THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM:

HON. LADY JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ

HON. LADY JUSTICE C.N.B.KITUMBA, JA

HON. LADY JUSTICE C.K.BYAMUGISHA, JA

CIVIL APPEAL NO.9 OF 2002

BETWEEN

TWIGA CHEMICAL INDUSTRIES LTD::::::::::::APPELLANT

AND

VIOLA BAMUSEDDE t/a Triple B.Enterprises::::::: RESPONDENT

(*An appeal from the ruling and order of the High Court of Uganda sitting at Kampala (*Okumu-Wengi J) *dated the 27th November 2001 in Misc.Application No.554/2001 arising out of H.C.C.S No.531/2000)*

JUDGMENT OF BYAMUGISHA, JA

This appeal arose out of a ruling and orders made on the 27th November 2001 wherein the appellant's application for setting aside the dismissal of its suit was dismissed with costs to the respondent.

The background to this appeal can be summarised as follows. On 11th May 2000, the appellant filed a suit under the provisions of **order 33** of the **Civil Procedure Rules** against the defendant for the recovery of *shs* 15,420,000/= and costs of the suit. The basis of this claim was that sometime in November 1996 the appellant sold to the respondent various chemicals for which the latter made part payment but remained with a balance of *shs* 15,420,000/=. This balance was apparently acknowledged in two letters dated 18/03/99 and 19/06/99 respectively. The said letters were attached to the plaint as annextures. On 03/11/2000 the respondent filed her written statement of defence in which she denied any indebtedness in the sum stated in the plaint. In the alternative, she averred that during the 1996/97 cotton season the appellant declined to contract her but instead contracted one Eseri Nyakaisiki trading as Misango Traders to distribute on loan 3,800 litres of ambush to farmers. The farmers were supposed to pay after cotton had been harvested. It was the respondent's case that before cotton was harvested the directors of Misango Traders passed away

and she was requested by the appellant to salvage whatever she could on a commission basis and recover money from the debtors of Misango Traders as well as her own debtors. She alleged that she recovered *shs* 16,000,000/= which she paid over to the appellant on 11th November 1997. She denied that she sold any chemicals on behalf of the appellant after the 1995/96 season.

In the counter-claim the respondent averred that during the 1995/96 cotton season, under a contract arrangement between the Cotton Development Organisation and the appellant, the respondent was the intermediary for the distribution of super ambush to cotton farmers. The appellant was supposed to pay the respondent the sum of *shs* 800/= per litre of chemical distributed. The respondent further averred that a total of 6000 litres of ambush was distributed to farmers for which Cotton Development Organisation through Stanbic Bank paid the appellant on 15/09/97. The total amount paid according to the respondent, was *shs* 94,800,000/= and the appellant was supposed to pay *shs* 4,800,000/= for distribution services to the respondent which it did not. In addition, the respondent claimed *shs* 2,967,000/= as expenses incurred for collecting debts of Misango traders.

The appellant did not file any reply to the averments contained in the written statement of defence and counter-claim. The parties appeared in court on 08/12/2000 and the appellant was given time to file a reply to the counter- claim out of time but it did not. The case was fixed for mention on 12/03/01 but the day became a public holiday. The matter came before court on the 28/06/2001. The appellant and its counsel were absent and the suit was dismissed. Accordingly, judgment was entered against the appellant on the counter-claim in the sum of *shs* 4,800,000/= as a liquidated sum with interest at the rate of 25% from July 1996 till payment in full and the taxed costs of the suit. On the 13th November 2001, the appellant filed an application by way of Notice of Motion seeking to set aside the order dismissing the suit; stay of execution and setting aside the decree entered in favour of the respondent on the counter-claim. The main ground advanced in support of the application was that the appellant was not aware of the hearing date, as it was not served with any hearing notice. The application was dismissed on the 26th November 2001- hence the instant appeal.

