THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 191 OF 2013

PATRICK OKWIR..... ..... APPELLANT

VERSUS

CHARLES OLWA EKWARO..... RESPONDENT

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA
Hon. Mr. Justice Geoffrey Kiryabwire, JA
Hon. Mr. Justice Christopher Madrama, JA

JUDGMENT OF JUSTICE KENNETH KAKURU, JA

I have had the benefit of reading in draft the Judgment of my learned brother Madrama, JA.

I agree with him that this appeal ought to succeed for the reasons he has ably set out in his Judgment. I also agree with the orders he has proposed.

As Kiryabwire, JA also agrees this appeal is allowed in the terms and orders set out in the Judgment of Madrama, JA

Dated at **Kampala** this 29th day of June 2020.

.....

Kenneth Kakuru
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

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PATRICK OKWIR========== APPELLANT

VERSUS

CHARLES OLWA EKARO==========RESPONDENT

(CORAM: KAKURU, KIRYABWIRE, MADRAMA)

JUDGMENT OF MR. JUSTICE GEOFFREY KIRYABWIRE, JA

JUDGMENT

I have had the opportunity of reading the draft Judgment of my Brother Hon. Mr. Justice Christopher Madrama, JA in draft and I agree with the findings and final decisions and orders and have nothing more useful to add.

Dated at Kampala this 29th day of June 2020.

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HON. MR. JUSTICE GEOFFREY KIRYABWIRE

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO 191 OF 2013

(ARISING OUT OF MISCELLENEOUS APPLICATION NO 314 OF 2012 AND ALSO ARISING FROM CIVIL SUIT NO 563 OF 2007)

(CORAM: KAKURU, KIRYABWIRE, MADRAMA JJA)

PATRICK OKWIR} ..... APPELLANT

VERSUS

CHARLES OLWA EKWARO} ..... RESPONDENT

JUDGMENT OF CHRISTOPHER MADRAMA IZAMA

This appeal arises from the decision of Tuhaise J, judge of the High Court as she then was, in Miscellaneous Application No 314 of 2012 in which she dismissed the Appellant's application to set aside the dismissal of the Applicant's suit under the provisions of Order 9 rule 22 of the Civil Procedure Rules. The application was brought under Order 9 rule 22 of the Civil Procedure Rules.

The genesis of the application is clearly reflected in the application before the High Court. The application was filed under the provisions of Order 9 rule 23 of the Civil Procedure Rules for an order that the order issued by the High Court on 22nd February, 2012 dismissing High Court Civil Suit No 563 of 2007 be set aside and the suit be reinstated and for costs of the application to be provided for. The Applicant's suit namely High Court Civil Suit No 563 of 2007 had been fixed for hearing on 22nd of February 2012 and his Counsel had been served with hearing notice for that day. Neither the Applicant nor his

Counsel appeared for the hearing of the suit whereupon the High Court dismissed it with costs.

Pursuant to the dismissal of the suit, the Appellant filed High Court Miscellaneous Application No 314 of 2012 in the Land Division of the High Court and the learned trial judge found that the Applicant's lawyers had been served with a hearing notice. The contention that the Appellant was not aware of the hearing date could not stand because his lawyers had been served and had duly accepted service. Secondly, the learned trial judge found that the contention of the Appellant that there was an error or lapse on the part of his lawyers because the lawyer did not inform him though he had been served was neither pleaded in the application no mentioned anywhere in the affidavit and was best regarded as evidence from the Bar. She found that there was no sufficient cause to set aside the dismissal and dismissed the Appellants application accordingly. The Appellant being aggrieved by the dismissal of his application appealed to this court on 3 grounds of appeal namely:

1. The learned trial judge erred in law when she held that the Appellant failed to show sufficient cause for setting aside ex parte judgment passed against him when he had never applied for setting aside of ex parte judgment in Miscellaneous Application No 314 of 2012.

2. The learned trial judge erred in law when she held that the Appellant failed to show sufficient cause for his or his Counsel's non-appearance when the suit was called on for hearing.

3. The learned judge failed to properly evaluate the evidence on record with regard to sufficient cause for nonappearance of the Appellant and therefore came to a wrong conclusion.

This appeal came for hearing when there was a lockdown on account of the Covid 19 global pandemic and Counsel were directed to file written submissions. The record indicates that the Appellant is represented by Messieurs Kania & Alli Advocates & Solicitors while the Respondent is represented by Messieurs Didas Nkurunziza & Company Advocates.

Submissions of the Appellants Counsel

In the skeleton arguments the Appellant's Counsel argued grounds 1 and 2 together. He submitted that in the ruling of the learned trial judge, it was held that the Appellant failed to show sufficient cause for setting aside the dismissal as envisaged by Order 9 rule 23 of the Civil Procedure Rules. The Appellant's Counsel relied on the definition of "sufficient cause" in **Nabatanzi v Binsobedde (1991) ULSLR 97** to the effect that it depends on the circumstances of the case but must relate to the inability or failure to take a particular step in time. He submitted that the Appellant's Counsel was served with a hearing notice for the matter which had been fixed for 22nd February, 2012. The Appellant's Counsel informed the Appellant that the matter had been transferred to Lira where the suit land is situated. When the matter came for hearing at the Land Division in Kampala, the Appellant's Counsel did not turn up neither did the Appellant turn up on the basis of the information earlier on given by his lawyers.

The Appellant's Counsel submitted that there is a mistake of Counsel which should not be visited on the innocent litigant. He relied on **Nicholas Roussos versus Gullam Hussein, Habib Hirani & others; SCCA No 9 of 1993** where the Supreme Court of Uganda held that a mistake by an advocate though negligent may be accepted as sufficient cause to aside an ex parte Judgment under Order 9 rule 23 of the Civil Procedure Rules.

The Appellant's Counsel submitted that High Court Civil Suit No 563 of 2007 was dismissed for nonappearance of the Appellant and his advocate. The

Appellant's advocate had informed the Appellant that the case had been transferred to the High Court Holden in Lira.

Ground 3

The Appellant's Counsel contended that the learned trial judge failed to properly evaluate the evidence on record with regard to sufficient cause for nonappearance of the Appellant and therefore came to a wrong conclusion.

He relied on **Pandya versus Republic [1957] 1 EA 336** for the holding of the East African Court of Appeal that it is the duty of the 1st appellate court to re-evaluate the evidence on record and subject it to fresh and exhaustive scrutiny and arrive at its own conclusion bearing in mind that it neither saw nor heard the witnesses testify and should make due allowance in that respect.

He submitted that the learned trial judge did not properly scrutinise the evidence of the Appellant in the affidavit and particularly paragraph 3 where the Appellant states that he had been told by his advocate that the matter had been transferred to Lira High Court where the property was situated. It was therefore evident that the Appellants advocate was negligent when he was served and did not appear when the case was called for hearing and this was therefore sufficient cause to set aside the dismissal. Lastly, the Appellant's Counsel submitted that the negligence of the Appellants Counsel should not be visited on the Appellant who acted on the instructions of his advocate and proceeded to Lira High Court where he thought the matter would be heard.

Submissions of the Respondent's Counsel

In reply, the Respondent's Counsel submitted that that the Appellant had filed a suit for nullification of registered proprietorship of the Respondent in respect of property in Lira which the Appellant occupied. When the suit was

called on for hearing, neither the Appellant nor his lawyer was in court and the suit was dismissed with costs. Secondly, the Appellant filed an application to set aside the order of dismissal but that application was dismissed with costs.

The Respondent's Counsel set out 3 issues for resolution of the appeal namely:

1. Whether trial judge was correct to find that no sufficient cause has been shown to set aside the order of dismissal of the suit.
2. Whether the trial judge properly exercised her discretion in the matter.
3. Whether this appeal ought not to be dismissed with costs.

The Respondent's Counsel submitted that in the application for setting aside the order of dismissal of the suit, the Appellant did not allege, neither did the notice of motion or the supporting affidavit in that application alleged error or lapse of his Counsel.

Secondly, the Appellant did not show sufficient cause why neither he nor his lawyer attended court on the due date though properly served with the hearing notice.

The trial judge properly exercised her discretion and dismissed the application upon correctly finding that no sufficient cause had been shown to warrant her setting aside the order of dismissal of the suit.

