THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER, TSEKOOKO. KAROKORA. MULENGA, AND KANYEIHAMBA, JJ.SC)

CIVIL APPEAL NO. 6 OF 2004

BETWEEN

EDISON KANYABWERA:::::::::::::::::::::::::::::::::: APPELLANT

AND

PASTORI TUMWEBAZE:::::::::::::::::::::::::::::::::: RESPONDENT

(Appeal from the judgment of the Court of Appeal in Kampala (Mukasa-Kikonyogo, DCJ, Okello, and Engwau, JJ.A) dated 5/4/2004) in Civil Appeal No. 75 of 2003

JUDGMENT OF ODER, JSC

The appellant, Edison Kanyabwera, sued the respondent, Pastori Tumwebaze, in the High Court for damages in negligence arising from a road traffic accident in which the respective motor vehicles

of the two parties were involved and damaged. For ease of reference, I shall hereinafter refer to the appellant as **"the plaintiff" and respondent as "the defendant".** The plaintiff claimed that the accident was caused by the negligence of the defendant's driver for which the defendant was vicariously liable. The defendant filed a written statement of defence to the suit, in which he pleaded contributory negligence on the part of the plaintiff's driver, for which he claimed the plaintiff was vicariously liable. The hearing of the suit was adjourned on several occassions, because the defendant was not served with the hearing notice. On 23/3/1998, the trial judge, Lugayizi, J, adjourned the hearing of the suit to another date, because, according to him, the **"affidavit of service is unsatisfactory".** He directed that: -

> ***"Let the plaintiff's side serve the defendant again. They should go with LC's or Police and in case the defendant refuses service the LC. or Police should swear an affidavit to that effect as well".***

Subsequently on 10.11.1998, the record of "the trial court reads:

"Mr. Akampulira for plaintiff, plaintiff is present-Ms. Nabatanzi, court Clerk. Mr. Akampulira. Mr. Kabyesiza for defendant absent and defendant is not present either. They were served and I have an affidavit of service and a copy of the summons

they endorsed. Can we proceed exparte under order 9 rule 17 of the CPR?

<u>Court</u>

I am satisfied that the defendant's advocates were served with today's hearing notice. Since they have not turned up or given any explanation of their absence or that of their client I assume that both of them are no longer interested in being present during the hearing of this case. This case will therefore proceed exparte".

The learned trial judge proceeded to hear the plaintiffs evidence, after which, on 27.10.2001, he passed judgment for the plaintiff for:

1. Shs: 12m/= as replacement value for the pick up.

2. Shs: 2m/= general damages.

3. interest at rate of 6% p.a. for No.1 from the date of filing suit until payment in full and for No. 2 from the date of judgment until payment in full.

4. Costs of the suit.

Subsequently, the defendant filed an application in the High Court under Order 9, rule 24 of the Civil Procedure Rules (CPR) for an order for setting aside the ex-parte judgment. The main ground of the application was that the defendant was not served with the hearing notice for the suit. Okumu-Wengi, J, heard the application and dismissed it on the ground that the trial judge, Lugayizi, J, was satisfied that the defendant's advocates had been duly served with the hearing notice and rightly heard and passed the judgment exparte.

Thereafter, the defendant applied to the High Court for a review of its order, which had refused to set aside the ex parte judgment. The application was made under Section 35 of Judicature Act; Section 83 of the Civil Procedure Act; and Order 42, rules 1 and 8 of the CPR, on the grounds that:

1. There was an error apparent on the face of the record

2. The applicant was aggrieved by the decision of the judge dismissing the application for setting aside the exparte judgment

3. The applicant had a good defence to the suit

4. The order was appealable but no appeal had been preferred against the order arising from the decree and judgment. If the judgment arising from the exparte proceedings was not set

aside, a miscarriage of justice would be occasioned to the applicant.

Okumu-Wengi, J. heard and granted the application for a review, setting aside the ex-parte judgment. The plaintiff successfully appealed to the Court of Appeal. Hence the present appeal, which is made on the following grounds:

1. The learned Justices of Appeal erred in law and fact when they held that there was service on the defendant.

2. The learned Justices of Appeal failed in their duty of re-evaluating and subjecting the evidence on record to an exhaustive scrutiny before reaching their conclusion that the defendant's counsel was served with Court process.

3. The learned Justices of Appeal erred in law and fact when they held that the alleged error on the face of the record was non-compliance with the learned Judge's order for a specific order of service.

4. Having found that the order for specific mode of service was made to ensure that the defendant was served, erred in law and fact to hold that the alleged service on counsel for the defendant was proper.

Both parties to the appeal filed written submissions in support or opposition to the appeal as the case may be. M/S Ntambirweki

Kantebbe and Kwarisiima, Advocates, submitted for the plaintiff and M/S Babigumira & Co. Advocates, submitted in reply in opposition to the appeal. The plaintiffs learned counsel argued ground one and two of the appeal together. They submitted that it was not sufficient for the trial judge to accept counsel's submission from the bar that the defendant had been served with the Hearing Notice for the suit. The facts on which the learned trial judge based his ruling to proceed ex parte should have been written down to appear on the record of proceedings to prove that the defendant's lawyers had, in fact, been served with the Court process. For instance the affidavit of service should have been recorded as having been filed on the record, either before or at the time the suit was heard ex parte. Only the original or copy of such an affidavit would have provided proof that the defendant or his counsel had been duly served with a Hearing Notice. For this submission, learned counsel relied on the provisions of Order 5, rule 17 of the CPR and on the cases of ***D. Mbonigaba Vs. Nkinzehlki, Civil Suit No. 687 of 1971; and Osuna Otwani vs. Bukenya Ssalongo, Civil No. 62 of 1974 (1976) HCB.***

Learned counsel further submitted that particulars of the receipt (if any) for fees paid to file the affidavit of service or a copy thereof should have been entered on the court file cover. No such receipt was exhibited; nor was there evidence of any entry showing payment of fees for filing an affidavit of the service. The learned counsel further submitted that according to the notice of

change of advocates on record Messrs Kabyesiza & Co. Advocates became the defendant's lawyers in March 1999, long after the hearing of the suit had began. The hearing of the suit began on 10.11.1998, and it was completed on 16.8.2001. What was the purpose of serving Mr. Bakiza of that firm of advocates with hearing notice on 5.5.2001 as was stated by Ronald Sebagala in his affidavit of 8.5.2001? The appellant's learned counsel further submitted that the Court of Appeal should have subjected all the evidence concerning the alleged service of Court process on the defendant to that fresh and exhaustive re-evaluation that the defendant expected of it. Had it done so, it would have reached the conclusion that the defendant had not been properly served and it would have overturned the High Court's order reviewing its earlier decision. The Court of Appeal having failed in its duty to do so as the first appellate court, the learned counsel urged us to re-evaluate the evidence and reach our own conclusion. Learned counsel relied on **Kifamunte Henry vs. Uganda, Criminal Appeal No 10. of 1997 (SCU) (Unreported); Selle vs. Associated Motor Boat and Another (1968) EA.123, Bogere and Another vs. Uganda , Criminal Appeal No.1 of 1997(SCU) (Unreported); Pandya vs. Thomas (1947) AC 484 (H.L.).**

in their submissions opposing the appeal, the defendant's learned counsel contended that the grounds of appeal are intertwined, as they all revolved on the issue of whether or, not the service of hearing notice on the counsel for the defendant was effective. The

learned counsel therefore argued all the grounds of appeal together. They commenced by adopting their submissions in the lower Court and referred to the duty of that Court as the first appellate Court to scrutinize and re-evaluate the evidence and draw its own conclusions of fact or law, and to what this Court said in the case of ***Banco Arabe Espanol vs. Bank of Uganda, Civil Appeal No. 8 of 1998 (SCU) (unreported).***

Learned Counsel contended that in the instant case the Court Of Appeal properly performed its duty as the first appellate court in accordance with the principles stated by this Court in ***Banco Arabe Espanol (supra).*** After scrutinizing the evidence, the Court of Appeal found that Kabyesiza & Co, Advocates, who had instructions to represent the defendant in the case was served with the hearing notice as his duly appointed agent. Service on them on behalf of the defendant was proper and effective. The defendant's learned counsel further contended that the Court of Appeal rightly found that the error on the face of the record was not that the defendant's counsel had been served in the absence of the L**.C.** or the Police. The Court of Appeal rightly held that the trial judge had not intended to set a specific mode of service on the defendant by ordering that he should be served in the presence of the L.C**.** or the Police. The sum total of the findings of the Court of Appeal in this regard was that by making such an order, the learned trial judge intended to insure effective service of the hearing notice. The order did not exclude other modes of effecting service.

