IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 101 of 2018

In the matter between

OYWELO YAKOBO **APPELLANT**

And

1. BONGOMIN JOSEPH
2. MWAKA JOHN
3. OYOO ANDREW **RESPONDENTS**

Heard: 29 August, 2019.
Delivered: 12 September, 2019

Civil Procedure *— setting aside the ex-parte judgment and decree — The discretion to set aside an ex-parte judgment, is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately seeks, whether by evasion or otherwise, to obstruct or delay the cause of justice.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondents jointly and severally sued the appellant for recovery of approximately 800 acres of land situated at Toke sub-ward, Golo Parish, Latanya sub-county in Pader District, a declaration that they are the rightful owners of that land, general damages for trespass to land, *mesne* profits, an order of vacant

possession, a permanent injunction restraining the appellant from committing further acts of trespass onto that land and the costs of the suit. Their claim was that following the death of their father, the late Lazaro Latigo, the respondents and the rest of the family of the deceased continued to occupy and utilise the land in dispute as farmland and grazing land. The respondents were subsequently granted letters of administration to his estate. They were surprised when sometime during the year 2010 the appellant occupied the land in dispute, denied the respondents access thereto, and began giving away parts of it to divers persons.

The respondent's evidence in the court below:

[2] The respondents filed an affidavit of service indicating that the appellant had been served with summons to file a defence on 19th July, 2016. When the suit came up for hearing on 6th January, 2017 the court granted the respondent leave to proceed ex-parte, under the provisions of Order 9 rule 10 of *The Civil Procedure Rules.* The following testified; P.W.1 Bongomin Joseph; P.W.2 Mwaka John; P.W.3 Oyoo Andrew; and P.W.4 Labeja Vincent. The appellant did not file a written statement of defence to the suit. The court then visited the *locus in quo* on 15th March, 2017.

Judgment of the court below:

[3] Judgment was delivered in favour of the respondents on 8th June, 2017. They were declared owners of the land in dispute. They were awarded general damages of shs. 4,000,000/= for trespass to land, a permanent injunction was issued against the appellant. The costs of the suit were awarded to the respondents. The appellant was evicted from the land on 23rd March, 2018 and a return to that effect was duly filed in court.

Application for reinstatement of suit

[4] The appellant then filed an application seeking a re-instatement of the suit instead of one for setting aside of the ex-parte decree. The applicant argued that before the suit was heard, both parties appeared before the Clan Chief as mediator and counsel for the respondents intimated to the appellant that he was to withdraw the suit. The appellant was duped by the respondents not to file a defence to the suit. The appellant was not served with a hearing notice when the suit came up for hearing on 6th January, 2017. The affidavit of service filed in court was defective in so far as it did not disclose who commissioned it. The Court should have proceeded under Order 9 rule 10 and issued a hearing notice, which was not done.

[5] The respondents opposed that application and their advocates argued that the application for re-instatement of the suit was misconceived since the suit was never dismissed. Counsel for the respondents argued further that he joined the proceedings by notice of instructions dated 11th April, 2018 and first appeared in court on 26th June, 2018, long after the ex-parte judgment had been entered on 8th June, 2017. He therefore was not party to any misrepresentations that could have been made to the appellant. The affidavit of service of summons upon the appellant is dated 20th August, 2016 and filed on 30th November, 2016 as proof of service that was effected on the appellant on 19th July, 2016. Defects in the affidavit of service are immaterial since the appellant does not deny having been served with summons. The appellant never filed an application for leave to file a written statement of defence out of time.

[6] In his ruling, the trial Magistrate stated that it was not disputed that the appellant was served with summons. The prayer for re-instatement of the suit was misconceived. Counsel for the respondent accused of having duped the appellant not to file his defence to the suit joined the proceedings long after the

ex-parte judgment had been entered. The application was found to be without merit and it was dismissed with costs to the respondents.