Resolution of appeal

I have carefully considered the Applicant's application in the High Court, the decision of the learned trial judge dismissing the application to set aside the dismissal of the main suit, the grounds of appeal, the written submissions of the Respondent's Counsel and that of the Appellant's Counsel as well as the law.

The general duty of this court as a first appellate court is to reappraise the evidence on record and this duty is set out in Rule 30 (1) (a) of the Rules of this court as follows:

> 30. Power to reappraise evidence and to take additional evidence
> (1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—
>
> (a) reappraise the evidence and draw inferences of fact; and …

In **Peters v Sunday Post Limited [1958] 1 EA 424** and at page 429, the East African Court of Appeal held that the duty of a first appellate is:

> …to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.

In this case the appeal arises from a ruling in an application to set aside the dismissal of the suit for want of appearance and affidavit evidence was the basis of the finding of the learned trial judge. I have carefully considered the submissions of Counsel and the affidavit evidence is not in controversy.

The learned trial judge clearly indicated in her ruling that the advocate of the Appellant was served with court process and the service of process was effectual and sufficient. In this appeal, the question of fact that the Appellant's Counsel was served with the hearing notice is not in dispute. This is what she held:

> Since it is very clear that his Counsel was sufficiently served and he accepted service, his claims that the suit had earlier been transferred would be irrelevant, since, by being served and accepting service, his Counsel was on notice that the suit had actually not been transferred and was to be heard in Kampala on the dates indicated in the hearing notice served.

On the issue of whether there was an error or lapse on the part of the Applicant's Counsel when he did not inform the Applicant, this is what the learned trial judge held:

> This, however, was neither pleaded in the application not mentioned anywhere in the affidavit. At best, it can be regarded as evidence from the bar which is not acceptable as evidence in this application. I find that the question of error or lapse of Counsel not being visited on the Applicant does not arise in this case.

The basis of the dismissal of the application to set aside the dismissal of the suit is clearly that the Appellant's Counsel had been served. I must note at this stage the Appellant was represented, at the time of the hearing of the application to set aside the dismissal of the suit, by Messieurs Kusiima & Co. Advocates. In Miscellaneous Application No 314 of 2012, the notice of motion and ground 1 thereof showed that the Applicant was not aware that the hearing of the suit had been fixed for hearing on 22nd February, 2012 when it was dismissed. The 2nd ground is that the suit involves a land dispute with a substantial value where the Applicant resides with his family and it is in the interest of justice that the court hears it and determines it.

The affidavit in support of the application is that of the Appellant. It shows that on 10th April, 2012, the Appellant went to the High Court registry at the Land Division to check on the status of the suit and was informed that it had been dismissed on 22nd February, 2012. Earlier on, he had been told by his advocate Mr. Peter Kusiima that the case was due to be transferred to the High Court at Lira where the suit property is situated. He reiterated his contention in paragraph 6 of the affidavit that he was not aware that the case had been fixed for hearing on the day it was dismissed. In paragraph 7 he deposed that the subject matter is a residential house on land where he resides with his family and it is in the interest of natural justice that the High Court determines the dispute *inter partes*.

The affidavit in reply to Miscellaneous Application No 314 of 2012 is that of Emmanuel Bakwega, an advocate of the High Court of Uganda. He deposed that the case had been fixed for hearing on 22nd February, 2012 and the requisite hearing notice was served upon the lawyer of the Applicant/plaintiff Mr. Peter Kusiima on 16th February, 2012 and he duly acknowledged service by signing on the hearing notice and affixing the stamp according to a copy of the affidavit of service with the hearing notice duly endorsed and annexed to the affidavit. On the day of the hearing, neither the Applicant/Appellant nor his lawyers attended court and the suit was duly dismissed for want of prosecution.

The 1st ground of appeal is that **the learned trial judge erred in law when she held that the Appellant failed to show sufficient cause for setting aside *ex parte* judgment passed against him when he never applied for setting aside of *ex parte* judgment in Miscellaneous Application No 314 of 2012**.

