**Kanyabwera v Tumwebaze**

**Division:** Supreme Court of Uganda at Mengo

**Date of judgment:** 21 February 2005

**Case Number:** 6/04

**Before:** Oder, Karokora, and Kanyeihamba JJSC

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*[1] Appellate procedure – Duty of a first appellate court – Re-evaluation and scrutiny of the evidence*

*on record – Whether the Court of Appeal had discharged its duty.*

*[2] Civil procedure –* Ex parte *hearing – Procedure to be followed where party applying for* ex parte

*hearing not ready to proceed – Whether the trial court erred in permitting suit to proceed* ex parte *–*

*Order 9, rule 17*(*1*)(a) *– Civil Procedure Rules.*

*[3] Civil procedure – Review – Application for review – Error on the face of the record – Principles to*

*be applied in determining existence of error on the face of the record – Absence of affidavit of service –*

*Whether absence of affidavit amounted to an error on the face of the record.*

**JUDGMENT**

**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 occasions, because the defendant was not served with the hearing notice. On 23 March 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 November 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 *ex parte* under Order 9, rule 17 of the Civil Procedure Rules? *Court* 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 *ex parte*.” The learned trial Judge proceeded to hear the plaintiff’s evidence, after which, on 27 October 2001, he passed judgment for the plaintiff for: 1. U Shs 12 million as replacement value for the pick up. 2. U Shs 2 million general damages. 3. I nterest at rate of 6 percent per annum for number 1 from the date of filing suit until payment in full and for number 2 from the date of judgment until payment in full. 4. C osts of the suit. Subsequently, the defendant filed an application in the High Court Order 9, rule 24 of the Civil Procedure Rules (Civil Procedure Rules) for an order 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 *ex parte*. Thereafter, the defendant applied to the High Court for a review of its order which 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 Civil Procedure Rules, on the grounds that: 1. T here was an error apparent on the face of the record 2. T he applicant was aggrieved by the decision of the judge dismissing the application for setting aside the *ex parte* judgment 3. T he applicant had a good defence to the suit 4. T he order was appealable but no appeal had been preferred against the order arising from the decree and judgment. If the judgment arising from the *ex parte* 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. H aving 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. Messrs Ntambirweki Kantebbe and Kwarisiima, Advocates, submitted for the plaintiff and Messrs Babigumira and Company Advocates, submitted in reply in opposition to the appeal. The plaintiff’s 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 Civil Procedure Rules and on the cases of *D Mbonigaba v Nkinzehiki* Civil suit number 687 of 1971; and *Osuna Otwani v Bukenya Ssalongo* Civil number 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* and Company Advocates became the defendant’s lawyers in March 1999, long after the hearing of the suit had begun. The hearing of the suit began on 10 November 1998, and it was completed on 16 August 2001. What was the purpose of serving Mr Bakiza, of that firm of advocates, with hearing notice on 5 May 2001 as was stated by Ronald Sebagala in his affidavit of 8 May 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 v Uganda*, criminal appeal number 10 of 1997 (SCU) (UR); *Selle v Associated Motor Boat and another* [1968] EA 123, *Bogere and another v Uganda*, Criminal appeal number 1 of 1997 (SCU) (UR); *Pandya v 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 scrutinise 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 v Bank of Uganda* [1999] 2 EA. 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* (*ibid*). After scrutinizing the evidence, the Court of Appeal found that *Kabyesiza* and Company 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 LC 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 LC 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 defendant’s own affidavit supporting the application to set aside the *ex parte* judgment he deponed that in May 1998, he changed his instructions to Odere, *Kabyesiza* and Company 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 *ex parte* 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 Order 42 of the Civil Procedure Rules. 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 Civil Procedure Rules provides the details for exercising the court’s jurisdiction of review. “Order 42 (i) Any person considering himself aggrieved: ( *a*) B y a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or ( *b*) B y 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 plaintiff’s applications to set aside the *ex parte* judgment, were clearly stated in the defendants’ affidavit as follows: (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 aforesaid 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 an 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 a hearing notice in the presence of LC’s or the police, as Lugayizi, J had ordered before he proceeded to try the suit *ex parte*. 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 LC’s as earlier ordered by the trial udge. 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 LC’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 as to 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 LC’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 *AIR Commentaries: The Code of Civil Procedure* by Manohar and Chitaley, Volume 5, 1998, 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, ie 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 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 re-evaluated 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 November 1998 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 defendant’s 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 *ex parte* 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 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 plaintiff’s 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 JA 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 LC 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 LC or police and, in case the defendant refuses service let the LC 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 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 Civil Procedure Rules 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 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 Civil Procedure Rules. What I have said in this judgment disposes of all the grounds of appeal which should succeed. In 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. **Tsekooko JSC:** I have had the benefit of reading in draft the judgment prepared by my learned brother, Oder JSC and for the reasons I shall state presently, I agree with his conclusions that this appeal ought to succeed. The facts of this appeal are set out in the judgment of my learned brother. Like him, I shall also refer to the appellant as the defendant and the respondent as the plaintiff. On 10 November 1998, the day of hearing the suit Mr *Akampulira*, counsel for plaintiff, addressed court thus: “Mr *Kabyesiza* for the defendant is absent and the 