

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

CIVIL APPEAL NO. 32 OF 2021

(An appeal from Misc. App No. 21 of 2021)

(Arising from Misc. App No. 43 of 2019)

**(Also arising from Entebbe Civil Suit No. 19 of 2019 against the whole
decision of the Chief Magistrate's Court Holden at Entebbe dated 26th May
2021)**

1. LUSWATA RICHARD

2. NOAH NAMBARE:..... APPELLANTS

VERSUS

ASIIMWE CHARLES:..... RESPONDENT

BEFORE: HON. LADY JUSTICE ANNA B. MUGENYI

RULING

Introduction

This is an appeal from the judgement and orders of Her Worship Juliet Nakitende, Chief Magistrate (Trial Magistrate) made on the 26th day of May 2021 in the Chief Magistrates' Court of Entebbe, Miscellaneous Application No. 21 of 2021, arising from Miscellaneous Application No. 43 of 2019, and also arising from Entebbe Civil Suit No. 19 of 2019.

Background

The brief background to this appeal is that the Respondent filed Civil Suit No. 19 of 2019 for recovery of UGX 36,000,000/ being money given to the Appellants for purchase of 30 heads of cattle plus interest and costs.

The Appellants filed Miscellaneous Application No. 43 of 2019 seeking for leave to appear and defend, which was fixed for hearing on the on the 11th July 2019. The Application was dismissed under Order 9 Rule 22 of the Civil Procedure Rules SI 71-1 for non- appearance of the Defendant/Appellants.

Subsequently, the Appellants filed Miscellaneous Application No. 144 of 2019 seeking reinstatement of Miscellaneous Application No. 43 of 2019 and to set aside the dismissal order. The said application was struck out for failure to attach a copy of express authority given to the 1st Appellant by the 2nd Appellant to swear the affidavit on his behalf.

The Appellant engaged new lawyers who filed Miscellaneous Application No. 21 of 2021 seeking for setting aside of the dismissal order and the judgment entered against the Appellants dated on 11th July 2019 and that Miscellaneous Application No. 43 of 2019 be reinstated. The Application was dismissed, and the Appellants being satisfied with the whole decision filed this Appeal on the grounds below.

Grounds of the Appeal

The Appeal raises five grounds to wit:

1. The learned Chief Magistrate erred in law and in fact in overruling the preliminary objection that the Respondent's affidavit in reply in Miscellaneous Application No. 21 of 2021 arising out of Miscellaneous Application No. 43 of 2019, and also Civil Suit No. 19 of 2019 was

improperly before the trial Court, thereby arriving at a wrong conclusion thereby prejudicing the Appellant.

2. That the learned Chief Magistrate erred in law and in fact in failing to make a finding that Miscellaneous Application No. 21 of 2021 arising out of Miscellaneous Application No. 43 of 2019 and also arising Civil Suit No. 19 of 2019 was unchallenged.
3. That the learned Chief Magistrate erred in law and in fact when she held that the Appellants failed to prove that they should be heard interparty and on merit whereas not, thereby arriving at wrong conclusion to the prejudice of the Appellants.
4. That the learned Chief Magistrate erred in law and in fact when she dismissed Miscellaneous Application No. 21 of 2021 arising from Miscellaneous Application No. 43 of 2019 and Civil Suit No. 19 of 2019 without properly evaluating the evidence and pleadings before Court thereby arriving at a wrong conclusion to the prejudice of the Appellants.
5. That the learned Chief Magistrate erred in law and in fact when she dismissed Miscellaneous Application No. 21 of 2021 arising from Miscellaneous Application No. 43 of 2019 and Civil Suit No. 19 of 2019 on account of not filing the same immediately without evaluating the circumstances that caused the delays.

REPRESENTATION

The Appellant was represented by M/S Zahura & Company Advocates whereas the Respondent was represented by M/S Praxlex Advocates. Both parties filed written submissions which have been considered in this Ruling.

Right of appeal

As rightly submitted by Counsel for the Appellant, appeals under Order 9 rule 23 from orders made under Order 9 Rule 22, lie as of right as stipulated under Order 44 Rule 1 (1) (b), and he added that Miscellaneous Application No. 21 of 2021 was dismissed under that same order, therefore that the Appellant has a right of appeal.

Duty of first Appellate court

Before I delve into the merits of the Appeal, it is important to note that the duty of the First Appellate Court is to evaluate evidence and arrive at its own decision. Courts have discussed this principle severally, in *Kifamunte Henry v Uganda Criminal Appeal No. 10 of 1997* which was quoted in *Fredrick Zaabwe v Orient Bank SCCA No. 4 of 2006* where Court held that:

"The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate court must then make its own mind not disregarding the judgement appealed from but carefully weighing and considering it."

Ground 1

Counsel for the Appellant submitted that the learned Chief Magistrate erred when she overruled the preliminary objection that the Respondent's affidavit in reply in Miscellaneous Application No. 21 of 2021 was improperly before Court, on account that the Applicant equally did not file their notice of motion and serve within 15 days as required by Order 12 Rule 2 of the Civil Procedure Rules which requires that all replies must be made within 15 days. He submitted that the said affidavit was filed out of time in contravention of Order 12 Rule 3 (2) of the Civil Procedure Rules. He contends that the application was served on the Respondent

on 9th March 2021 and the affidavit in reply filed on 31st March 2021 which is 22 days later, outside the 15 days without leave of court to file outside time.

In reply, Counsel for the Respondent submitted that the Appellant misconceived Order 12 which deals with scheduling conference and alternative dispute resolution, and that rule 3 deals with interlocutory applications after completion of the dispute resolution. That the right law for the filing and service of these kind of applications is Order 5 of the Civil Procedure Rules given that it did not arise after a scheduling conference or an alternative dispute resolution. In the alternative, Counsel submitted that even if Court were to go by the provisions of Order 12 Rule 3, which allows 21 days within which the applicant should file and serve their application after the scheduling conference, it would still imply that the application was served out of time. He added that an affidavit in reply forms part of evidence, and that the strict rule of pleadings does not apply to affidavits.

I have looked at the affidavits and submissions of both parties and hold as follows. Order 12 Rule 3 sub rule 2 of the Civil Procedure Rules which the Applicant is relying on is in regard to interlocutory applications filed either after completion of alternative dispute resolution or after completion of the scheduling conference, as seen in sub-rule 1 below:

"All remaining interlocutory applications shall be filed within twenty-one days from the date of completion of the alternative dispute resolution and where there has been no alternative dispute resolution, within fifteen days after the completion of the scheduling conference; that date shall be referred to as the cutoff date."

Justice Madrama held a similar view in ***Stop and See (U) Ltd vs. Tropical Africa Bank Ltd HCMA No.333 of 2010*** where he held:

"It is however my finding that Order 12 rule 3 sub rule 2 is meant to give the timelines for all interlocutory applications that are envisaged after the completion of the scheduling conference or alternative dispute resolution. There are other kinds of interlocutory applications which are catered for in the preceding rules to rule 3 of order 12 that I have outlined above. I do not need to outline exhaustively the kinds of interlocutory applications envisaged in rule 1 and 2 of order 12. I may say that they deal with inter alia applications that do with interrogatories, discovery and alternative dispute resolution. The rest of interlocutory applications are covered by order 12 rule 3. The logical conclusion is that this application falls outside the provisions of order 12 itself."

Similarly, Miscellaneous Application No. 21 of 2021 which is subject to this appeal does not fall under either of the two circumstances mentioned above in Order 12 rule 3 sub rule 1, as the suit had not yet undergone scheduling and neither had it been referred for alternative dispute resolution.

Whereas Justice Madrama in *Stop and See (U) Ltd vs. Tropical Africa Bank Ltd* (supra) held that the general timelines applicable to pleadings under Order 5 is applicable to such applications as this, Justice Stephen Mubiru in *Lam-Lagoro V Muni University Miscellaneous Civil Cause No. 7 of 2016* elaborated why an affidavit in reply cannot be restricted to the timelines for filing of a defence under Order 5 and held thus:

"Unlike a written statement of defence which serves only one purpose of disclosing the case a defendant proposes to put forward or serving as a means of disclosing the facts which support particular issues raised by each party, an affidavit can be used in a number of important ways, most often as containing evidence to support or oppose an application. The affidavit becomes evidence in the

case...consequently, time constraints applied to defences may be misplaced when applied to affidavits”

The learned Judge goes on to say that the reason why the Rules Committee did not specify the time limits for the filing of affidavits in reply because it is indicative of the flexibility with which it intended Courts to deal with them. He concluded by saying that:

“An affidavit in reply, being evidence rather than a pleading in stricto sensu, should be filed and served on the adverse party within a reasonable time before the date fixed for hearing, time sufficient to allow that adverse party a fair opportunity to respond.”

