

UGANDA / JUDGMENT

Muhindo v Kamanyire (Civil
Appeal 30 of 2024) [2024]
UGHC 860 (16 September 2024)
[2024] UGHC 860

COURT

High Court of Uganda

BEFORE

David S.L. Makumbi, J

CASE / FILE NUMBER

Civil Appeal 30 of 2024

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KASESE

HCT-25-LD-CA-0030-2024

(FORMERLY FORT PORTAL HCT-01-LD-CA-0029-2020)

(ARISING FROM KASESE CHIEF MAGISTRATE KAS -00-CV-MA-024-2019)

(ARISING FROM KASESE CHIEF MAGISTRATE KAS-00-CS-LD-009-2019)

MUHINDO NDERU GEORGE:: APPELLANT

VERSUS

KAMANYIRE HUSSEIN:: RESPONDENT

BEFORE HON JUSTICE DAVID S. L. MAKUMBI

JUDGMENT

REPRESENTATION:

Appellant represented by M/S KRK Advocates.

Respondent represented by M/S Bagyenda and Co. Advocates.

BACKGROUND:

This is an appeal by which the Appellant, being aggrieved and dissatisfied with the judgment, decree and orders of His Worship Karakire Edgar, Magistrate Grade One delivered on 17th September 2020 at Kasese, appealed against the same on the following grounds:

1. The Learned Trial Magistrate erred in law and fact when he held that the Appellant was properly served with summons to file a defence thereby coming to a wrong decision.
2. The Learned Trial Magistrate erred in law and fact when he held that the suit land in Civil Suit No. 14 of 2013 was different from the suit land in Civil Suit No. 9 of 2019.
3. The Learned Trial Magistrate Grade 1 erred in law and fact when he held that Civil Suit No. 9 of 2019 is not **res judicata**.

The Appellant accordingly made the following prayers:

1. The Appeal be allowed and the judgment, decree and orders be set aside.
2. The Respondent's suit be dismissed for being **res judicata**.
3. Costs of the Appeal and in the lower court be awarded to the Appellant.

The brief facts in this matter as apparent from the court record are that in February 2019, the Respondent brought a suit vide Kasese Chief Magistrate Court Civil Suit No. 9 of 2019 as Plaintiff against the Appellant in capacity as Defendant. By that suit the Respondent/Plaintiff claimed as beneficiary to the estate of the late Kamanyire Ali land comprised in FRV 570, Folio 19, Plot 20 Busongora Block 94 located at Kikonzo Cell in Hima Town Council.

The Respondent/Plaintiff claimed that in December 2008 the Appellant/Defendant began to wrongfully claim part of the suit land and trespassed upon the same by planting Eucalyptus trees. The Respondent/Plaintiff subsequently sought declaration and orders to the effect that he was the rightful owner of the suit property and for orders of vacant possession against the Appellant/Defendant among other prayers.

On the 28th of June 2019, His Worship Edgar Karakire, Magistrate Grade 1, pronounced judgment **ex parte** against the Appellant/Defendant after he failed to appear in court despite having been served with court process. The Court found that the Respondent/Plaintiff was the rightful owner of the suit land and that the Appellant/Defendant had indeed trespassed upon the suit land when he planted eucalyptus trees thereupon.

On the 15th of November 2019, the Appellant/Defendant filed a Notice of Motion before the Chief Magistrate Court in Kasese vide Kasese Chief Magistrate Miscellaneous Application No. 24 of 2019. By that Notice of Motion the Appellant/Defendant sought orders that:

1. The *ex parte* judgment/decreed in Civil Suit No. 9 of 2019 be set aside and the suit be heard on merit *inter partes*.

2. The execution in enforcement of the decree in Civil Suit No. 9 of 2019 be stayed and set aside.
3. Costs of the application be granted to the applicant.

On 17th September 2020, HW Edgar Karakire delivered a ruling declining to set aside the *ex parte* judgment on the grounds that he was satisfied that the Appellant/Defendant had been properly served and had failed to appear in court.

Based upon the background above, what is apparent is that the Appellant who was previously the Defendant in the lower court had a judgment passed *ex parte* against him before HW Edgar Karakire. The Appellant then subsequently applied for the decision to be set aside and the application was declined.