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 *ex parte* under Order 9 rule 17 of the Civil Procedure Rules? Court: I am satisfied that the defendant’s advocates were served with today’s hearing notice. Since they have not turned up or given their 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 *ex parte*.” These passages should be read in the context of the record as a whole. Thus, about seven months earlier, on 23 March 1998, the same trial judge deemed affidavit of service for hearing on 23 March 1998 to be unsatisfactory. So he ordered for fresh hearing notice to issue for service on the defendant (*sic*). Although the above quoted order is brief, the only reasonable conclusion I can draw from the passages is that there was evidence of satisfactory service on counsel for the defendant. The trial judge has been criticised for not indicating on the record that he had physically sighted and handled the copy of the hearing notice which had been served on the defendant’s counsel and the affidavit of the process server. However, on 23 March 1998 when the judge ordered for a fresh service he did not write that he had looked at the hearing notice or at the affidavit of service. He wrote that: “The affidavit of service is unsatisfactory”. This implies that he read the affidavit. My own understanding of the record is that although the learned trial Judge was brief,in that he omitted to indicate that he had in fact sighted and perused both the hearing notice and the affidavit of service to satisfy himself about what Mr *Akampulira* stated,the judge should be presumed to have seen the documents. The appellant’s counsel has made a mountain out of this. The procedure adopted by the learned Judge, though it lacks detail,,it alone would not, in my opinion, be sufficient to justify setting aside his judgment. In the absence of any obvious wrong, it is legitimate to presume that when the judge stated that he was satisfied that the defendant’s advocates were served he must have seen the two documents. I am satisfied that the trial judge must have seen both the hearing notice and the affidavit of service which *Akampulira* announced in open court that he was in possession of. These documents could have been misplaced or lost subsequently. Careless keeping of court records by court registry staff which must be depreciated in no uncertain terms, is not peculiar to this case. With respect I would, therefore, not go along with the view that the learned trial Judge proceeded with *ex parte* hearing without satisfactory proof of service of the hearing notice. I, therefore, agree with the Court of Appeal insofar as that court held that there had been effective service of the hearing notice on the defendant’s counsel but that is as far as I can go, on that aspect of this appeal. I think,with respect, that the learned trial Judge made an error of a different nature which would justify setting aside his judgment. Counsel for the plaintiff applied for the order for *ex parte* hearing knowing very well that only one witness was present. This he announced, in open court, after the judge had granted the order for *ex parte* hearing of the case. He boldly announced that “I have one witness”. As this is a case which had been fixed for hearing for two days, I would have expected the learned Judge to ascertain from the plaintiff and his counsel whether they would call only that witness or other witnesses would appear later in the day or the following day before receiving evidence of the only available witness. Alternatively, as the judge had established that service was effected on defendant’s counsel and since the plaintiff did not have all his witnesses, the judge could have ordered for personal service on the defendant. On the facts it is clear that the plaintiff and his counsel were not quite ready to prosecute the suit. Yet after obtaining the court order to proceed *ex parte* and after the plaintiff’s testimony on the same day (10 November 1998) counsel for the plaintiff sought and was granted adjournment; to enable him get other witnesses. That day the rest of the witnesses for the plaintiff were absent. Yet the court obligingly granted the application for adjournment and adjourned the hearing of the case to 1 February 1999, giving a space of two and a half months. Indeed even on 1 February 1999, plaintiff’s counsel sought and was granted another adjournment to call a fourth witness. Eventually the hearing of the case could not be concluded until 16 August 2001. I do not believe that Order 9, rule 17(1)(*a*) is intended to allow a party to have indefinite *ex parte* hearing without making the other party aware of this. Order 9, rule 17(1)(*a*) reads as follows: “Where a 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 trial judge is given discretion in deciding whether or not to grant *ex parte* hearings. Granting an *ex parte* hearing should, in my opinion, enhance expeditious disposal of a case, but not to give further delay. As ordering an *ex parte* hearing is discretionary, it ought to be granted with caution therefore it ought not to be granted to a party which is, itself, not ready as was the case here. I think that rule 17(1)(*a*) should be read together with rule 18, which states: “Where the court has adjourned the hearing of the suit *ex parte*, and the defendant at or before such hearing appears and assigns good cause for his previous non-appearance, he may, upon such terms as the court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.” Whilst courts should promote expeditious hearing and disposal of cases and therefore should not have their work delayed by absence of parties or their witnesses, presiding trial judges would do well to be aware that rules 17 and 18 give court discretion to do justice. I think that in circumstances where a party is represented and his lawyer for unknown reason does not appear though served, the first option ought to be for the absent party to be served personally. In my opinion this should have been the proper course to be taken in this case. I say this because in terms of Order 15, rules 1 and 4, hearing once commenced should continue unless there is sufficient cause to justify an adjournment. This means that a party who asks for hearing of the case to start must be ready to proceed fully. It is not sufficient cause for adjourning the hearing of the case, whose hearing started *ex parte*, on account of absence of witnesses for the plaintiff. If the plaintiff wanted the case to be heard, he cannot be the same one to cause the hearing to be adjourned, as in this case, three times because of the absence of his own witnesses. It makes no sense to me. It amounts to unfair hearing, I think. In my considered opinion this would have been a legitimate ground for setting aside the *ex parte* judgment but not the alleged absence from the court record of the hearing notice and the process server’s affidavit. It is because of these reasons that I agree that this appeal ought to succeed. Furthermore, I think that Okumu-Wengi J erred in reviewing his ruling. I agree with the Court of Appeal that there was no error on the record merely because the affidavit of service was missing. The defendant should have appealed against the first ruling given by Okumu-Wengi, J instead of applying for review. I would allow the appeal with costs in this Court and the Court of Appeal. I would order that costs in the trial court do abide the results of the retrial.