The memorandum of appeal contains 10 grounds namely: -

1. **The learned Judge erred in law and fact to proceed to dispose of a matter, which had not been duly fixed for hearing on 28th June 2001.**
2. **The learned Judge erred in law and fact in dismissing HCCS No531 of 2000 relying on counsel for the respondent's submission from the bar.**

3. **The learned Judge wrongly exercised his discretion by dismissing the appellant's case when neither the appellant nor his counsel were aware of the hearing date of 28th June 2001.**
4. **The learned Judge erred in law and fact in entering judgment summarily in a claim which was not brought under summary procedure, and without perusing all the pleadings on record.**
5. **The learned trial Judge erred in law and fact in holding that the respondent's counter-claim was a liquidated claim.**
6. **The learned Judge erred in law and fact in holding that the respondent was entitled to a decree on the counter-claim as there had been no reply to it.**
7. **The learned trial Judge took into account irrelevant matters and thus wrongly exercised his discretion in refusing to set aside the *ex parte* judgment and decree of 28th June 2001.**
8. **The learned trial Judge erred in law and fact in entering judgment for the respondent in the sum of Ug *shs* 4,800,000/- with interest and costs without evidence.**
9. **By misconstruing the submissions made by counsel for the appellant on 26th November,2001 the learned trial Judge erred in law and fact**
10. **The learned trial Judge erred in law and fact when he ignored without reason binding precedents which were cited in support of the appellant's application to set aside the *ex parte* decree.**

The appellant made the following prayers:

1. **That the appeal be allowed.**
2. **The *ex parte* judgment entered on the 28th June 2001 against the appellant be set aside and the suit be remitted to the High Court for hearing *interpartes.***
3. **The Ug. *Shs* 16,998,938/= which was deposited in the High Court by the appellant be released to the appellant.**
4. **The respondent accounts for the appellant's two motor vehicles Nos 828 UAJ and 786 UAV that were attached in pursuance of the *ex parte* decree.**
5. **Costs of the appeal be granted to the appellant.**

When the appeal came before us for disposal, Mr Geofrey Mutaawe, learned counsel for the appellant, made submissions on the appeal. He based himself on two basic issues namely

1. whether sufficient cause to set aside the *ex parte* decree was shown.

2. Whether the judgment entered in favour of the respondent on the counter-claim was legal.

In submitting on these two issues, learned counsel adopted his submissions before the lower court when he applied to set aside the *ex parte* judgment. He contended that there was no evidence of how the case was fixed for hearing as there was no hearing notice issued for service on the parties. He further contended that the case was coming for hearing for the first time, and as such counsel for the respondent misled court when he stated that the appellant had lost interest in the case. On the claim by counsel for the respondent that he was alerted about the hearing date by the former counsel for the appellant, Mr Mutaawe submitted that Mr Opwonya did not tell court when the telephone call to him was made.

He criticised the learned trial for holding that the appellant as the plaintiff had undertaken to effect service of court process on the respondent. Counsel contended that there was no hearing notice and therefore there was nothing to serve.

He cited the case of **Departed Asians Property Custodian Board v Issa Bukenya (**SCCA No.18/91)(unreported). The appellant in this case was the defendant and an *ex parte* judgement was entered against it. It applied to set aside the judgment and the application was dismissed on the grounds that no good or substantial reasons had been given to justify setting aside the decree. On appeal it was held that for an application to set aside an *ex parte* deree to succeed, the applicant must show that summons had not been duly served or was prevented by sufficient cause from appearing at the date fixed for hearing. Learned counsel pointed out quite rightly in my view that the above case concerned a defendant. He also referred to the case of **Kanji Naran V Velji Ramji (1954) 21 EACA 20** This case is authority for the legal proposition that as a general practice, the court should require an affidavit of service of summons in every case before entering judgment in default of appearance. He pointed out that where there is no proper service, the Judge should not dismiss the suit. It was his submission that after dismissing the suit, the Judge was bound by **order 9 rule 17** instead of entering judgment on the counter-claim. He claimed that the judge entered judgment under a procedure unknown to law. He criticised the trial judge for entering judgment on the counter-claim under the pretext that there was no reply. He pointed out that under **order 8 rule 18(5)** the facts in the counter-claim are deemed to be admitted but the court can give leave to the plaintiff to file a reply.

