THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL UGANDA AT KAMPALA

CIVIL APPEAL NO 008 OF 2005

[Arising The Ruling Of The High Court Of Uganda At Kampala In Misc. Appl No.762 Of 2004 Arising From H.C.C.S No.643 Of 2004 Dated 24th November 2004 Delivered By The Honourable Edmund Sempa Lugayizi J. (as he then was)]

AMER NAGY==========APPELLANT

VERSUS

1. EKAME JOHN

2. KASEREKA TWAYAYE HILLARY } **==========RESPONDENTS**

CORAM HON MR.JUSTICE KENNETH KAKURU JA

HON MR.JUSTICE GEOFREY KIRYABWIRE JA

HON MR. JUSTICE CHRISTOPHER MADRAMA JA

BACKGROUND

This is an appeal from an ex-parte judgment of the High Court delivered on 15th October 2004. In that matter Mr. Amer Nagy, (the appellant) was committed to civil prison and ordered to pay Ekame John and Kasereka T. Hillary (the

respondents) money being owed to them together with interest on the sum and costs of taking out the execution. On the 24th November 2004 the appellant applied to court to set aside the ex-parte judgment. The application was dismissed with costs. He now appeals to the court of appeal.

The facts

This is a first appeal originating from the suit of the first and second respondents filed in the High Court of Uganda (commercial division) at Kampala against the appellant and Sama East Africa Ltd claiming breach of agreement to pay a sum of US $38,750(United States Dollars Thirty eight thousand seven hundred fifty only). On 24th June, 2004 the Respondent filed a suit at the High Court Civil suit (HCCS No.643 of 2004) against the appellant and Sama East Africa Limited, for recovery of the sum of US $38,750 (United States Dollars Thirty eight thousand seven hundred fifty only) which he had not paid to the respondents when the respondents supplied him with 2,100kgs of tantalite ore at an agreed price of US $ 21 per kg.

The appellant paid the respondent US $ 5,350 and guaranteed to pay the rest of the amount with a cheque dated 6th July, 2000. The appellant breached the contract to pay the balance of US $ 33,000. The respondents then filed a suit under summary procedure dated 24th June 2004 for recovery of the balance.

After being served with summons and copy of the plaint, the appellant did not file a defence within the prescribed time. On 24th November, 2004 an ex-parte judgment was entered against the appellant to pay the said sum. Counsel for the appellant thereafter prayed for leave to appeal and also that execution be stayed.

The applicant then made an application to set aside the ex-parte judgment under Order 33 rule 11 (now Order 36 rule 11). In his application to the High court to set aside ex-parte judgment he advanced two grounds namely;

a) **The applicant was wrongly sued and had a full defence to the respondent.**
b) **The suit contract was an illegal contract and unenforceable under the law and /or did not disclose a cause of action against the defendants.**

The second respondent opposed the application and maintained in his affidavit in reply that the appellant was the right person to be sued and that the contract was legal and enforceable in law. The learned trial judge dismissed the application with costs.

The appellant being aggrieved by the ruling of the High court to set aside judgment and decree of the ex-parte judgment appealed the said decision. The grounds of appeal are as follows:

1. **The learned trial judge erred in law and fact in failing to find that the appeal had disclosed good cause for the setting aside the ex-parte judgment under o.33 rule 11 CPR (now order 36 rule 11).**
2. **The learned trial judge erred in law in failing to address the points of law and authorities cited to him.**
3. **The suit contract was illegal and unenforceable in law.**

REPRESENTATIONS

Mr. Philip Karugaba of ENS Africa Advocates represented the appellant while Mr. Eric Muhwezi of M/S Muhanguzi and Co. Advocates represented the respondents.

