THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO.23 OF 2009

(Arising out of High Court (Commercial Division) Misc. Application No.335 of 2008 before Honourable Justice Anup Singh Choudry)

SIRAJI KIMULI.....APPELLANT

V E R S U S

STANBIC BANK.....RESPODENT

CORAM: **HON. MR. JUSTICE S.B.K. KAVUMA, AG. DCJ**
HON. MR. JUSTICE RICHARD BUTEERA, JA
HON. MR. JUSTICE G. KIRYABWIRE, JA

JUDGMENT OF THE COURT:

Background:

The appellant filed a suit against the respondent vide H.C.S.S. No. 668 of 2006 [Sinai Kimuli vs Stanbic Bank (U) Ltd] on 3rd November 2006, seeking general and exemplary damages arising out of an alleged unlawful closure of his account.

The respondent filed its defence on 20th November 2006 and subsequently the suit was set down for hearing and accordingly cause listed for 27th March 2007.

At the hearing on 27th March 2007, the suit was dismissed under O.9 r 22 of Civil Procedure Rules (CPR) owing to the non appearance of both the applicant and his counsel.

On the 10th July 2008 the applicant filed Misc. Application No.335 of 2008 arising out H.C.C.S No.668 of 2006 [Siraje Kimuli vs Stanbic Bank (U) Ltd] seeking to set aside the dismissal and seeking for reinstatement of the suit. The trial judge, in exercise of his discretion, dismissed the application with costs to the respondent thus this appeal:-

By this appeal the appellant seeks to have the dismissal of Misc. Application No.335 of 2008 set aside and the suit to be reinstated.

Grounds of Appeal:

Siraje Kimuli, the above named appellant, appeals against the High Court Judge's decision on the following grounds according to the Memorandum of Appeal:-

(1)The learned judge erred in law and fact when he failed to consider the grounds and merits of the Miscellaneous Application No.335 of 2008 which sought to reinstate the dismissed suit.

(2)The learned judge erred in law when he ruled that an application seeking to reinstate a suit under Order 9 Rule 23 requires an applicant to show merit in the substantive case.

(3)The learned judge erred in law and fact when he considered the merits of substantive suit and further relied on it to deny the application.

At the hearing of the appeal the appellant was represented by learned counsel, Richard Nsubuga, whilst the respondent was represented by learned counsel, Arnest Sembatya.

Counsel for the appellant submitted that the trial judge at the High Court dismissed the application for setting aside the ex parte judgment on wrong premises.

The application before the High Court was under Order 9 r 23 asking the court to reinstate the suit on the ground that the plaintiff and his counsel did not receive court summons and as a result did not attend court. According to counsel, under O.9 r 23 the plaintiff was applying for setting aside the dismissal order on the ground that there was sufficient cause for non appearance. The Court should have entertained the application and considered whether or not there was sufficient cause to set aside the dismissal order.

Counsel contended that the trial judge did not listen to find out whether or not they had sufficient cause for non appearance which was the issue before the trial judge for consideration.

Counsel submitted that the trial judge intervened and before the appellate had presented the grounds and the substance of the application immediately formed the opinion and made a finding that the application had no merit as the suit upon which the main suit itself was based had no merit. The trial judge then, mistakenly,

arrived at the conclusion that in order to re-instate the case the plaintiff ought to show that not only was the notice of the proceedings not served on him but also that there was need to show that the main case had merit.

Counsel for the appellant contended that thus the trial judge erred in law as he failed to consider the grounds and merit of the Miscellaneous Application to re-instate the case. He submitted that it was an error for the judge to have considered the merits of the substantive suit and rely on that ground to deny the appellant to present the merits of his application for courts consideration.

Counsel for the appellant further submitted that the applicant had applied for re-instatement of the case immediately the appellant learnt of the dismissal of their case and there was no inordinate delay in making that application.

Counsel Sembatya for the respondent opposed the appeal. He submitted that the trial Court had properly handled and considered the application for re-instatement and the grounds raised and dismissed the same on merit.

Counsel for the respondent contended that the trial Court considered the issues of service and inordinate delay in bringing the application for re-instatement and then the merits of the suit. According to counsel, the trial court had to consider whether in fact the underlying suit which they sought to re-instate had any triable issues and it is in that context that the merits had to be considered.

Counsel further submitted that re-instatement of the dismissed suit is in the discretion of the court and as an appellate court, this Court should not interfere with the decision of the trial Court when it had properly exercised its discretion to disallow the re-instatement. That the trial judge in the instant case had properly directed himself and had not reached a wrong decision to justify interference from the appellate court as there was no miscarriage of justice.

Counsel prayed this Court to disallow the appeal and dismiss it with costs to the respondent.

Courts resolution of the issues:

Our duty as the first appellate court has been stated by the Supreme Court in the case of **Attorney General versus George Owor Constitutional Appeal No.1 of 2011** as follows:-

"It is an established principle of the law that a first appellate Court has powers to consider a question of law, mixed law and fact and of facts. It also has the duty to subject the evidence on record as a whole to a fresh and exhaustive scrutiny and to make its own findings of facts giving allowance to the fact that it had no opportunity to see or observe the witnesses as they testified. See *Pandya versus R [1957] E.A.336* though that case is a criminal case, the principle laid therein applies with equal force to civil cases as well. See *Selle and Anor versus Associated Motor Boat Co. Ltd (1968) E.A. 128.*

Applying the above stated principles we shall consider what was before the High Court for hearing on 27th March 2007and all the evidence on the court record. Apparently there were no hearing notices issued. The appellant's counsel who had also represented him (when he was) the plaintiff at the High Court had written to Court to fix a hearing date. When the case was fixed by Court for hearing on 27th March 2007, neither party was served. The respondent (who was the defendant) had by other means found out about the hearing date and did appear. The appellant (then a

plaintiff) was absent. The suit was dismissed for want of prosecution by the Court.