Learned counsel claimed that under our law judgment could not be entered summarily unless the counter-claim is a liquidated demand or where facts are admitted. He stated that the respondent had filed a counter-claim in which she claimed special and general damages and therefore before

judgment could be entered the respondent had to comply with the provisions of **order 9 rule 3** which requires an affidavit of service to be filed before judgment can be entered in default. He relied on the case of **Hajji Asumani Mutekanga v Equator Growers (U) Ltd (**SCCA No.7/95) for that contention. He invited us to allow the appeal.

In reply, Mr Opwonya, counsel for the respondent invited us to dismiss the appeal. He defended the decision of the learned trial judge to dismiss the appellant's case on the 28th June '01 because according to him, the case was fixed and cause- listed. He reiterated the contents of his affidavit sworn on the 23rd November '01 opposing the application for setting aside the dismissal of the suit. He claimed that no one challenged the truth of what he stated that it was counsel for the appellant who alerted him of the date. He further submitted that the appellant feared to call Mr Lubwama-Kawesa to challenge what he stated in paragraph 3 of the said affidavit.

He also submitted rightly that it was not the duty of counsel for the respondent to prove that the appellant's advocate had been served. He pointed out that this was not the first lapse or lack of vigilance on the part of the appellant. The first lapse according to counsel occurred when the appellant failed to file a defence to the counter-claim for a period of six months. He pointed out that the counter-claim was filed on 03rd November.2001. When the parties appeared in court on 08th December 2000 the appellant was given time to file a defence without applying for enlargement of time. Counsel pointed out that no defence was filed.

Learned counsel pointed out that the affidavit of the appellant affirmed in support of the application to set aside the dismissal of the suit was false when he claimed that he did not know about the dismissal until the 9th November 2001 when Court bailiffs went and attached its property and yet Mr Lubwama- Kawesa had accepted a taxation hearing notice on 27th August '01.
On the authorities cited by counsel for the appellant, Mr Opwonya stated that the case of **Departed Asians** emphasised cause listing as being important and vigilance by the litigant. He claimed that a telephone call was summons. On the case **Kanji,** counsel stated that it was distinguishable because the case was about lack of service of summons.

In order to determine whether the appellant was prevented by a cause that is sufficient, regard must be had to the provisions of the law under which the application for setting aside the *ex parte* judgment was filed. It has to be borne in mind that the appellant was the plaintiff. The application was filed under the provisions of **order 9 rules 20** and **24** of the Civil Procedure Rules. The correct

rule is **rule 20(1)** that govern applications by the plaintiff where a suit is wholly or partly dismissed. The rule states as follows:

"***Where a suit is wholly or partly dismissed, under rule 19 of this order, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal order aside, and, if he satisfies the court that there were sufficient cause for non-appearance when the suit was called 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".*** (underlining added)

The provisions of this rule and those of rule 24 require a party applying to show sufficient cause for failure to appear on the date fixed for the hearing of the suit. The only difference is that under rule 24 the defendant can succeed by showing either that there was no proper service or that he/she/it was prevented by sufficient cause. The defendant has a slight advantage over the plaintiff. Therefore in order to succeed in the instant appeal, the appellant had to show that there was sufficient cause for its failure to attend court when the suit was called for hearing on 28th June 2001. The sole reason advanced by the appellant was that it, together with its counsel were not aware of the hearing date. Counsel for the appellant submitted before the lower court that it was incumbent upon the respondent to prove that the applicant or counsel was served for 28/06/01 with a hearing notice.