THE DUTY OF THE COURT

This is a first appeal and this court is charged with the duty of reappraising the evidence and drawing inferences of fact as provided for **Rule 30(1) (a) of the judicature (court of Appeal Rules) Directions SI 13-10**.This court also has the duty to caution itself that it has not seen the witnesses who gave the testimony first hand. On the basis of its evaluation, this court must decide whether to support the decision of the High Court or not as illustrated in **Pandya v R [1957] EA 336 and Kifamunte Henry v Uganda Supreme Court Criminal Appeal No.10 of 1997.** The grounds of this appeal in many ways are interrelated but we shall still address them as filed.

LEGAL ARGUMENTS

GROUND ONE

The learned trial judge erred in law and fact in failing to find that the appeal had disclosed good cause for the setting aside the ex-parte judgment under Order 33 rule 11 CPR (now order 36 rule 11).

Arguments for the appellant

Counsel for the appellant relied on Order 33 rule 11 of the CPR which provides as follows:

"...after the decree of court may if satisfied that the service of summons was not effective or for another good cause which shall be recorded set aside the decree if necessary stay or set aside execution and may give leave to the defendant to appear to the summons and defend the suit..."

He specifically pointed to the second part of the rule which provides *"for any other good cause"* to set aside a decree, to assert that an illegality of the contract can amount to for any other good cause. His submission was that the contract was illegal since the parties to the contract did not have a license to deal in minerals as required under Section 72 of the **Mining Act CAP 144(8)**.

Counsel further cited the East African authority of **Kimani vs McConnel (1966) EA 547** for the proposition that a party with a counterclaim should also be allowed to present his defence.

He also cited the case of **Capt. Philip Ongom VS Catherine Nyero Owata S.C.CA No. 14 of 2001** to support the argument that on an application to set aside a judgment the merits of the defence should be considered. He however argued that the learned trial judge did not consider the merits of the appellant's defence and merely relied on the fact the appellant had received the summons to dismiss his application.

Arguments for the respondent

Learned counsel for the respondents in response supported the decision of the learned trial judge. He contended that Order 36 rule 11 was not applicable to a defendant who was served with summons and failed to file an application for leave to appear and defend.

He asserted that it was only applicable to a party who was not served with summons .That is when he would be entitled to apply to set aside the default judgment for any other ground that she would show sufficient cause why he did not appear and defend. He thus prayed that the appeal be dismissed.

RESOLUTION OF THE COURT

We have considered the arguments of the respective counsels and the record of appeal in this matter together with the cited legal authorities for which we are grateful.

The crux of this appeal is whether the appellant who had an ex-parte Judgment entered against him because he had failed to file an application for leave to file a defence in time despite having been served with summons, should have had the said ex-parte Judgment set aside under the provisions of Order 33 rule 11 (now Order 36 rule 11 with the same wording) by the trial Court.

The provision of Order 36 rule 11 (to bring the legislation up to date) provides:

"...after the decree of court may if satisfied that the service of summons was not effective or for another good cause which shall be recorded set aside the decree if necessary stay or set aside execution and may give leave to the defendant to appear to the summons and defend the suit..."

This provision has been the subject of a lot of litigation. However the Supreme Court in the recent decision of **Post Bank (U) Ltd V Abdu Ssozi** SCCA 008 of 2015 has discussed Order 36 Rule 11 and indeed the whole of Order 36 as it stands.

The Court sets out the purpose of the Order 36 as follows:

"...Order 36 was enacted to facilitate the expeditious disposal of cases involving debts and contracts of a commercial nature to prevent defendants from presenting frivolous or vexatious defences in order to unreasonably prolong litigation. Apart from assisting the courts in disposing of cases expeditiously, Order 36 also helps the economy by removing unnecessary obstructions in financial or commercial dealings..."

Indeed the matter before us involves a debt arising out of a commercial contract and Order 36 is designed in our view as well to spur economic development by seeing to the expeditious enforcement of contracts by avoiding clearly frivolous and vexatious defences that often prolong litigation.