The background above, therefore raises the question whether this instant appeal has been properly instituted before this court. This is because the Appellant is substantively appealing against the judgment of HW Edgar Karakire Magistrate Grade 1 but in so doing is also seeking orders for the same to be set aside. This raises a preliminary question on whether the appeal is properly before this Court.

Preliminary Analysis:

Before I can delve into the merits of the appeal, I find it necessary by the very background of this appeal to address the issue of whether this appeal is properly brought before this court. The issue in this regard being whether the Appellant, having unsuccessfully applied to set aside the ex parte judgment in Kasese Chief Magistrate Miscellaneous Application 24 of 2019, could then go ahead to substantively appeal the merits of the judgment in the main suit decided ex parte against him.

In considering the issue above, I bear in mind the provisions of Order 9 Rule 27 of the Civil Procedure Rules under which the Appellant himself sought to move the Chief Magistrate Court to set aside the ex parte judgment. It is provided thereunder that,

“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 ...”

In his submissions, Counsel for the Appellant argued that the dismissed application was premised on Order 9 Rule 27 of the Civil Procedure Rules and that under Order 44 Rule 1(1)(c), an Order under Order 9 Rule 27 is appealable as of right. To that extent Counsel for the Appellant argued that this appeal was properly before this Court.

Counsel for the Respondent failed to adhere to the timelines set by court for filing of submissions and as a result there were no submissions considered for the Respondent.

In principle the grounds of appeal in their individual respects are of no concern per se. However, closer examination of the grounds raises a preliminary issue as to whether the grounds of appeal as raised by the Appellant could be jointly resolved in the same appeal.

The prayers of the Appellant in this appeal inter alia were that:

1. The Appeal be allowed and the judgment, decree and orders be set aside.
2. The Respondent's suit be dismissed for being res judicata.

The nature of the grounds of appeal and the prayers raised by the Appellant are for remedies that are by their very nature mutually exclusive. The Appellant could only either appeal the interlocutory decision of the lower court declining to set aside the ex parte decision or he could appeal the merits of the decision of the lower court in the main suit but not both.

In the case of **Uganda Revenue Authority v M/S Urgent Cargo Handling Ltd and Another – Civil Appeal No. 20 of 2018**, His Lordship Gashirabake JA held at Page 13 that,

“The question of whether a party aggrieved by an ex parte judgment should apply to set it aside or lodge an appeal can be described as within the choice of the party. Although the Appellant, in this matter had the option of applying to have the judgment set aside, that is not a bar to seeking to appeal it considering Section 67(1) of the Civil Procedure Act expressly confers such a right. The right to appeal a decision accrues to the party dissatisfied with the court decision, regardless of the same being rendered ex parte. A litigant unless estopped, or by former adjudication, or by law, is not foreclosed or otherwise prevented from a determination of the merits of his or her case by means of any available remedies. Litigants are at liberty to choose one out of several means afforded by the law for the redress of an injury, or one of several available forms of action. In an exercise of election of remedies, selection of one makes the party lose the availability of the other remedy. By way of analogy, if one chooses to pursue an appeal, they lose the right to set the decision aside, and vice versa.

Mulla on Code of Civil Procedure, 16th Edition, further notes that an appeal against a decree passed ex parte is possible even if the Appellant did not exhaust or exercise the remedy provided (to set aside the ex parte decree and proceedings). The only limitation is that the Appellant will not be allowed, on appeal, to challenge the order posting the suit for ex parte hearing by the trial court. He can only challenge the merit of the suit.”

Following the reasoning of the Court of Appeal above, one cannot opt to adopt the remedy to appeal the decision posting the suit for ex parte hearing while at the same time adopting the remedy of challenging the merits of the suit. The remedies are mutually exclusive in the sense that once one opts to appeal the decision declining to set aside an ex parte judgment and decree, you cannot also appeal the merits of the same suit for which you seek to have the entire judgment set aside.

In this instant case the Appellant's first ground of appeal was clearly inviting this court revisit the lower court's conclusion that the Appellant had been properly served with summons. This ground of appeal was problematic because whereas the Appellant was raising the ground as a substantive ground of appeal affecting the merits of the judgment/decreed in Kasese Chief Magistrate Civil Suit No. 9 of 2019, the reality is that it relates to a decision determined in an interlocutory application vide Kasese Chief Magistrate Miscellaneous Application No. 24 of 2019. It was therefore not open to the Appellant to appeal with regard service of summons while at the same time raising further grounds of appeal in Civil Suit No. 9 of 2019 which grounds were not pertinent to Miscellaneous Application No. 24 of 2019 and substantively affect the merits in the main suit.

