>, but all subsequent proceedings shall nevertheless continue in the name of the firm.***
> 7. ***<u>No appearance except by partners</u>.***
> ***Where a summons is served in the manner provided by rule 3 of this Order upon a person having the control or management of the partnership business, no appearance by him or her shall be necessary unless he or she is a partner of the firm sued."***

From reading the three rules together, it is evident that *"deeming service"* in any of the modes provided by r.3 to be *"good service upon the firm"* is premised on an assumption that the person served will ensure that all the partners sued under the firm name ultimately receive the summons. Hence the mandatory requirements under rr.6 and 7, that the partners, and only the partners, have to enter appearance in their individual names. This is so because a suit against a partnership firm is in essence a suit against the individual partners jointly and severally. Obviously, the partners cannot comply with the requirement to enter appearance where they are not made aware of the summons and the suit.

Needless to say, O.30 r.3 does not constitute a partnership firm into a corporate legal person nor does it vest in the person served, power of attorney to act for all the partners of the firm sued. The rule provides the alternative modes of service only for expediency. It must not be construed as compromising the right of any

partner to know of a suit instituted against him or her under the firm name and to have opportunity to decide whether or not to enter appearance and defend; or in the case of a summary suit, to decide whether or not to apply for leave to appear and defend.

It is apparent that in concluding that the assumed service on Matsiko Kasiimwe was effective service, the courts below took the expression *"deemed good service"* referred to in O.30 r.3 and the expression *"effective service"* referred to in O.36 r.11 to mean the same thing and actually used them interchangeably. In my view, the two expressions are significantly different.

The Oxford Advanced Learners' Dictionary defines the word "effective" to mean "having the desired effect; producing the intended result". In that context, effective service of summons means service of summons that produces the desired or intended result. Conversely, non-effective service of summons means service that does not produce such result. There can be no doubt that the desired and intended result of serving summons on the defendant in a civil suit is to make the defendant aware of the suit brought against him so that he has the opportunity to respond to it by either defending the suit or admitting liability and submitting to judgment. The surest mode of achieving that result is serving the defendant in person. Rules of procedure, however, provide for such diverse modes of serving summons that the possibility of service failing to produce the intended result cannot be ruled out in every case.

For example, in appropriate circumstances service may be lawfully made on the defendant's agent. If the agent omits to make the defendant aware of the summons, the intended result will not be achieved. Similarly, the court may order substituted

service by way of publishing the summons in the press. While the publication will constitute lawful service, it will not produce the desired result if it does not come to the defendant's notice. In my considered view, these are examples of service envisaged in O.36 r.11 as *"service* (that) *was not effective."* Although the service on the agent or the substituted service would be *"deemed good service"* on the defendant entitling the plaintiff to a decree under O.36 r.3, if it is shown that the service did not lead to the defendant becoming aware of the summons, the service is *"not effective"* within the meaning of O.36 r.11. (See ***Pirbhai Lalji vs. Hassanali,*** (1962) EA 306).

The word "deemed" is commonly used in legislation to create *legal or statutory fiction*. It is used for the purpose of assuming the existence of a fact that in realty does not exist. In ***St. Aubyn (LM) vs. A.G.*** (1951) 2 All ER 473, at p.498 Lord Radcliffe describes the various purposes for which the word is used where, he says –

> ***"The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible."***

In my view, the expression *"service that is deemed to be good service"* is so broad that it includes service that might not produce the intended result, which therefore is not effective.

In the instant case, there is no evidence of service on any partner at all. The courts below inferred that the summons was served on Matsiko Kasiimwe from the fact

that he signed the consent judgment, notwithstanding the contention by the appellants that he did so in pursuit of a fraudulent conspiracy. With due respect to the Court of Appeal, I think it was not reasonable to draw from Matsiko Kasiimwe's "***failure to deny in his affidavit that he had been served with summons"*** an inference that he had been served. No one alleged that he was served to necessitate his denial. On the contrary, since his affidavit was made to contradict his partners' averments, which included the averment that they were not served with the summons, one would have expected him to aver that contrary to the allegations of the appellants he was duly served. To say the least, I find it odd, albeit inconclusive, that no such averment appears in his affidavit.