The ground of appeal:

[7] The appellant was dissatisfied with the decision and appealed to this court on the following ground, namely;

1. The learned trial Magistrate erred in law and fact when he failed to consider the grounds for the application for setting aside the ex-parte judgment and decree in Civil Suit No. 38 of 2016, thereby causing a miscarriage of justice.

Arguments of Counsel for the appellant:

[8] In his submissions, counsel for the appellant, argued that the appellant was never served with summons to file a defence yet the suit proceeded ex-parte against him. The court never served a hearing notice upon him, the court never visited the *locus in quo,* he was never served with a judgment notice and the only time he came to know about the suit was when execution of the decree began. His application seeking to set aside that decree was erroneously dismissed. The trial court failed to direct itself regarding the incompetence of the affidavit in reply since it was purportedly sworn on behalf of numerous persons whose written authority was not filed in court, contrary to Order I rules 12 (1) and (2) of *The Civil Procedure Rules*. The respondents are relatives of the applicant and at a mediation undertook to withdraw the suit, which they eventually did not, contrary to their undertaking. The appellant was duped into believing the suit had been withdrawn, whereas not. The respondents obtained the ex-parte decree by deceit. Since the status quo has never changed and the appellant is still in possession of the land, a re-trial would not occasion any injustice. The appellant was not found to be guilty of any dilatory conduct. The administration of justice is better served when disputes are decided on merit inter parties. Procedural errors

should not be a barrier to litigant's access to justice. They prayed that the appeal be allowed. Counsel for the respondents did not file any submissions in reply.

Duties of a first appellate court:

[9] It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). In a case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

[10] The appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

The motion to set aside the ex-parte judgment and decree.

[11] The appeal rests on a single ground, failure to set aside the ex-parte judgment and decree. In exercise of the discretion to set aside an ex-parte judgment, the main concern of the courts is to do justice to the parties before it. The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay

the cause of justice (see *Mbogo v. Shah [1968] EA 93 at 96G* and *Patel v. E. A. Cargo Handling Services [1974] E.A. 75*). When deciding whether or not to grant such an application, the nature of the suit should be considered, the probable defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court (see *Sebei District Administration v. Gasyali and Others [1968] EA 300*). It also goes without saying that the reason for failure to attend should be considered.

[12] This was a suit for recovery of land. According to Order 9 rule 10 of *The Civil Procedure Rules*, in all suits where the claim is not for a liquidated sum, in case the defendant does not file a defence on or before the day fixed therein and upon a compliance with Order 9 rule 5 (filing of an affidavit of service), the suit may proceed as if that party had filed a defence. Order 9 rule 11 (1) of *The Civil Procedure Rules*, then requires that is that notice of the hearing of the suit is to be served on the defendant as if that party had filed a defence. The court has no such discretion where it appears there has been no proper service (see *Kanji Naran v. Velji Ramji (1954) 21 EACA 20*).

[13] In the instant case, the appellant's failure to file a defence is attributed to a misrepresentation to the effect that the suit was to be withdrawn in light of mediation undertaken by the Clan Chief. Failure to attend court on 6th January, 2017 and subsequently at the *locus in quo* on 15th March, 2017 was because no hearing notice was served upon the appellant. The appellant therefore was not deliberately seeking, whether by evasion or otherwise, to obstruct or delay the cause of justice. The respondents could reasonably be compensated by costs for any delay. Had the trial court overlooked the procedural lapses and focused on the substance of the dispute it would have come to a different conclusion. Bearing in mind that to deny a litigant a hearing should be the last resort of a

court, this is a fit and proper case in which the appellant ought to be granted the relief sought.

Order :

[14] In the final result, for those reasons the appeal succeeds. The ex-parte judgment is set aside and the appellant is given fourteen days, from the date of this order, within which to file a defence to the suit. The costs of the appeal will abide the results of the trial.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Odongo and Co. Advocates.

For the respondent : Mr. Charles Dalton Opwonya.