The Appellant could appeal against the decision of the lower court in Miscellaneous Application No. 24 of 2019 but having opted to do so he would have no locus to appeal the merits of the judgment and decree in Civil Suit No. 9 of 2019. The same applies vice versa in the sense that the Appellant having opted to appeal the lower court judgment and decree in the main suit would then be automatically excluded from appealing the decision in the interlocutory application.

I do note though that in deciding Miscellaneous Application No. 24 of 2019, His Worship Karakire erroneously treated the issue of the main suit being **res judicata** as a ground of appeal. I consider this erroneous because according to the Appellant's grounds as raised in the aforementioned application he treated the **res judicata** ground as a plausible defence warranting the main suit being heard **inter partes** should it be determined that there was no proper service of summons. This meant that the **res judicata** ground could only be handled upon the successful setting aside of the **ex parte** judgment and decree. The **res judicata** issue could not therefore be validly introduced to this Court as a ground of appeal from the interlocutory application.

In the instant case what is clear to me is that the Appellant in this matter is essentially seeking to have his cake and eat it at the same time. This is because the first ground of appeal touches on an issue that was determined in an interlocutory application while the rest of the grounds of appeal relate to issues that speak to the merits of the decision in the main suit vide Kasese Chief Magistrate Court Civil Suit No. 9 of 2019. There is no way that the first ground of appeal can be determined alongside the other grounds of appeal as they are mutually exclusive for reasons well elucidated in the decision of the Court of Appeal cited above.

Determination of the Court:

In light of the preliminary analysis it is my considered view and conclusion that this appeal is misconceived in as much as the Appellant seeks both to have the **ex parte** decision of the lower court set aside while at the same time seeking to appeal the merits of the same decision.

The Appellant, having unsuccessfully made an interlocutory application to set aside the *ex parte* judgment in the main suit, could not be seen to appeal both the decision in the interlocutory application and the substantive merits in the main suit. The two remedies are mutually exclusive and cannot to that extent be granted by this Court. Furthermore, having been presented with two mutually exclusive remedies, it is not for this court to select for the Appellant which remedy he ought to proceed with.

It is also pertinent to note that for reasons I have already explained above, appeal on the basis of the main suit being **res judicata** was not open to the Appellant before this Court as it related to the main suit while the question of service of summons related to the interlocutory application. His Worship Karakire's decision to handle both the issue of service of summons and the question of whether the main suit was **res judicata** in the interlocutory application was erroneous to the extent that he was only required to determine whether the **ex parte** judgment would be set aside or not and not the actual merits of the judgment.

His Worship Karakire ought therefore to have restricted himself to determining whether the **res judicata** issue was a sufficient basis for determining that the matter be heard afresh **inter partes** but even then only if he had been satisfied that service of summons in the main suit had not been effective. If he found that service was effective and that to that extent the **ex parte** judgment and decree stood then the Applicant's only remedy would be to appeal the **res judicata** issue to the High Court as a matter separate from the validity of the **ex parte** judgment and decree.

This appeal therefore fails on the grounds that the remedies sought by the Appellant cannot be entertained in the same appeal.

In light of the determination above, I find no reason to delve further into the actual merits of the grounds of appeal as the appeal in its present form seeks remedies which this Court is not in position to grant. While this Court could very well exercise its discretion in the matter to traverse the merits in the appeal, it is my considered view that doing so would be tantamount to the Court determining for the Appellant which direction his own appeal ought to have taken. Such an approach risks the Court appearing partial to the Appellant's case especially given that the matter in the lower court had been determined against the Appellant **ex parte**.

The only way that this appeal could be impartially determined by this Court is either as an appeal seeking to set aside the **ex parte** judgment of the lower court or as an appeal addressing the merits in the **ex parte** judgment of the lower court. It cannot be an appeal to determine both. This is because an appeal seeking to set aside the **ex parte** judgment and decree would result into the matter being sent back to the lower court to be heard **inter partes** while an appeal on based on the merits of the decision would result in this Court either upholding the lower court decision or quashing it altogether without necessarily reinstating the matter to be heard **inter partes**.

ORDER:

This appeal is dismissed with costs to the Respondent.

Right of appeal explained.

David S. L. Makumbi

JUDGE

16/09/24

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