**Mulenga JSC:** I have read in draft the judgments prepared by my learned brothers Oder and Tsekooko JJSC. I agree with both that the appeal should succeed and concur with the orders proposed by Oder JSC. Having regard to the circumstances of this case, as reflected in the record, I would not be inclined to hold that the trial judge, Lugayizi J, erred when on 10 November 1998 he held that he was satisfied that the defendant’s advocates were served with the hearing notice. In view of the fact that on the previous appearance, on 23 March 1998, the same judge had held that the affidavit of service was unsatisfactory, I think it is more probable that on the latter occasion he was satisfied from the affidavit of service mentioned by counsel rather than from the word of mouth of counsel. The omission to record what satisfied him, in my view, should not be construed as though he was not satisfied on proper and lawful grounds. Similarly, I am not inclined to hold that merely because no affidavit of service was found on the court file subsequently, it means that none was ever done or that the defendant was not

served with the hearing notice properly or at all (*sic*). I am, however, in agreement with my learned brother, Tsekooko JSC, that the learned trial Judge did not exercise his discretion judiciously when after ordering the case to proceed *ex parte* (because the defendant was absent that day) he permitted the hearing to be adjourned from day to day, without any further notice to the defendant as if he was barred from the proceedings. The rule permitting an *ex parte* hearing when a defendant does not appear, is intended to discourage a defendant from frustrating a plaintiff who is ready to present his case for no good cause. It is not intended to bar the defendant, who has defended the suit, from further participation. Although in this appeal the parties did not address this point, in my opinion, the error is of sufficient gravity to render the proceedings a mistrial, and to justify setting aside the *ex parte* judgment.

**Karokora JSC:** I have had the benefit of reading in advance the draft judgment prepared by my learned brother, the Honourable Justice AHO 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 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 service of court process had been effected. It is ordered that the case which gave rise to this appeal must be heard *inter partes de novo* by the High Court. **Kanyeihamba JSC:** I have read, in draft, the judgments of my brothers Oder and Tsekooko, JJSC and for the reasons given by Justice Tsekooko, I agree that this appeal be allowed. I also agree with the orders proposed by Justice Oder, JSC.

For the appellant:

*Mr Akampulira*

For the respondent: