THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ
HON. JUSTICE G.M. OKELLO, JA
HON. JUSTICE S.G. ENGWAU, JA

CIVIL APPEAL NO. 75 OF 2003

PASTORI TUMWEBAZE :::::::::::::::::::::::::::::: APPELLANT

VERSUS

EDSON KANYABWERA :::::::::::::::::::::::::::::: RESPONDENT

(Appeal from the Judgement/Decree of the High Court delivered at Kampala by the Hon. Mr. Justice R. O. Okumu Wengi, dated 15th May 2003 in Miscellaneous Application No. 235 of 2003)

JUDGEMENT OF L.E.M. MUKASA-KIKONYOGO, DCJ

This appeal is against the decision of the High Court in Civil Application No. 235 of 2003 dated 15th May 2003. Pastori Tumwebaze, the appellant sued the respondent, Edson Kanyabwera, for special and general damages arising out of a traffic accident involving his vehicle and that of the respondent. The background, the facts, the grounds of contention and submissions of counsel for the parties have been ably stated and dealt with in the draft judgement prepared by Okello J.A. I do not have much to say but only to comment on those issues which deserve mention. I agree with him that this appeal must succeed. Following ex-parte proceedings judgement was entered for the appellant on 27/10/2001 for Ug. Shs. 12.000.000/= cost of replacement of his vehicle, shs. 2.000.000 general damages, interest on special damages from the date of filing till payment in full and interest on general damages from the date of judgement till payment in full and costs of the suit.

When the respondent learnt of the ex-parte judgement against him, he instructed his counsel to file an application under 09 Rule 29 of the Civil Procedures Rules but it was dismissed by the High Court. Aggrieved by the decision of the court the respondent filed an application under Section 35 of the CPA for a review which was allowed. The learned trial judge, Okumu Wengi reviewed his Ruling, vacated the order he had made there in and set aside the ex-parte judgement passed in favour of the appellant, hence this appeal. The grounds of the appeal have been all reproduced I will not cite them again. I however, wish to comment on the issue of the error on the record under ground one which reads as follows;

" (1) there was an error apparent on the face of the record in that there was no proof of service."

The law on grant of reviews in Civil Cases is settled and reiterated in a number of authorities including **Sardar Mohamed versus Charon Singh Nan Singh and Another (1959) E.A 793** It was expanded in the Civil Procedure **Rules O 42r (1)** as follows:-

"Any person considering himself aggrieved-

a) by a decree or order from which an appeal is hereby 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 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 judgement to the court which passed the decree or made the order sought to be reviewed"

See also **Yusuf versus Mokrach (1971) E.A 104**

My problem with the instant case is the alleged error on the face of the record. As stated in the authority cited by Okello J.A namely:

"Mulla on the Code of Civil procedure Act 1908 3rd edition at page 1673"

An error is described as follows;

"An error is apparent on the face of record when it is obvious and self evident and does not require an elaborate argument to be established"

Apparently what amounts to error apparent on the face of record is not precisely defined by law but depends on the facts of the particular case. In the present case, the error on the face of record appears to be non compliance with the learned trial judge's order for a specific mode of service. He had ordered that the respondent should be served again in the presence of the Police or LC official and if he refused service, the LC official or Police would swear an affidavit to that effect. However, on 10/11/98 when the suit was called for hearing, counsel for the appellant informed the court that counsel for the defendant had been served with the hearing notice but not in accordance with the courts specific order. The respondent was not served personally in the presence of the Police and LC official.

In my view service effected on counsel for the defendant was good service. Counsel for appellant cannot be faulted for that. The order for a specific mode of service was made to ensure that the respondent was served. The specific mode of service ordered by the learned trial judge was not exclusive. The intention was to ensure effective service. I do not agree that the said order prevailed over other modes of service. I see no error on the face of the record. Failure by the appellant to serve the respondent in the specific mode ordered by the learned trial judge was not detrimental to his case, It did not amount to a miscarriage of justice.

As Engwau J.A. holds a similar view, by a unanimous decision of this court the appeal is allowed. The order revising the dismissal of the application to set aside the ex-parte judgement is set aside. The respondent is ordered to pay costs to the appellant in this court and High Court.

DATED at Kampala this……5th …….day of…April…..2004

L.E.M. MUKASA-KIKONYOGO
HON. DEPUTY CHIEF JUSTICE