Obviously, there was no *ex parte* judgment as such and the matter proceeded on the issue of whether there was sufficient cause to set aside the judgment dismissing the plaintiff's suit. The plaintiff's suit was dismissed under Order 9 rule 22 of the CPR which rule is couched in mandatory terms as follows:

> 22. Procedure when defendant only appears.
>
> Where the defendant appears, and the plaintiff does not appear, when the suit is called on for hearing, the court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part of it, in which case the court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

The learned trial judge proceeded under the provisions of Order 9 rule 23 of the Civil Procedure Rules which provides that:

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 bringing 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.

I have carefully considered the ruling of the learned trial judge and ground 1 of the appeal has no merit. The learned trial judge clearly proceeded under the provisions of Order 9 rule 23 of the Civil Procedure Rules and also clearly indicated that where a suit is wholly or partly dismissed under rule 22 the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action but he or she may apply for an order to set aside the dismissal upon showing sufficient cause for nonappearance when the suit was called on for hearing. I therefore find no basis for ground 1 of the appeal and it is hereby disallowed.

As far as ground 2 of the appeal is concerned it is averred that:

The learned trial judge erred in law when she held that the Appellant failed to show sufficient cause for his Counsel's nonappearance when the suit was called on for hearing.

I have carefully considered the submissions of Counsel and the ruling of the learned trial judge. The learned trial judge stated that the issue could not be one of lapse of Counsel on the basis of transfer of the suit for hearing to the High Court in Lira. The issue was that the Appellant's lawyers were served and there is no explanation anywhere as to why neither the Appellant nor his

lawyers appeared on the date stated in the hearing notice. The contention of the Appellant in this appeal is that he had earlier on been informed by Mr. Peter Kusiima, his lawyers that the suit was due for transfer to Lira High Court. It is clear that on 16th February, 2012, the Appellant's lawyers had been served with hearing notice and they acknowledged service. No explanation was given for the nonappearance of the lawyers of the Appellant upon being served. The question is whether the learned trial judge could be faulted or whether she erred in coming to the conclusion she did.

Sufficient cause as submitted by the Appellant's Counsel must relate to the inability of the Appellant or his lawyers to appear for the hearing as duly notified. There is no evidence whatsoever which proves what could have gone wrong leading to the nonappearance of the Appellant's lawyers or why the Appellant's lawyers did not notify the Appellant that they had been served with a hearing notice showing that the suit had been fixed for hearing in Kampala on 22nd February, 2012. For emphasis paragraph 3 of the affidavit of Patrick Okwir in High Court Miscellaneous Application No 314 of 2012 deposed as follows:

> That I had earlier been told by my advocate Mr. Peter Kusiima that the case was due to be transferred to the High Court at Lira where the suit property is situated.

The affidavit is dated 12th of April 2012 and only stated that the suit was due for transfer and not that it had been transferred. There is no statement of fact as to when the suit was due for transfer. Immediately preceding paragraph 3 of the affidavit of the Applicant in that application, it is indicated that on 10th April, 2012, the Appellant went to the High Court Registry at the Land Division to check on the status of the case. There is no clear indication or evidence of when the Appellant was told by his lawyers that the case was due to be transferred to the High Court at Lira. Secondly, there is no evidence as to why he was not informed by his lawyers of the hearing date fixing the

suit for hearing in the High Court at Kampala on 22nd February, 2012. Sufficient cause must relate to the inability of the Applicant to attend court on the date fixed for hearing whatever the basis of that inability inclusive of being unaware of the hearing date. In this particular case, the Appellant's lawyer had been served and could have proceeded with the hearing in the absence of the Appellant since the facts in support of the application are in affidavit evidence. There is no explanation whatsoever for the nonappearance of the Appellant's advocate. The address of service for purposes of the application was that of Messrs. Kusiima & Co. Advocates. The hearing notice clearly indicated *inter alia* that it was addressed:

> TO:
>
> PATRICK OKWIR
>
> C/O KUSIIMA & CO ADVOCATES
>
> KAMPALA

The heading of the hearing notice clearly indicated that it was in the High Court of Uganda at Kampala, Land Division. The Appellant could only be served at the address of his lawyers as indicated in the hearing notice.

The above notwithstanding, this is a matter in which the Appellant's lawyers may be considered as being responsible for the state of affairs depending on the facts. The Appellant has a possible remedy against his former advocates in circumstances of the case. The record clearly indicates that the lawyers are responsible for the nonappearance having duly received and acknowledged the hearing notice on behalf of the Appellant.

