THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
CIVIL APPEAL NO. 019 OF 2018
(ARISING FROM JINJA MISC. APPLN. NO.41 OF 2017)
ORIGINAL JINJA LAND CIVIL SUIT NO. 31 OF 2012

1. KIIGE FRED
2. KUNYA JAMES
3. WAKABI LIVINGSTONE
4. BATULI CHARLES :::::::::::::::::::::::::: APPELLANTS
5. KUNYA SIMON
6. WAKABI DENIS
7. MUYODI FRED
8. KISIRA MOSES

VERSUS

KALUYA YONASANI :::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE HON. JUSTICE MICHAEL ELUBU

JUDGMENT

This is an appeal filed by the eight appellants. The Respondent is KALUYA YONASANI.

The appeal is against the Ruling and Orders of H/W. SHALLON NIWAHA which she delivered on the 14th of March 2018.

The background to this matter is that the Respondent filed Civil Suit No. 31/2012, in the Jinja Chief Magistrate's Court, against all the appellants. It is alleged that despite several attempts they refused to acknowledge service and did not file a defence. They also did not respond to all other summons to attend court despite failure to acknowledge service of summons.

The lower court eventually granted an order that the matter proceed exparte and judgment was entered for the respondent.

The Appellants then filed M.A. No. 41 of 2017 seeking orders that the Judgment and decree delivered exparte by court in Civil Suit No. 31/2012 be set aside and the suit heard interparty on its merits. The grounds for that application included an allegation that the Applicants were never served for the hearing of the case and should not therefore be condemned unheard. It is their contention that the process servers connived with the Respondent to swear false affidavits of service.

The Respondent opposed the Application. That the Applicants were served with several summons to file a defence and hearing notices before the court allowed the Respondent to proceed exparte. That they denied themselves an opportunity to be heard.

The learned trial Magistrate found that the appellants failed to satisfy the court with reasonable grounds why they failed to appear for the hearing and dismissed the application.

Being dissatisfied with the ruling of The Trial Court the Appellants have lodged this appeal with 3 grounds namely:

1. The learned Trial Magistrate Grade I, failed to weigh and or to assess the evidence adduced by either party, as per the court records,

otherwise, if she had done so, she would have come up with the irresistible conclusion that the Appellants were not effectively served with summons under the main suit.

2. The learned Trial Magistrate Grade I, erred in law and fact, when she denied the Appellants the right to be heard, in such a sensitive and delicate matter involving family land on which they were born, by dismissing their Application seeking for setting aside of the exparte Judgment against them.

3. Unless, this Appeal is allowed, the Appellants, shall lose the suit land, on which they were born and wholly depend for their subsistence and income purposes.

They seek the following orders;

i) That this appeal be allowed
ii) The Ruling/Orders of the Trial Magistrate Grade I, be set aside.
iii) The exparte Judgment under the main suit be set aside.
iv) The Appellants be granted leave to file their written statements of defence.
v) Costs of this Appeal and of the Application from which it arose be awarded to the Appellants.

As this is a first appeal, this court is under duty to reconsider the evidence, evaluate it itself and draw its own conclusions though due regard should be given to the fact that it has neither seen nor heard the witnesses **(see Ug Breweries Ltd Vs. Uganda Railways Corp S.C.C.A 6/2001).**

Hajji Juma Munulo was Counsel for the Appellants. Mr. Onesmus Tuyiringire appeared for the Respondents.

Counsel for the Appellants argued the grounds of appeal jointly.

It was his contention that there is a constitutional right to be heard and a party expressing a desire to be heard should be granted that opportunity. That the respondent alleges the Appellants avoided court despite service. That notwithstanding, they would want to be heard. They should be given that opportunity as they were simple peasants living in a world of ignorance.

Secondly that the Appellants have attached their draft written statement of defence. That a very strong defence on the merits is disclosed. That the court should closely examine this defence. Before setting aside an exparte judgment the court has to be satisfied that the defendant has a reasonable excuse for not appearing and secondly a defence on merit in the case **(See Kyobe Senyange V Naks Ltd (1980) HCB 31.**

That the court must consider the interests of justice from the circumstances of the case before it can set aside an exparte judgment **(see E. Bikampata V Ug Libyan Trading Co. (1979) HCB 52).**

The Respondents Counsel opposed the application and submitted that the right to be heard must be exercised. However the appellants were properly served with summons but deliberately chose not to participate in the trial proceedings. That it was a lie for them to swear in the affidavit in support that came to know of the court proceedings at the level of execution. That the Appellants attended court at the locus and frustrated the Magistrate. That such litigants do not deserve to be heard.

That even **Art 126 (2) (e) of The Constitution** enjoins courts to administer substantive justice subject to the law. That the law here is that an exparte judgment shall be entered where a party is served and does not appear. That in these circumstances even the submission that there is a good defence on merit cannot stand.

I shall now turn to the merits of this appeal, and just like Counsel on both sides, will examine the grounds of appeal jointly.

The first matter for consideration should be service of court process. According to the record, Civil Suit No. 31/2012 was filed on The 7th of August 2012. On the 8th of August 2012 summons to file a defence were endorsed by the Chief Magistrate. A process server, MAGANDA MATHIAS, went to the village of the appellants where he found all of them in a meeting with the District Police Commander. That he attempted to effect service on the Appellants but that under the instigation of one WAKABI LIVING they all refused to acknowledge receipt of the plaint. WAKABI LIVING nevertheless retained a copy of the summons and attached plaint. The Appellants did not file a defence.