Order 36 however gives a defendant an opportunity when served with a specially endorsed plaint to apply to court to file a defence. The Supreme Court in the **Post Bank case (Supra)** put it thus:

"....Defendants in cases which fall under Order 36 are protected by being given the right to apply to court for leave to appear and defend the suit. When the court receives their application and is satisfied by the defendant's affidavit that the defendant has raised a genuine triable and not a sham or frivolous issue, it will grant the defendant leave to appear and defend the suit. (Order 36 rule 4).

If the court is not satisfied that the defendant has raised a triable issue, it will refuse to grant leave to appear and defend the suit, and the plaintiff will be entitled to a decree in the amount claimed in the plaint with interest, if any. (Order 36 rule 5)..."

The onus therefore is on the defendant to apply to court to defend the suit by raising a genuine triable issue which is not a sham or is frivolous. Where the defendant does not file such an application then again according to the **Post Bank case (Supra)**

"...If the defendant fails to apply for leave to appear and defend in the time prescribed (which is 10 days), the plaintiff is entitled to a decree for an amount claimed in the plaint with interest, if any. (Order 36 rule 3(2))..."

Indeed this is what happened in this matter before us, the defendant failed to apply for leave to appear and defend within the prescribed time consequently a default judgment was entered against him.

This is where Order 36 rule 11 CPR provides a life line to the defendant to have the ex-parte Judgment set aside if the court is satisfied that

1. The service of summons was not effective or
2. For another good cause.

Counsel for the appellant laboured to argue that the trial judge only addressed himself to issue of service of summons and not to the appellant's case that it had a good case based on illegality. In this regard he referred us to the case of Capt **Philip Ongom V Catering Nyero Owota** SCCA 014 of 2001 for the proposition that default judgment can be set aside for good cause. Furthermore he argued that the said case is authority for the proposition that a litigant has a right to be heard and that this right should supersede any procedural requirements of the rules. We have reviewed that case and find that it relates to Order 9 rule 24 of the CPR and not Order 36 rule 11 of the CPR. In any case the reason why the default

judgment was set aside in that case was that counsel for the applicant though instructed had take no action in the case leading to the default judgment. In this case we do not know why no application to defend the case was made within the prescribed time yet there was evidence of service. Instead an application that the trial court dismissed was made nearly 6 months late. We therefore do not agree with counsel for the appellant that his client was not afforded an opportunity to be heard because he was, but he simply did not take advantage of the said opportunity.

This notwithstanding there is as counsel for the appellant rightly argued another avenue and that is the test of "good cause"; in the **Post Bank case (Supra),** it was held that:

*"...In the case of **Geoffrey Gatete & Another vs. William Kyobe**, SCCA No. 7 of 2005, this court explained reasons for setting aside the decree under Order 36 rule 11 by stating that **"...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"..."***

In this case counsel for the appellant submitted that the transaction he was involved in was illegal as respondent who was trying to sell him minerals did not have a license as required under Section 72 of the **Mining Act CAP 144.** Counsel went on to argue that if the respondent did have a licence as required under the law, he would have pleaded it but did not. Counsel for the appellant submitted that his client as a defendant could not plead estoppel against the law. He argued therefore that the plaint did not disclose a cause of action because it was based on an illegal contract. In this regard he relies on the affidavit in support of the

Motion of one Sarah Nambasa (as counsel for the respondent argued we are not sure in what capacity she swore the affidavit, but she appears to be counsel) that the said contract was illegal.

On the face of it, it would appear that Order 33 rule 11 avails a defendant an easy way into defending a case under a specially endorsed plaint and that the threshold established by the courts to be granted leave to appear and defend is very law. We do not agree with this position. Leave to defend a case even under Order 36 rule 11 is an exercise of judicial discretion and the necessary tests under the said rule will also have to be met. The onus is on the defendant to show that he deserves the exercise of judicial discretion in his favour and that he has triable issue. In this case the defendant does not deny the transaction/contract but argues that it was illegal for want of a license. It is not clear to us at what point the appellant realized that he and his company was involved in what he calls an illegal contract with the respondent. At least no register of licenses for mining or other documentation has been produced before us to support this otherwise sweeping allegation. The legal position no doubt is having participated in such an illegal contract then the appellant is *in pari delicito* "in equal fault". In contract law, neither party can claim breach of contract by the other if the fault is more or less equal. Indeed where parties are equally at fault the position of the defendant is stronger (See Black's Law Dictionary 10th Edition P. 1921). Given the dilatory conduct in the late filing the application at the trial court (nearly six months after the default judgment was rendered) can only find that allegation of an illegal contract was an afterthought and a sham defence.