When the applicant became aware of the situation, he applied for re-instatement of the suit. This application came up before Justice Anup Singh Choudry.

At the hearing of this application counsel for the applicant submitted as below:-

> **"My lord first of all the application is brought under O.9 r 23 and the grounds of the application basically in summary are that there was no service effected on the plaintiff nor his counsel for the hearing of the matter and that essentially is what caused his non appearance for the suit when it was set down for hearing. And that the plaintiff has sufficient cause for non appearance when the suit was called. As such it would be just and equitable for the Honourable Court to reinstate the suit."**

The trial judge then interrupted counsel for the applicant thus:-

"What is the subject matter?"

From that point there is a long interaction between counsel for the applicant and Court. The substance of the interaction is essentially on the substance of the case.

Eventually as part of that interaction between counsel and Court, the Court reached its decision and ruled in substance as follows:-

> **"In order to reinstate the case, the plaintiff ought to show that not only were the proceedings not served on him but also they need to show that there is merit in the case. There is clearly no basis of any merit in this case because the bank cannot be criticized for what they did in view of the very serious nature of the inquiry; that is money laundering. The application is therefore refused with costs."**

The main issue which to us is critical for resolution of this appeal is whether the application for re-instatement was dismissed after due consideration and on proper principles.

The application that was before the High Court was brought under Order 23(1) of the Civil Procedure Rules. The Order provides:-

"23. Decree against plaintiff by default bars fresh suit.

(1)Where a suit is wholly or partly dismissed under Rule 22 of this Order, the plaintiff shall be precluded from brining a fresh suit in respect of the same cause of action. But he or she may apply for an order to set the dismissal aside, and, if he or she satisfies the court that there was sufficient cause for nonappearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal, upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2)No order shall be made under this rule unless notice of the application has been served on the opposite party."

The relevant part of the rule is the underlined.

The rule was considered by the Court of Appeal for East African in the case of **Shamsudin Jiwan Mitha vs Abdulaziz Ali Ladak [1960] E.A. 1054.** The Court held that to succeed under the rule, the applicant has to show that he did not appear and that he was prevented from appearing by sufficient cause.

In the instant case the cause that the applicant was alleging for nonappearance was that he was not served.

The issue that was being presented to the trial judge which should have been considered and determined was whether there was proper service and whether that was sufficient cause for nonappearance by the applicant.

In the instant case before the trial judge, there is evidence that there was no service of summons, even the defendant (Now respondent) had not been served.

Where a party has not been served for hearing he would not be condemned for nonappearance. That was the issue for the trial judge to consider in the application before him.

The trial judge dismissed the application on the ground that the main case had no merit. This would be a matter to be determine at the trial and not at this stage.

Counsel for the applicant in the instant case was proceeding to submit further and explain the justification for nonappearance by counsel and his client when he was interrupted by the trial judge and there ensured an interaction between counsel and the judge that ended up with the judge's ruling.

We have studied the court record. It is clear that the trial judge did not give due consideration to what was relevant for the application before him. What was relevant was whether there was sufficient cause for the nonappearance of the applicant. The applicant had not been served for the hearing. The reason for the dismissal of the application was that there was no merit for the main case.

The effect of failure to serve sermons was considered by Court in official receiver **Continental Bank of Kenya Ltd v Mukunya [2003] 1 EA 209.** Where the Court held as follows:-

"The effect of failure to serve process upon the party affected thereby has been considered in several cases. In *Graig v Kanseen [1943] 1 all ER 108 the Court of Appeal in England* stated:

> ***'The failure to serve the summons upon which the order in the present case was made was not a mere irregularity, but a defect which made the order a nullity, and therefore, the order must be set aside.'***

And in the case of *Khami v Kirobe and others [1956] EACA (VOLUME 23)* 195 the Court of Appeal for Eastern Africa held:

> ***'The question we have to deal with is whether the admitted failure to serve the summons upon which the order in this case was based was a mere irregularity, or whether it was something worse, which would give the defendant the right to have the order set aside. In my opinion, it is beyond question that failure to serve process where service of process is required, is a failure which goes to the root of our conceptions of the proper procedure in litigation. Apart from proper ex parte proceedings, the idea that an order can validly be made against a man who has had non-notification of any intention to apply for it is one which has never been adopted "England". To say that an order of that kind is to be treated as a mere irregularity, and not something which is affected by a fundamental vice, is an argument which, in my opinion, cannot be sustained.".***

In the instant case, there was no service of summons for the hearing. Applying the above quoted authorities to this case, it is clear that the appellant were not served when they ought to have been. The application for setting aside the ex parte judgment should have received due consideration. That was not done by the trial judge.

We do not find that the trial judge properly exercised his discretion in the consideration of whether to re-instate the case or not. If he had properly given consideration to the issue before him he would have reached a different decision.

We, for that reason, allow the appeal.

The trial judge's decision and orders are set aside. The case should be submitted to the High Court before a different judge to proceed on its merits with each party presenting its case for the consideration of Court.

Dated this day..... of..... 2014.

Hon. Justice S.B.K. Kavuma
AG. DEPUTY CHIEF JUSTICE.

Hon. Justice R. Buteera
JUSTICE OF APPEAL.

Hon. Justice G. Kiryabwire
JUSTICE OF APPEAL.