The court opted to give the Appellants, though they had not filed a defence an opportunity to be heard. The matter was fixed for the 14/2/13 and hearing notices extracted.

The Process Server MAGANDA MATHIAS, in the company of the Respondent / Plaintiff went to serve the Appellants on the 2nd of February 2013. That KUNYA SIMON, WAKABI DENIS, KISIRA MOSES, MUYODI FRED and KUNYA JAMES turned violent forcing the Process Server to throw the notices at them and ran off on a boda boda.

At that time three other Defendants had been detained at Bugembe Prison. The Process Server visited the prison where he found KIGE FRED, BATULI CHARLES and WAKABI LIVING in detention. They refused to acknowledge when he attempted service but the officer in charge of the prison acknowledged the hearing notice and directed that a production warrant for the 14/2/2013 be made. None of the defendants were in court on the 14/2/2013 when the matter was called.

One MUKEMBO HARRIET, a Process Server took hearing notices for the 24th of March 2014 which she received on the 4/3/2014. KIGE FRED

and BATULI CHARLES were at Bugembe Court on that day. They both acknowledged service.

These two Defendants, let alone all the others, were absent on the 24th of March 2014 when the matter was called.

The case was adjourned to 12/5/2014 when hearing notices were acknowledged by the parties but there was no affidavit of service.

When the matter was adjourned to the 22/10/14 service was effected through the LC.I Chairman Mr. Munobwa Moses. He swore an affidavit of service where he stated that he invited all the accused persons, with the exception of Wakabi Living, to his home and served them. They all refused to acknowledge service.

On the 8/12/2014 the Plaintiffs prayed for leave to proceed exparte which the court granted. The suit was subsequently heard exparte with 6 witnesses testifying for the Plaintiff.

When matter came up on the 25/11/2018 the court adjourned to visit the locus on 21/12/2016.

The court proceedings indicate that the parties went to the locus. The trial Magistrate entered the following on the record,

> *'After recording the attendance list, defendants turned rowdy, Chaos was brewing and the attendance list was destroyed. Court left the locus'.*

The Judgment in trial was read on the 14/7/17.

It was that exparte Judgment that the appellants sought to set aside by their application No.41/2017 which was dismissed on the 14/2/2018.

The appellants had stated in their affidavit in support of the application to set aside the *Ex Parte* judgment that they were never served with the summons to enter a defence. That the Process Server connived with the Respondent and the LC.I Chairman to file a false affidavit of service.

I have keenly studied the sequence of events in this matter.

The Appellants were at one stage served while on remand at Bugembe Prison. There is also service which was effected on Batuli and Kiige at Bugembe Court. Even on those occasions they did not appear.

The conduct on these two occasions leads me to believe that indeed service on all the other occasions was properly made on the Defendants.

With a sense of impunity they defied service and even once threatened a Process Server.

The trial Magistrate noted the presence of the Defendants when he stated they interrupted proceedings at the locus.

From the above it is clear the Appellant's affidavit in support is untruthful.

They were properly served on several occasions. They refused to acknowledge and obey court summons. They threatened court officials and disrupted a court hearing.

It is my finding that they were duly served.

Secondly there has been no sufficient, reasonable or credible reason advanced for the absence of the Applicants on the many occasions that Civil Suit No.31/2012 was called for hearing.

The Applications had applied to have the exparte judgment set aside under O.9 r. 27 which stipulates,

> In any case in which a decree is passed ex parte against a defendant, he or she may apply to the court by which the decree was passed for an order to set it aside; and if he or she satisfies the court that the summons was not duly served, or that he or she was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him or her upon such terms as to costs, payment into court, or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit; except that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also.

As can be seen to succeed under this rule an applicant must show that;

a) He was not duly served.
b) That he was prevented by sufficient cause from appearing.

These grounds were reaffirmed in,

- **Twiga chemicals Vs. Bamusedde (2005) EA 325**
- **Departed Asians Custodian Board V Bukenya Issa S.C.C.A 18/1991.**

In the circumstances this court is not persuaded that there were any grounds upon which the trial court could have granted the application in M.A. 41/2017 as there is nothing to show that the Appellants intended to be present at the trial but were prevented from doing so.

For this reason it is clear that the Appellants were on several occasions invited to have their side of the dispute heard. They firmly shut the door on themselves by their actions. It is for this reason that they cannot even

invoke the provisions of **Art 126 (2) (e)** of the Constitution which are only open to a litigant who has submitted to the law.

For these reasons, it would not be useful to consider whether the Defendants / Appellants had a defence on merits. They refused to file one when invited to do so.

In the result this Court finds that the appeal has no merit and it is dismissed.

The Respondent is granted costs here and in the Courts below.

MICHAEL ELUBU
JUDGE
20/02/1019

4.3.19.

Appellants present save for 3rd, 5th, 7th

Resp. present.

Mr. Minule for the Appellants

Mr. Katagara holding brief for

counsel [illegible] for the Resp.

Court: [illegible] clerk.

Judgment delivered in the presence of the above.

4.3.19