Firstly, I find it appropriate to affirm that the Notice of Motion in Miscellaneous Application 21 of 2021 was served within 21 days, as it was issued on 03/03/21 when it was signed and the acknowledgment of service was on 09/03/2021; which is clearly within the 21 days of service, contrary to what the Trial Magistrate found because she erroneously counted the days within which the application should have been served from 15/02/2021 when the Notice of Motion was lodged in the registry as opposed to 03/03/2021 when it was signed or issued.

Subsequently, whereas it is true that the Respondents were served on 03/03/2021 and they filed their affidavit in reply on 31/03/2021, basing on the above authority, the affidavit in reply was properly before Court and therefore there was no error on the part of the Trial Magistrate in overruling the preliminary objection. It was the right thing to do to consider the application on its merits. The only issue that would arise would have been whether or not the affidavit in reply had been filed within a reasonable time to allow the Applicant/Appellant make his rejoinder before the

hearing date. In the event that it had not, the only recourse would have been in granting an adjournment and awarding costs to the Applicant.

Therefore, the first ground fails.

Ground 2

Since the first ground fails, it follows therefore that Miscellaneous Application No. 21 of 2021 was not unchallenged, and that is why the Trial Chief Magistrate considered it on its merits, and it was rightly so. Therefore, the second ground fails too.

Ground 3

Counsel for the Appellant submitted that the learned Trial Magistrate erred on page 8 of her ruling when she said that the Appellants had failed to prove that they wished to be heard interparty, without referring to any evidence on court record or stating any reason for rejecting the evidence contained in the affidavit in support and in rejoinder of the Application.

In reply, Counsel for the Respondent relied on the case of *Nakiridde V Hotel International Ltd [1987] 85* to submit that the applicant needs to show desire to be heard and that he acted diligently in pursuing the right to be heard. He added that the Trial Magistrate had shown that the applicant's pleadings did not demonstrate such desire as it had taken them one year without taking any steps in pursuing their case.

I have considered submissions of both Counsel and looked at page 7 of the said ruling where, before concluding that the Applicants had failed to prove that they indeed wished to be heard interparty and on merit, the Trial Magistrate stated:

"Had the applicants wanted to be heard on merit then they would have filed Miscellaneous Application No. 80 of 2020 to set aside the dismissal of Miscellaneous Application No. 43 of 2019 immediately. Alternatively had they immediately sought the leave to appeal the dismissal."

Therefore, it is apparent that she based her decision on the Appellant's failure to immediately file the said application, but she forgot that Miscellaneous Application 144 of 2019 which was dismissed for having a defective affidavit in support was filed for the same prayers to have the default judgment and for the reinstatement of Miscellaneous Application 43 of 2019. Having a defective affidavit is a mistake of Counsel that should not be imputed on the litigant, and the Supreme Court expounded on this principle in the case of ***Banco Arabe Espanol Vs. Bank of Uganda, SCCA No. 8 of 1998*** where it held that;

"A mistake, negligence, oversight or error on the part of counsel should not be visited on the litigant. Such mistake, or as the case may be, constitutes just cause entitling the trial judge to use his discretion so that the matter is considered on its merits."

Whereas, it is true that a litigant must show that he acted diligently to show interest in their case, the circumstances of this case show that the litigants were severally let down by their counsel as regards the applications filed, therefore, if the Trial Magistrate's reason for holding that the Appellants had failed to prove that they indeed wished to be heard interparty and on merit based on the delays and mishaps pointed out, then she erred in law and in fact because the nature of applications filed were beyond the Appellants, and were based on the advice of the lawyers. Therefore, to that extent, this ground succeeds, however, it does not answer the question whether or not they had sufficient cause for non-appearance that led to the

dismissal of Miscellaneous Application No. 43 of 2019, which can only be conclusively answered upon re-evaluating the evidence. Ground 4 will settle that.

Ground 4

Counsel for the Appellant submitted that the learned Chief Magistrate erred by not properly evaluating the evidence on record, because if she had done so, she would have found that the Appellants had sufficient cause warranting setting aside the default judgement and reinstating Miscellaneous Application No. 43 of 2019.

He submitted that a decree issued under Order 36 Rule 3 (2) can be set aside under Order 36 Rule 11. He further cited the Supreme Case of *Geoffrey Gatete & Another V William Kyobe SCCA No. 07 of 2015* where Court outlined ineffective service and just cause as the reasons for setting aside. He added that the Appellants had taken reasonable steps in instructing their former lawyers M/S Human Rights Awareness and Promotion Forum to file Miscellaneous Application No. 43 of 2019 on their behalf, but that the lawyers did not inform them of the hearing date, and neither did they appear therefore the Application was dismissed under Order 9 Rule 22 which precludes them from filing a fresh suit but allows applying for an order to set aside. Counsel submitted that mistake of Counsel cannot be visited on the Appellants who are illiterate litigants.

Secondly, Counsel submitted that the trial Court did not evaluate the evidence on existence of a triable issue which is a good cause. He cited the earlier case of *Geoffrey Gatete & Another V William Kyobe* (supra) in support, and stated that the Appellants had good cause but that the trial Court did not evaluate the evidence. He then pointed out that paragraph 3 of the affidavit in support of this application shows that civil suit No. 19 of 2019 is severely challenged, which shows no arrangement endorsed between the parties, and possible forgeries of the

alleged agreements. He concluded that if the learned trial Magistrate had evaluated such evidence, she would have allowed the Appellants to be heard on merit by allowing Miscellaneous Application No. 21 of 2021.

In reply, Counsel for the Respondent submitted that the Trial Magistrate stated that she had considered the evidence and found that it was not sufficient to warrant set aside. He cited case law that shows sufficient cause is interpreted where no negligence, inaction, or want of bona fides is imputed. He added that in this case the Appellants ought to have shown sufficient cause why they did not attend court, which they did not because they filed an application for leave to appear and defence but did not follow up or appear in court after the Respondent fixed it for hearing and even served them. He added that there was unexplainable delay in filing Miscellaneous Application No. 21 of 2021 to set aside the dismissal. That since there must be an end to litigation, this appeal must be dismissed.

In rejoinder, Counsel for the Respondent reiterated that the Trial Magistrate did not weigh the evidence presented in the affidavits, and that if she had, she would have reached a different decision, and that mistake of Counsel cannot be imputed on the litigant.

I have looked at the evidence and submissions on this ground. In Miscellaneous Application No. 21 of 2021 the Appellant had prayed for an order setting aside judgment/decreed dated 11/07/2019 entered in Civil Suit No. 19 of 2019, an order setting aside the order dismissing Miscellaneous Application No. 43 of 2019 and that it be reinstated.

Bearing in mind that it is the duty of the first appellate Court to re-evaluate evidence and reach its own decision, I will handle each separately starting with the first.

a. Whether the judgement/decree dated 11/07/2019 entered in Civil Suit No. 19 of 2019 should be set aside?

Order 36 rule 11 of the Civil Procedure Rules permits the Court to set aside a default judgment if it seems reasonable on two grounds; either upon satisfaction that the service of summons was not effective or for good cause. In ***Geoffrey Gatete & Another versus William Kyobe SCCA No. 07 of 2015***, which was cited for the Appellants in the trial Court, the Supreme Court explained that a decree can be set aside under Order 36 rule 11 where there was ineffective service and where the defendant has a just cause.

From paragraph 4 of the 1st Applicant's affidavit in support of the Notice of Motion in Miscellaneous Application No. 21 of 2021, the 1st Appellant acknowledges that they were served with court process in Civil Suit No. 19 of 2019, therefore that leaves court with one ground as to whether the Appellants have good cause that warrants setting aside of the decree specifically the existence of triable issues for which the Appellants would be granted leave to appear and defend. The meaning of 'a triable issue' was explained by Court in ***Makula Interglobal Trade Agency V Bank of Uganda [1985] HCB 65 at 66*** where it held that:

"When there is a reasonable ground of defence to the claim, the defendant is not entitled to summary judgment. The defendant is not bound to show a good defence on the merits but should satisfy court that there was an issue or question in dispute which ought to be tried and the court shall not enter upon the trial of issues disclosed at this stage."

In this case, under paragraph 3 of his affidavit in support of the Application, the 1st Appellant/Defendant alleges forgery on the part of the Respondent/Plaintiff stating

that he had never endorsed on the annexures and that he had never entered into any arrangements with the Respondent for the purchase of cattle. Further, in Annexure B to the affidavit in support of Miscellaneous Application No. 21 of 2021, under paragraphs 4 to 6 of his affidavit in support of notice of motion in Miscellaneous Application No. 043 of 2019, he denied taking any money from the Respondent for the purchase of cattle but admitted to having borrowed money from a one Rwankiiko Nathan and the Respondent, but added that he paid it back.

Whereas the 1st Appellant has not produced evidence of how much money he had borrowed and when he paid back, I find that the issue of forgery is a serious one that ought to be tried together with ascertaining whether or not the Appellants made any payments.

It is trite law where there are triable issues, the defendant must not be shut out. In ***Miter Investments Ltd Vs. East African Portland Cement Co. Ltd, M.A No. 0336 of 2012*** it was held that;

"In order to avoid judgment being entered for the plaintiff, the defendant must show that there is a triable issue or that for some other reason, there ought to be a trial. Where the defendant raises a triable issue on his affidavit, he must not at this stage be shut out, and must have leave to defend, although his case may appear to be a weak one. On the other hand, mere denials of the plaintiff's case are insufficient. The defendant must clearly disclose the nature and extent of his defense in a clear language."

Although the Appellant's case may seem weak as at this point because the evidence may not be sufficient, they have a triable issue therefore I find that it is just cause for setting aside the decree entered in Civil Suit No. 19 of 2019. Therefore, the Trial Magistrate erred in law and in fact when she failed to evaluate

the evidence and failed to find that the Appellants had just cause for setting aside the default judgment.

b. Whether the order dismissing Miscellaneous Application No. 43 of 2019 should be set aside and the application be reinstated?

Under Order 9 Rule 23 of the Civil Procedure Rules, where a suit was dismissed when only the Defendant appears under Rule 22, the Court can make an order setting aside the dismissal upon being satisfied that there was sufficient cause for the nonappearance when the suit was called for hearing. 'Sufficient cause' was explained in the case of *Bishop Jacinto Kibuuka V The Uganda Catholic Lawyers Society & 2 Others Miscellaneous Application No. 696 of 2018* as follows:

".....sufficient cause means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been not acting diligently or remaining inactive."

In this case, the Appellants allege illiteracy, and that they had instructed their former lawyers, in whom they trusted, to act on their behalf. They contend that they had not been informed about the hearing date by the said lawyers who were also not in court, hence the dismissal.

I have taken cognisance of the authorities cited to the effect that mistake of counsel should not be imputed on the litigant, however, this is only limited to mistakes which amount to an error of judgment on the part of counsel. Lady Justice Arach Amoko expounded on this in *Kiirya Grace Wanzala V Daudi Migereko & Another Court of Appeal Election Reference Appeal No. 39 of 2012* where she held:

“.....a litigant should not be penalised by mistake of his counsel. This only benefits litigant if the mistake of counsel amount to an error of judgement.”

Therefore, the Appellant's argument that their former lawyers did not inform them of the hearing date does not suffice. That is not only a mistake that does not amount to an error of judgment on the part of the lawyers but it also amounts to inaction and negligence on the part of the litigant. It is incumbent upon the litigant to personally follow up on their matter, therefore, the Appellants cannot rely on mistake of Counsel.

However, **Section 98 of the Civil Procedure Act** allows Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. In addition, the administration of justice requires that the substance of all disputes should be investigated and the cases be decided on their merits; and that errors and lapses should not necessarily debar a litigant from pursuing his rights (See *Essaji and Ors V. Solanki (1968) E.A 218*).

Therefore, the requirement to have cases decided on their merits is sufficient cause to set aside the order dismissing Miscellaneous Application No. 43 of 2019.

Ground 5

Counsel for the Appellant argued that the Trial Magistrate erred in law and fact when she dismissed Miscellaneous Application No. 21 of 2021 on account of not filing the same immediately without evaluating the circumstances that caused the delays. He contends that the litigants are illiterates who trust in their advocates, and that the delay was occasioned by the Appellant's former lawyers who were instructed to file an application for setting aside but instead filed Application No. 144 of 2019, and then upon its dismissal filed Miscellaneous Application No. 21 of

2021. That the mistake of Counsel of filing an incompetent application cannot be visited on the Appellant.

Counsel also submitted that the Application was dismissed on the first day on which the matter came up for hearing and that the Appellant was not given a warning in the form of a last adjournment. That the Trial Magistrate did not consider that a technical error in filing Miscellaneous Application caused the delay which was not intentional, and that if the appeal is not allowed, the Appellant would be required to pay the UGX 36,000,000/ yet they have a valid defence against the claim, but have not been heard on merit.

In reply, Counsel for the Respondent submitted that the Trial Magistrate considered the dilatory conduct exhibited by the Appellant in the prosecution of their matters and that she relied on Article 126 (2) (b) to reach her decision. He added that after the Appellants had filed the application for leave to appear and defend, the Respondent fixed it for hearing and served them twice but they still did not appear and then the matter was dismissed. That it took them a year to file the application from which this appeal arises. Counsel prayed that the appeal be dismissed as the Appellants do not deny taking the money from the Respondent and have never paid it back, in addition to exhibiting dilatory conduct in prosecuting their matters.

In rejoinder, Counsel submitted that it was the inexcusable conduct of the Appellant's lawyers that drove the Appellants away from the seat of justice as they were condemned unheard. He prayed that the appeal be allowed.

Having considered the evidence on record, it is in dispute that there was a delay in filing Miscellaneous Application No. 21 of 2021 since the dismissal of Miscellaneous Application No. 43 of 2019. The only way to ascertain the cause of

the delays is by analysing the evidence. Miscellaneous Application No. 43 of 2019 was filed on 25/03/2019 and it came up for hearing on 11/07/2019 and was dismissed under Order 9 rule 22 of the Civil Procedure Rules. The Appellant then filed Miscellaneous Application No. 144 of 2019 on 23/10/2019 for setting aside the default judgment entered in Civil Suit No. 19 of 2018 and that Miscellaneous Application No. 43 of 2019 be reinstated. The same was also dismissed for having a defective affidavit. And finally, Miscellaneous Application No. 21 of 2021 was filed on 10/02/2021 and a ruling delivered on 26/05/2021. It was from that ruling that this appeal was filed.

From the above, whereas it is true that there is a delay in filing of this current application, it is clear that the Appellant has been in Court prosecuting several applications from the time of the dismissal of Miscellaneous Application No. 43 of 2019. Therefore, such time lag cannot be the reason why the application would be dismissed as the Appellant was prosecuting other applications in relation to the same. I agree with Counsel for the Appellant that the delay was not intentional and that the Trial Magistrate ought to have considered the circumstances under which the delay happened. On page 7 of her ruling, the Trial Magistrate noted that the Appellants should have filed Miscellaneous Application No. 80 of 2020 to set aside the dismissal or in the alternative to immediately seek leave to appeal the dismissal. I find that this is a technical issue that was decided by the lawyers, as the Appellants do not know legal procedures, and that is why they prosecuted the several applications filed by their lawyers then until they decided to change them. This ground succeeds although it has no substantial effect on the merits of the appeal.

In the premises, the ruling of the Trial Magistrate in Miscellaneous Application No. 21 of 2021 is hereby overturned. The Appeal is allowed with the following orders:

1. The default judgement entered in Civil Suit No. 19 of 2019 is hereby set aside and the matter be reinstated.
2. The order dismissing Miscellaneous Application No. 43 of 2019 arising from Civil Suit No. 19 of 2019 is hereby set aside and the same be reinstated.
3. No order as to costs.



HON LADY JUSTICE ANNA B. MUGENYI

DATED.....25/5/23.....