In dealing with this submission, the learned trial Judge stated as follows:

"The argument for this is that there is no proof that the plaintiff had been served and made aware of the hearing during which the suit was dismissed and a decree entered on the counter-claim. First I want to point out that as it is the practice, the advocate for the plaintiff did indicate that they would undertake to effect service of process on the defendants. In this case the summary plaint in paragraph 2 is quite explicit.

It states:

2 The defendant is an adult female person of sound mind and trading as Triple B Enterprises and the plaintiff's advocates undertake to effect service of court process upon the defendant (emphasis added)

I think that the rule that parties are bound by their pleadings has remained the same and that in view of this pleading it is not correct that a defendant who has appeared in court should be the one to prove that he was served with court process."

I entirely agree with the learned trial Judge that a defendant has no burden to prove that a plaintiff, who is absent when the suit is called for hearing, was served with a hearing notice. This is in line with the provisions of **order 9 rule 19.** The rule states thus;

"***When 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 thereof, 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 reminder".***[underlining added]

On a proper reading of this rule, the court is not required to ascertain whether the plaintiff was served or not when the suit is called for hearing. The rule is couched in mandatory terms. This is in contrast with **rule17 (1)** of the same order which state that where "the *plaintiff appears and the defendant does not appear when the suit is called on for hearing-*

"(a) if the court is satisfied that the summons or notice of hearing was duly served it may proceed ex parte;

(a) if the court is not satisfied that the summons or notice of hearing was duly served,it shall direct a second summons or notice to be issued and served on the defendant;

(b) if the court is satisfied that the summons or notice of hearing was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed, or that the defendant was for sufficient cause unable to appear in person or cause appearance to be made on his behalf, it shall postpone the hearing of the suit to a future day to be fixed by the court and shall direct notice of such day to be given to the defendant".

I have endeavoured to reproduce the provisions of the rule to show that the law accords greater protection to the defendant who fails to appear on the date when the suit is called for hearing than the plaintiff. It the plaintiff who drags the defendant to court and therefore it is understandable and reasonable for the plaintiff who claims to be aggrieved to take steps and fix the case for hearing. What constitutes sufficient cause under the rule is a question of fact and each case depends on its own facts. In the case of **Nicholas Roussos vs Gulamhussein Habib Virann &Another** (SCCA No.9/93)(unreported) the Supreme court gave guidance of how the court can exercise its discretion in applications of this nature. It said:

"As for the principles upon which the discretion under r.24 may be exercised, the courts have attempted to lay down some of the grounds or circumstances which may amount to sufficient cause. A mistake by an advocate though negligent may be accepted as a sufficient cause. See Shabin Din V Ram Parkash Anand (1955) EACA 48. Ignorance of procedure by an unrepresented defendant may amount to sufficient cause Zirabamuzale v Correct [1962] EA 694. Illness by a party may also constitute sufficient cause: P.B.Patel v The Star Mineral Water and Ice Factory [1961] EA 454. But failure to instruct an advocate is not sufficient cause. See Mitha v Ladak [1960] EA 1054. It was also held in this case that it is not open for the court to consider the merits of the case when considering an application to set aside an ex parte judgment under this rule".

The appeal in the above case arose out of an application by a defendant to set aside an *ex parte* judgment but the guidelines laid down in the case can be used in case of a plaintiff.

The appellant in its application for setting aside the dismissal of the suit advanced two reasons for its failure to attend court on 28th June ' 01.

- That the advocate Mr Lutwama-Kawesa who was representing the appellant was not aware of the hearing date since no hearing notice was served on him.
- The appellant was absent because it too was not served with a hearing notice.

The above reasons were supported by the affidavits of one Surinder Kalsi the General Manager of the applicant affirmed on 13th November '01 and a second one in rejoinder dated 24th November '01 respectively. The respondent opposed the application by swearing an affidavit through her advocate Mr Opwonya. The main thrust of the appellant's affidavit is found in the following paragraphs:

"4 ***that when the said suit was called up for hearing on the 28th day of June, 2001 neither the applicant's then lawyer Mr Lubwama Kaweesa nor ourselves were in court and our suit was then dismissed and judgment entered on the respondent's counter-claim.***

5. That our lawyer's absence and the applicant's absence was caused by the fact that no hearing notice was ever sent to either our lawyer or to ourselves and hence the applicant did not know of the hearing date.

6. that the applicant only learnt of the dismissal of its case and the ex parte decree on the 9th of November, 2001 when the court bailiffs went to attach the applicant's properties outlined in

the advert in the New Vision dated 13th November,2001, a photocopy of which is hereto attached marked "B"

The respondent's reply is contained in paragraph 3 that states thus:

"That the applicant was the plaintiff in the original suit whose advocate Mr Lubwama of M/S Lubwama Kaweesa & Co Advocates ALERTED our Mr Charles Dalton Opwonya, counsel for the defendant/respondent of the hearing date of the 28th June through a telephone enquiry as to whether service for that date was already effected on the defendant".

The appellant's rejoinder paragraph 5 thereof stated as follows:

"***That Iam informed by my said lawyer which information I verily believe to be true that a hearing date is fixed either by consent of both counsel and the consent is filed in court, OR a hearing notice is taken out by one party and service of the same is effected on the opposite party OR the date is fixed by court and both counsel are served".***

Paragraph 6 stated that:

" ***That in light of that information, the contents of paragraph 3 cannot constitute fixing a case or a hearing notice".***

On this conflict of evidence the learned trial Judge dismissed the appellant's application. He said:

"I therefore do not agree that it was up to the defendant's advocate to prove that the plaintiff's advocate who had undertaken to effect all court process had no knowledge of the hearing of his own case. I therefore adhere to the rule that a party is bound by his pleadings and in this case the defendant's advocate duly responded to a hearing notice, and the burden is not on him to explain why the plaintiff's advocate was not in court. Further to this there is no affidavit by Mr Lubwama Kawesa to support the view of his client that he Mr Kawesa was not aware of the hearing of the case. Without his evidence no sufficient cause would be made out in order to set aside the dismissal of the suit. (Emphasis added)

When the trial Judge dismissed the application, he was exercising his discretion. It is well settled that an appellate court will not interfere with the exercise of discretion unless there has been a

failure to exercise discretion, or a failure to take into account a material consideration or taking into account an immaterial consideration, or an error in principles was made. Where a trial court gives reasons as it did in this appeal, which do not constitute *sufficient cause*, the appellate court will interfere and if no reasons are given, the appellate court will interfere if the order made was wrong. The position of the law on non-interference in the exercise of discretion by the appellate court was restated by the Supreme Court in the case of **Bank Arabe Espanol vs Bank of Uganda (**SCCA No.8/98)(unreported).

When a court is considering an application to set aside the dismissal of a suit, it has to take into account all the relevant factors into consideration and therefore the party who is appealing against the exercise of discretion has to show that there were some matters which the court ignored when it arrived at its decision.

As I have already stated elsewhere in this judgment, the appellant's case in the lower court was that it was not aware that its case was coming for hearing on 28th June '01 together with its counsel because both were not served with a hearing notice. If the appellant's affidavits that it together with its advocate were not aware of the date of 28th June, was true, it would constitute *sufficient cause* for setting aside the dismissal of the suit under **rule 20** (supra). However, as the learned trial Judge stated in his ruling, there was no affidavit from Mr Lubwama Kawesa to support his former client's case that he was not aware of the hearing date. There are factors, which tend to show that Mr Lubwama Kawesa might have been aware of what had transpired on 28th June but chose to do nothing. On 27th August '01 he was served with a hearing notice for taxation of the respondent's bill of costs. He accepted service. An affidavit of service sworn by one Onono Bonick dated 11th September '01 is on the court file. On the 25th September '01 another taxation hearing notice was served on him. He declined service on the ground that he no longer represented the appellant. He directed the process-server to serve another law firm of M/s Jombwe & Co Advocates who accepted service on behalf of the appellant and apparently took part in taxation proceedings. The service of the hearing notices for taxation shows that Mr Lubwama- Kawesa had actual knowledge that a judgment had been entered against his client. His knowledge was therefore the knowledge of the appellant under the doctrine that a man or woman who empowers an agent to act for him/her is not allowed to plead ignorance of his/her agent's dealings.

There are some other lapses on the part of the appellant and its counsel. The respondent filed her written statement of defence and counter claim on 03/11/2000. On 08/12/2000 both counsel were

in court and they consented that the appellant should file a reply to the counter-claim out of time. The case was adjourned to the 12/03/2001 for mention. That day became a public holiday and therefore there was no court business.

I have examined the record of the lower court. There is nothing to indicate who requested the fixing of the case for the 28th June.2001. I agree with the submissions of Mr Mutaawe and the affidavit evidence in rejoinder about fixing of cases. But be that as it may, Mr Opwonya's affidavit that it was Mr Lubwama Kawesa who alerted him about the date was not displaced in my view. This appeal is not one of those cases where a litigant cannot be made to suffer because of mistakes committed by his counsel. The appellant did not claim that counsel made any mistake. There are a wealthy of authorities in this court and the Supreme Court to the effect that mistakes committed by an advocate should not be visited on the litigant unless it is shown that the litigant is privy to that mistake. For that reason I can do no better than quote an excerpt from the case of **Capt. Philip Ongom V Catherine Nyero Owota(SCCA No.14/01**(unreported). In the lead judgment Mulenga JSC at page 9 said:

"Although in law service of the notice on the advocate constituted valid service on the appellant, I would not consider the advocate's failure, in the instant case, to comply with the notice, as failure by the appellant who did not know about the contents of the notice. It is an elementary principle of our legal system, that the acts and omissions of the advocate in the course of the representation bind a litigant who is represented by an advocate. However, in applying that principle, the court must exercise care to avoid abuse of the system and/or unjust or ridiculous results. To my mind, a proper guide in applying the principle is its premise, namely that the advocate's conduct is in pursuit of and within the scope of what the advocate was engaged to do. In light of that, in my view, a litigant ought not to bear the consequences of the advocate's default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give to the advocate due instructions".

The facts in the above case were that the appellant was served with summons and a plaint. His advocate entered appearance but did not file a written statement of defence within the prescribed time. A judgment in default was entered and the suit was set down for formal proof. On the date of the hearing, neither the appellant nor his counsel attended court, and the trial proceeded *ex parte* and judgment was entered. He made an application to set aside the judgment in which he advanced two grounds namely

1. that his failure to defend the suit and attend court on the hearing date, was the fault of his advocate whom he had instructed to defend him, and did not inform him of the hearing date; and
2. that he had a good defence to the suit.

The main reason why I have reproduced the passage from the judgment in the above appeal was to illustrate the point that the appellant in this appeal did not claim that its counsel in the course of representing it committed any mistakes. Parties must be bound by their pleadings. If Mr Lubwama Kawesa knew about the date of 28th June 2001, then the appellant also knew. The practice of fixing cases in the High Court as outlined by Mr Mutaawe should be adhered to but I do not think that a defendant who is informed by the plaintiff that the case has been fixed for hearing on a certain date, should be made to suffer merely because no hearing notice was taken out and served. A telephone call may not be equivalent to a hearing notice but in this age of information technology it might as well serve a similar purpose. The provisions of **rule 19(**supra) are clear. It was not pointed out to us what factors the trial Judge ignored or whether he took into account irrelevant matters before reaching his decision. The learned trial Judge in the peculiar circumstances of this appeal exercised his discretion judiciously and I have found no need to interfere with that exercise.

The second issue that was raised in this appeal was whether the judgment that was entered in favour of the respondent on the counter-claim was legal. **Order 8 rule 13** states that:

"If in any case in which the defendant sets up a counter-claim, the suit of the plaintiff is stayed, discontinued, or dismissed, the counter-claim the counter-claim may nevertheless be proceeded with".

This rule gives court discretion to proceed with the defendant's counter-claim if the plaintiff's suit is dismissed. The submission of counsel for the appellant was that judgment couldn't be entered in a summary manner unless the claim is a liquidated one. He cited the case of **Dave v Business Machines [1974] EA 68** for that contention. It was his submission that the respondent's claim was for pecuniary damages and therefore the suit should have been set down for hearing.

The respondent's counsel submitted that the counter-claim was not challenged and that formal proof is only required if the sum is not calculated. The counter-claim was for special damages of *shs* 4,800,000/= being a sum for distribution services allegedly rendered by the respondent in the 1995/96-cotton season. The sum was reflected in paragraph 5 of the counter-claim. There was no reply to this averment. The respondent had also claimed general damages and other sums of money

but they were not awarded by the trial Judge. **Order 9 rule 4** of the Civil Procedure Rules provides that:

"***Where the plaint is drawn claiming a liquidated demand and the defendant fails to file a defence, the court may, subject to rule 3 of this order, pass judgment for the sum not exceeding the sum claimed in the plaint together with interest at a rate specified (if any), or if no rate be specified, at the rate of eight per centum per annum to the date of judgment and costs".***

The counter-claim was not drawn claiming pecuniary damages only as provided under **rule 6** of **order 9** which rule requires the setting down of the suit for formal proof and assessment of those damages. The counter-claim was a mixture of both. The trial Judge gave judgment for the amount, which was already ascertained together with interest of 25 %. from July 1996. The case of **Dave v Business Machines Ltd** that Mr Mutaawe cited is distinguishable. In that case the appellant had entered appearance and denied the debt that was being claimed by the plaintiff. The appellant did not file a defence to the counter-claim. Another issue raised on this matter was that the respondent had admitted owing the appellant money in a letter or letters that were attached to the summary plaint. When the respondent filed a defence, however she denied that she was contracted by the appellant to sell any chemicals on its behalf during the 1996 cotton season, which was the basis of the appellant's claim. Instead she attached a dealership agreement dated 6th September 1995. She further alleged that Cotton Development Organisation through Stanbic Bank paid the appellant. These averments raised new matters and the appellant did not reply to them. Secondly there were other averments to the effect that the respondent was collecting debts from farmers who were formerly the customers of Misango Traders Ltd for the cotton season of 1996/97. This is reflected in paragraph 2 of her letter dated 18/03/99. The appellant did not reply to these allegations.

On the whole I think the learned trial Judge acted within the law when he entered judgment in favour of the respondent on the counter-claim. There was no need for the respondent to file an affidavit of service under **o.9 rule 3** as submitted by Mr Mutaawe because the appellant had been given time to file a reply and failed to do so. I think I have said enough to show that there is no merit in this complaint. This ground would also fail.

The above conclusions more or less dispose of the whole appeal with the result that the same would be dismissed with costs to the respondent.

Dated at Kampala this 03rd day of March 2004.

C.K.Byamugisha

Justice of Appeal

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

I had the advantage of reading the judgement in draft prepared by Hon. Lady Justice C.K. Byamugisha Justice of Appeal and I agree with her that for the reasons she gave this appeal should be dismissed.

As Hon. Justice C.N.B. Kitumba Justice of Appeal holds a similar view, this appeal is dismissed with costs to the respondent.

DATED At Kampala, this…03rd ……..day of…… March ….2004

HON. LADY JUSTICE L.E.M. MUKASA-KIKONYOGO

DEPUTY CHIEF JUSTICE