The question of whether a litigant should be penalised for the mistake, error or negligence of his lawyer depends on the facts and circumstances of each case. Oder JSC in the **Banco Arabe Espanol v Bank of Uganda; [1999]**

UGSC 1 (Civil Appeal No 8 of 1998) stated at page 15 of the judgement that:

> The question of whether an "oversight", "mistake", "negligent" or "error", as the case may be, on the part of counsel should be visited on a party the counsel represents and whether it constitutes "sufficient reason" or "sufficient cause" justifying discretionary remedies from court has been discussed by courts in numerous authorities. Those authorities deal with different circumstances; and may relate to extension of time for doing a particular act, frequently in cases where time has already run over; some of them concern setting aside ex parte judgment or reinstating dismissed suit such as in the present case. But, they have the common feature whether a party shall, or shall not, be permanently deprived of the right of putting forward a bona fide claim or defence by reason of the default of his professional advisor or advisor's clerk. The interests of the party who has obtained, or is in a position to obtain, a permanent advantage by reason of such default, and of the unfortunate and perfectly innocent party who has been deprived of the right through no fault of his own, are irreconcilable, and the courts have always found difficulty in deciding who is to suffer.

In the facts and circumstances of this case where the appellant clearly indicated that his lawyer had informed him that the case was due for transfer to Lira but at the same time evidence discloses that that the appellant's lawyers were served with a hearing notice in Kampala, the question really is whether the litigant should be penalised for the faults of his lawyers. The property in dispute concerns (according to the affidavit evidence) a house in which the appellant lives with his family. The appellant had filed an action alleging fraud against the respondent. The suit was never tried but was dismissed for want of appearance of the Appellant or his lawyers and the dispute has never been resolved on the merits. Should the appellant be permanently deprived of an opportunity to resolve a dispute over property when the evidence shows that it is the fault of his lawyers that led to dismissal of his suit without a hearing? Further, the fact that the suit was never tried means that it would be dismissed on a procedural problem of want of

appearance when the suit was called for hearing. The Applicant promptly applied to set aside the dismissal and there was no in ordinate delay in that regard. Because there was no in ordinate delay, the respondent was not prejudiced if the suit was reinstated and heard on the merits. The Appellant has no other remedy and his only possible remedy is to set aside the dismissal of the suit. In the circumstances, Article 126 (2) (e) of the Constitution of the Republic of Uganda is applicable because it commands that substantive justice shall be administered without undue regard to technicalities. It could be argued that the Applicant has a remedy against his lawyers in negligence and the question is why should the respondent, if there is a cause of action against him benefit from the negligence or default of the Appellant's lawyers? The failure to appear by the appellant could clearly be attributed to the appellant's lawyers. The term "sufficient cause" includes the cause of justice. Would justice be better served if the applicant was shut out from the seat of justice? In the circumstances of this appeal, I would find that there was sufficient cause to set aside the dismissal to enable the applicant who erroneously thought that this matter had been transferred to the High Court sitting at Lira, to have it heard on the merits of his suit. I would therefore find that ground 2 of the appeal has merit and is hereby allowed.

Ground 3 is that **the learned trial judge failed to properly evaluate the evidence on record with regard to sufficient cause for nonappearance of the Appellant and therefore came to a wrong conclusion**.

On the basis of my finding in ground 2 of the appeal, there is no need to consider in detail ground 3 of the appeal which in any case deals with whether there was sufficient cause for nonappearance of the Applicant. The learned trial judge properly evaluated the evidence by erred in law not to find that it disclosed sufficient cause to set aside the dismissal. Ground 3 of the appeal is unnecessary and disallowed.

I would issue the following orders:

1. The appeal has merit and is hereby allowed.
2. The judgment of the High Court in Civil Suit No. 563 of 2007 is hereby set aside and substituted with this judgment reinstating the suit.
3. The High Court Registrar is hereby directed to fix the suit for hearing before another judge.
4. The Respondent shall pay the costs of this appeal.

Dated at Kampala 29th day of June 2020

Christopher Madrama Izama

Justice of Appeal