Be that as it may, the appellants were not served. In view of the haste in which Matsiko Kasiimwe signed the consent judgment, I do not find it plausible, as he alleges, that he consulted the appellants prior to signing the judgment. I find it more probable that the appellants became aware of the suit at the time of execution of the decree. Consequently, for the reasons I have given, even if, as the courts below inferred, Matsiko Kasiimwe was served with the summons, I would hold that the service was not effective.

I now turn to the second holding, namely that there was no other good cause for granting leave to the appellants to defend the suit, which underlies the findings that Matsiko Kasiimwe had ostensible authority to borrow on behalf of the partnership; and that the appellants did not plead particulars of, and did not strictly prove the alleged fraud.

I should stress that in an application for leave to appear and defend a summary suit, the court is not required to determine the merits of the suit. The purpose of the

application is not to prove the applicant's defence to the suit but to ask for opportunity to prove it through a trial. What the court has to determine is whether the defendant has shown good cause to be given leave to defend. Apart from ineffective service of summons, what the courts have consistently held to amount to good cause is evidence that the defendant has a triable defence to the suit.

From the application and the affidavits in support thereof, in the instant case, it is evident that the appellants wish to defend the suit on the principal ground that the loan agreement is not binding on them. First, they contend that though Matsiko Kasiimwe purportedly entered into it on behalf of the partnership, he did so without authority. Secondly they contend that the alleged loan was not utilised by or for the partnership. While the respondent and Matsiko Kasiimwe allege that the loan was for payment to the suppliers of a consignment of used tyres shipped to the partnership firm from Denmark and for payment of import duties and clearing charges in respect of that consignment, the appellants allege that the partnership bought and imported the tyres from the said Matsiko Kasiimwe who apparently carries on business as MTL-Multi Invest of Denmark, on credit; and that the import duties/taxes and clearing charges in respect of the said goods were paid by the appellants partly from money provided by the 1st appellant and partly from money borrowed from one Gerald Lukyamuzi. Each side produced documents in support of the respective contentions. Further the appellants contend that the consent judgment is not binding on them because Matsiko Kasiimwe was not authorized to consent to it on behalf of the partnership firm, but did so in fraudulent conspiracy with the respondent.

In my opinion, if the appellants' contentions that Matsiko Kasiimwe acted without authority, and that the firm did not utilise the alleged loan, are proved to the

required standard they could constitute valid defence to the suit. With due respect to the Court of Appeal, it was erroneous to hold that because Matsiko Kasiimwe admitted liability by signing a consent judgment, his partners, the appellants, had no defence to the suit. Similarly, having regard to the appellants' averments, whether the said Matsiko Kasiimwe acted fraudulently either in entering into the alleged loan agreement or in consenting to the judgment is a triable issue. The time to give particulars of fraud and to strictly prove it will be at the time of filing the defence and of adducing evidence respectively.

For the reasons I have outlined, I would hold that there was no effective service of summons and that the appellants have shown a triable defence to the suit. In my view, if the learned trial judge and Justices of Appeal had correctly directed themselves they would have concluded, as I do, that it is reasonable to grant the appellants leave to defend the suit. Accordingly, the first and second grounds of appeal ought to succeed. I think this disposes of the appeal and I need not consider the third ground of appeal.

In the result I would allow the appeal, and set aside the judgments of the courts below. I would also set aside the consent judgment in the summary suit and grant to the appellants unconditional leave to appear and defend that suit. I would award costs of the appeals in this Court and in the Court of Appeal and of the application in the High Court to the appellants in any event.

DATED at Mengo this 21st day of September 2007.

J.N. Mulenga,

Justice of Supreme Court

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT MENGO

[CORAM: TSEKOOKO, KAROKORA (RETIRED), MULENGA, KANYEIHAMBA AND KATUREEBE JJSC.]

CIVIL APPEAL No. 7 OF 2005

BETWEEN

1. **GEOFREY GATETE** } **:::: APPELLANTS**
2. **ANGELA MARIA NAKIGONYA** }

VERSUS

WILLIAM KYOBE :::::::::::::: RESPONDENT

[Appeal from the judgment of the Court of Appeal at Kampala (Okello, Engwau and Byamugisha, JJ.A) dated 3rd November, 2004 in Civil Appeal No. 57 of 2004].

JUDGMENT OF TSEKOOKO JSC

I have had the advantage of reading in advance the judgment which has just been delivered by my learned brother, the Hon. Mr. Justice Mulenga, JSC., and I agree with his reasoning on the points of law raised in the appeal and his conclusion that this appeal should

be allowed. I also agree with the orders which he has proposed.

As we were in process of setting down this appeal for judgment, our attention was drawn to a document entitled **Consent settlement out of Court** by which ***inter alia*** the appellants agree to withdraw this appeal. The document was lodged in the registry on 11th this month.

The document does not cite the law under which it was lodged in court. However, it would seem that this was done under **Rule 90(1)** of the **Rules** of this Court which reads as follows:

"90(1) An appellant may, at anytime after instituting his or her appeal and ***BEFORE THE APPEAL IS CALLED ON FOR HEARING,*** *lodge in the Registry, notice in writing that he or she does not intend further to prosecute the appeal".*

The rest of the rule explains the consequences.

In **G.M. Combined (U) Ltd. Vs. Fulgence Mungereza** (Supreme Court Civil Application Nos. 16 of 1998) which was consolidated with Civil Applications Nos.17 to 19 of 1998, this Court held that it can permit an appellant who seeks to withdraw his/her appeal to do so if an application to do so is lodged in the manner

prescribed by Rule 90 in which case the consequences stipulated by the rule will apply.

It is clear that what the appellants here seek to achieve should have been done before the hearing of the appeal and not after the hearing. In this particular appeal this document is irrelevant now. However, this does not prevent parties from effecting their wishes in the High Court.

As the other members of the Court agree, the appeal is allowed in the terms proposed by Mulenga JSC.

Delivered at Mengo this 21st day of September 2007.

J. W. N. Tsekooko
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA, & KATUREEBE, JJ.S.C.)

CIVIL APPEAL NO. 7 OF 2005

BETWEEN

GEOFFREY GATETE
ANGELLA MARIA NAKIGONYA } **:::::::::::::::::: APPELLANT**

AND

WILLIAM KYOBE :::::::::::::::::::::::::::::::::::: RESPONDENT

(Appeal from decision of the Court of Appeal (Okello, Engwau & Byamugisha, JJA) at Kampala in Civil Appeal No. 57/04 dated 3/11/2004)

JUDGMENT OF KANYEIHAMBA, JSC.

I have had the benefit of reading in draft the judgment of my learned brother Mulenga, J.S.C and for the reasons he has ably given, I agree with him that this appeal be allowed. I also concur in the orders he has proposed.

Dated at Mengo, this 21st day of September 2006

G.W. Kanyeihamba

JUSTICE OF SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

[CORAM: TSEKOOKO, KAROKORA (RETIRED), MULENGA, KANYEIHAMBA AND KATUREEBE JJ.SC]..

CIVIL APPEAL NO. 7 OF 2005

B E T W E E N

1. **GEOFREY GATETE** } **::::::::::: APPELLANTS**
2. **ANGELA MARIA NAKIGONYA**

VERSUS

WILLIAM KYOBE ::: RESPONDENT

[Appeal from the judgment of the Court of Appeal at Kampala (Okello, Engwau and Byamugisha, JJ.A) dated 3rd November, 2004 in Civil Appeal No. 57 of 2004].

JUDGMENT OF KATUREEBE, JSC

I have had the benefit of reading, in draft, the judgment of my brother Mulenga, JSC, and I fully concur in the judgment and the orders he has proposed therein.

Dated at Mengo this 21st day of September 2007

Bart M. Katureebe
JUSTICE OF THE SUPREME COURT