Regarding change of advocates the defendant's learned counsel submitted that in the defendants own affidavit supporting the application to set aside the exparte judgment he deponed that in May 1998, he changed his instructions to Odere, Kabyesiza & Co. Advocates to continue with his defence. Learned counsel contended that in the circumstances, Okumu-Wengi. J., rightly held that the defendant had been properly served when the learned judge was rejecting the defendant's application for setting aside the exparte judgment.

in my opinion, the main issue in this appeal is whether the High Court's decision to review its earlier decision dismissing the defendant's application to set aside the ex-parte judgment should be left to stand. The application was made under Section 35 of the Judicature Act, Section 83 of the Civil Procedure Act and rules 1 and 8 of **o**rder 42 of the CPR. Section 35 of the Judicature Act appears to be irrelevant. Section 83 of the Civil Procedure Act provides for the right of any person aggrieved by a decree or order from which an appeal is allowed under the Act but from which no appeal has been preferred to apply for a review of the judgment to the Court, which passed the decree or order. Order 42 of the CPR provides the details for excising the Court's
jurisdiction of review.

"***Order42***

(i) Any person considering himself aggrieved:

a) ***by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***

b) ***by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him may apply for a review of judgment to the Court which passed the decree or made the order".***

in the instant case, the grounds for the application for a review of the High Court's decision rejecting the plaintiffs applications to set aside the ex parte judgment were clearly stated in the defendants' affidavit as follows.-

> "***5 (iii) The learned judge should not have dismissed any application since there was no affidavit of service on record but instead he relied on the fact that the learned trial judge had stated in his judgment that the defendant was served, whereas there was no proof of service.***

(iv) That dismissing my afore said application in the absence of an affidavit of service on records is an apparent error on the face of the record which is a good and sufficient ground for review of the judgment passed against me".

The basis of the application was that there was some mistake or error apparent on the face of the record and that error was dismissing the application in absence of affidavit of service as proof that the defendant or his counsel had been served with the relevant hearing notice.

The learned trial judge Okumu-Wengi, J., granted the application for review and vacated his earlier order refusing to set aside the ex-parte judgment. His main ground for doing so appears to be that the defendant had not been served with hearing notice in the presence of LC.'s or the Police as Lugayizi, J., had ordered before he proceeded to try the suit exparte. This is what Okumu-Wengi, J., said in his ruling granting review:

> ***"From a review of the record there is no affidavit or evidence of service that the applicant was served in the presence of L.C's as earlier ordered by the trial judge. There is also no record as to what satisfied the judge about the service in the way he ordered and there is no record of any order vacating the one***

***made by the judge requiring service in the presence of L.C's. This being the case, and in the absence of any document or evidence in the possession of the Respondent/Plaintiff and that of his advocates this court is left with a mysterious gap. This applicant and his advocates have had more than enough opportunity to fill the gap and correct or complete the record. The statement by the trial judge that he became satisfied about the service onto the defendant/applicant remains largely unsubstantiated or justified by the record without having to go outside the record, in this event, I am left in some doubt how I can support the statement, as I cannot justify it by the record. It is therefore my decision that my order complained of must be reviewed and I do hereby review it and order that it be vacated....*"**

What the learned trial judge said here appears to be a reversal of his earlier decision that the defendant had been served and he, consequently, refused the defendant's application to set aside the ex parte judgment passed in his absence.

The basis of the Court of Appeal's decision was that there was no mistake or error apparent on the face of the record to justify a review. The absence from the record of evidence on that the defendant had been served in the presence of L.C's or Police was

not the error or mistake apparent on the face of the record, it was the fact that no evidence of a proper and effective service on the defendant, existed at all on the record.

in **A.I.R. Commentaries: The Code of Civil Procedure by Manohar and Chitaley, volume 5, 1908,** it is stated that in order that an error may be a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on the record. The **"error"** may be one of fact, but it is not limited to matters of fact, and includes also error of law.

in the instant case, my considered opinion is that the absence from record of an affidavit of service on the defendant or his counsel was an error or mistake on the face of the record justifying a review of the trial judge's refusal to set aside the ex parte judgment against the defendant. Had the learned Justices of Appeal properly reevaluated the evidence, they would have reached the conclusion that the defendant or his counsel was not served at all with the hearing notice of the suit. On 10.11.98 when the suit was called for hearing by Lugayizi, J., the plaintiff's counsel Mr. Akampulira only informed the Court that the defendant and his counsel Mr. Kabyesiza were absent though served, and

that Mr. Akampulira had an affidavit of service and a copy of the summons they had endorsed.

The Court record does not show that Mr. Akampulira showed the returned document of service to trial judge Lugayiuzi, including the affidavit of service, which he apparently had in his possession. The learned trial judge merely recorded that he was satisfied that the defendants advocates were served. The record does not show that the learned trial judge had a sight of the returned documents, and the affidavit of service. I have already referred in this judgment to what Okumu-Wengi, J., said in this regard in his ruling refusing the defendant's application for setting aside the exparte judgment. At the cost of repeating, he said, inter alia: -

> "***Unfortunately I have been unable to see the affidavit of service. On the basis of which the Judge proceeded having been satisfied that service had been effected***".

I agree with the submissions of the appellant's learned counsel that that had there been service, then the affidavit of service should have been on, the Court record and if the copy on the Court file was missing, then the plaintiffs advocate would or should have produced a copy from their office file.

The finding of the Court of Appeal that the defendant was served with the hearing notice is contained in the following passage of

the judgment of Okello, J.A, with which the other members of the Court agreed.

> "In ***the instant case it was submitted that the trial judge had ordered a specific mode of service to effect service of the process on the respondent. The service was to be effected on the respondent in the presence of the Police or LC and that if he refused to accept service then the L.C. or Police should swear an affidavit to that effect. I do not agree that the trial judge thereby intended to set a specific mode of service on the respondent. The record shows that the trial judge had not been satisfied with the earlier service when he said: -***

The affidavit of service is unsatisfactory. Let the plaintiff's side serve the defendant again. They should go with L.C or Police and, in case the defendant refuses service let the L.C or Police swear an affidavit to that effect as well.

He clearly wanted a proper and effective service on the defendant even where he might have refused service. He only gave guidance of an effective service. Failure to follow the method he proposed could not constitute an error apparent on the face of the record provided that there was evidence of a proper and effective service on the defendant. There would have been an error apparent on the record if there had been

no evidence of proper and effective service on the defendant. In "this case there is evidence that that was effected on the defendant's lawyer who accepted service".

With the greatest respect, as I have already said in this judgment, there was no evidence on record that the defendant was served. Order 5, rule 17 of the C.P.R provides that where summons have been served on the defendant or his agent or other person on his behalf, the serving officer, shall in all cases, make or annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which the summons was served and name and address of the person, if any, identifying the person served and witnessing the delivery of the tender of the summons. The provisions of this rule is mandatory, it was not complied with in the instant case. What the rule stipulates about service of summons, in my opinion, applies equally to service of hearing notices.

There was no affidavit of service on the record. The absence of such affidavit leads inevitably to the conclusion that the defendant was not properly served with the hearing notice before the suit was heard in his absence. The point is that there was no evidence that the defendant was served at all, not that he was not served by the special mode of service prescribed by Lugayizi, J., which would not have been an issue if the defendant was normally served as required by the C.P.R.

What I have said in this judgment disposes of all the grounds of appeal, which should succeed, in the result I would allow this appeal with costs here and in the Court of Appeal. Costs in the High Court should abide the result of the trial.

I would set aside the order and judgment of the Court of Appeal and restore the order of the High Court setting aside the judgment of Lugayizi, J., and order that the suit which gave rise to this appeal should be tried de novo by the High Court on a date notified to both parties.

As other members of the Court agree, it is ordered in those terms.

JUDGMENT OF KAROKORA, JSC:

1 have had the benefit of reading in advance the draft judgment prepared *b*y my learned brother, the Hon. Justice A. H. O. Oder JSC, and I agree with his conclusions that the appeal ought to be allowed with costs to the appellant here and in the courts below.

In the result the order and judgment of the Court of Appeal must be set aside and the order of the High Court setting aside the judgment of Lugayizi, J, is hereby restored as there was no proper evidence that the service of court process had been effected. It is ordered that the case which gave rise to this appeal must be heard inter parte de novo by the High Court.

Dated at Mengo this 21st February 2005.