We agree with the finding of the trial Judge that there is a great danger in allowing parties to ignore summons served on them and then simply allow them to come months later with a sham defence to court to seek leave to file it; because it is perceived that the tests in this regard to do are very low. The floodgate rule will apply here to negate the purpose of Order 33.

We accordingly dismiss this ground.

GROUND 2

The learned trial judge erred in law in failing to address the points of law and authorities cited to him.

Arguments for the appellant

Counsel for the appellant submitted that the plaint did not disclose a cause of action because the pleadings where for the enforcement of sale of minerals. Counsel for the appellant asserted that the law required a party dealing in minerals to have a license yet respondents did not have a license.

He argued that a cause of action must show that the plaintiff had a right. However In this case the plaintiff did not establish a right to trade in minerals in Uganda. He relied on the Section 72 of the Mining Act cap 144(8).

Arguments for the Respondent

In response to the argument that there was no cause of action disclosed, learned counsel for the respondent asserted that there was clear a debt owing and he in this regard relied on the evidence of the cheque dated 6th July, 2000 to the respondent's claim. He submitted that was the reason why the respondent

proceeded under summary procedure to recover the debt. He asserted that this debt amounted to a cause of action.

Resolution of court

We have in the resolution of ground one also addressed the resolution of this ground. The point of law and in particular the defence of illegality we have found is nothing more than a sham defence and we have rejected it.

The appellant in the alternative could have founded his cause of action on the cheque if he had wanted but he did not. In the case of **Kotecha vs. Mohammed [2002] EA 112** court was of the view that save in exceptional circumstances, the holder of a bill of exchange was ordinarily entitled to judgment even where the defendant had a cross claim for damages under contract. However this cheque was withdrawn before presentation and therefore could not be relied upon.

We accordingly also dismiss this ground of appeal.

GROUND 3

The suit contract was illegal and unenforceable in law.

Arguments for the appellant

Learned counsel for the appellant submitted that section 72 of the Mining Act (cap 144) required anyone dealing in mineral to have a mineral license and yet the parties to the contract did not have the said license to contract.

He then cited the authority of **Mistry Amar Singh Vs Serwana Wofunira Kulubya (1963) EA 408** for the proposition that court should not assist a plaintiff to

enforce obligations under an illegal contract. He asserted that in the instant case, the respondents were seeking to enforce an illegal contract and to thereby recover **$33,000** from the appellant.

Arguments for the respondent

In response to the alleged illegality learned counsel for the respondent faulted the affidavit in support of the application which was sworn by sworn by Nambasa Masembe. His contention was that the affidavit did not indicate in what capacity the deponent swore that affidavit for it did not state whether he was counsel for the applicant or that he was an employee of the applicant. He therefore concluded that the affidavit was defective as the deponent no locus standi to swear it.

He also attacked the supplementary affidavit deponed by the appellant as baseless when the appellant asserted that he lost his job when the said company went into liquidation.

Resolution of the court

We have also resolved this ground in ground number one. We need not repeat the reasoning here. The defence of illegality we have found is nothing more than a sham defence and we have rejected it.

We accordingly also dismiss this ground of appeal.

Final Result

Since the appellant has not been successful in any of the grounds we hereby dismiss this appeal with costs here and the trial court.

We so Order.

Dated at Kampala this....01st.....day of ....November.....2018.

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HON. MR.JUSTICE KENNETH KAKURU, JA

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HON. MR.JUSTICE GEOFFREY KIRYABWIRE, JA

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HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA