**Muzito v Njuki**

**Division:** Court of Appeal of Uganda at Kampala

**Date of judgment:** 21 September 2005

**Case Number:** 28/04

**Before:** Okello, Engwau and Byamugisha JJA

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*[1] Civil procedure – Substituted service – Defendant outside the country – Whether advertisement in*

*newspaper is an effective form of substituted service.*

**Editor’s Summary**

**JUDGMENT**

**Okello JA:** This appeal arose from the ruling of Okello J, whereby she declined to set aside the *ex parte* judgment entered against the appellant on the 9 December 2002. The facts leading to this appeal are briefly as follows: Until 30 January 2003, the appellant was the registered owner of land comprised in Kyadondo Block 255 Plot 84 situated at Munyonyo, Kampala District. He had bought the land from one, Nora Erivania Kamuwanda, the administrator of the state of her late father, Yowas Njuki, who had been the registered owner of the land. The land was subsequently, transferred and registered in the appellant’s name. The appellant lives and works in Sweden. The respondent, who alleged that the appellant was not a bona fide purchaser of the land, filed in the High Court, Civil suit number 79 of 2001, alleging fraud. He sought *inter alia* cancellation of the appellant’s title to the land. Service of summons to file a defence could not be effected on the appellant personally, as he could not be traced. On application, the respondent obtained leave of the High Court to effect substituted service by publication of the notice of the summons in one of the national daily newspapers, The New Vision. When the appellant did not respond upon that publication, the respondent obtained *ex parte* decree against the appellant. Consequently, on court order, the appellant’s certificate of title was cancelled and the respondent’s name was substituted on 30 January 2003, as the registered owner of the land. When the appellant returned to Uganda, he learned of this development and by Miscellaneous application number 36 of 2003, he sought under Order 9, rule 24 of the Civil Procedure Rules to have the *ex parte* judgment against him set aside. His reasons were, *inter alia,* that he had not been duly served with the necessary summons to file a defence. The trial judge dismissed the application prompting this appeal. The memorandum of appeal comprised five grounds as follows: 1. T he learned trial Judge’s findings that the respondent conducted a diligent search for the appellant before applying for substituted service, is not justified by the evidence on record. 2. T he learned trial Judge erred in law and fact, when she found that the substituted service within jurisdiction was effective service on the appellant, who was, by then, a person ordinarily resident out of jurisdiction and was in fact, physically absent from Uganda at the time. 3. T he learned trial Judge was not justified in concluding that there was substituted service on the appellant’s lawyers which was effective service on the appellant, the said lawyers not being his agents for purposes of service of court process. 4. T he learned trial Judge erred in law and fact, when she found that the appellant’s lawyers were competent to receive service on his behalf and under an obligation to notify the appellant of such service. 5. T he learned trial Judge erred in law and fact, when after assessing the evidence on record, she failed to find that the appellant had as defence to the main suit. Counsel for both parties later held a scheduling conference before the register of this Court. Both counsel wrote conferencing notes submitting on the issues they agreed on to be determined by this Court. This judgment is based on those submissions. The crucial question for determination was whether substituted service of the summons to file a defence was effective upon the appellant? To succeed in an application under Order 9, rule 24 of the Civil Procedure Code, the applicant has to satisfy the court either, 1. t hat the summons was not served on him or 2. t hat he was prevented by any sufficient cause from appearing when the suit was called for hearing. In the instant case, the reason was that the summons was not duly served on the appellant. It is not in dispute that the alleged service was by substituted service by publication of the notice of the summons in the New Vision Newspaper. The burden is, thus, on the appellant to satisfy the court that he was not duly served by that method of service. In an attempt to discharge that burden, the appellant swore an affidavit in support of his application on 14 March 2003. In paragraphs 12 and 13 thereof he deponed as follows: “12 that the reason why service of the court papers could not be effected upon me personally is because I live and work outside Uganda in Sweden. 13. t hat as such, I could not get to know about substituted service in the New Vision.” The respondent deponed an affidavit in reply on 2 June 2003, but, did not address the facts deponed to by the appellant in the above two paragraphs. The appellant’s assertions that he had not been duly served with the summons by that mode of service because he lives and works outside Uganda, in Sweden, therefore, remained unchallenged. The learned trial Judge dealt with this matter thus: “It is my finding that substituted service was appropriate and it constituted effective service, not only because the law provides for it, but because it is the best way of communicating information. In this respect, it served to bring information either directly to the person concerned, or indirectly through agent counsel. I understand the applicant’s arguments to be that Ms Kawanga and Kasule Advocates and Company have been and are his lawyers for purposes of the suit land. The advocates had a duty to bring to the applicant’s attention service upon him of summons by substituted service (*see* paragraph 4 of the undated affidavit in support filed in court on 14 March 2003). All in all, I find that there was a diligent search for the applicant before substituted service was effected. I also find, on the facts, that the substituted service was effective, despite the physical absence from Uganda of the applicant. His agent Kabugo and the firm of advocates, whose address appear in the certificate of the suit land should have and actually had, a duty to inform the applicant of the substituted service or to inform the respondent or his counsel that the applicant was not physically within the jurisdiction.” With respect to the learned trial Judge, I do not agree with her findings contained in the above passage, that the substituted service was effective despite the physical absence of the appellant in Uganda. There is nothing in the appellant’s referred to affidavit in support of the application, nor in the respondent’s affidavit in reply that Ms Kawanga and Kasule Advocates were the appellant’s appointed agent for purposes of High Court civil suit number 79 of 2001. There is no evidence that they had instructions to receive service of court process on behalf of the appellant in that suit. Therefore, they had no legal obligation to inform the appellant of the notice of the summons in the New Vision, even if they had seen it. They equally had no obligation to inform the respondent that the appellant was outside Uganda. The same applies to Kabugo. There is no evidence that he was appointed appellant’s agent for purposes of that case. His caretaking of the suit land did not make him a legal agent of the appellant for purposes of that suit land. Further, there is no evidence of the scope of his powers as caretaker of the suit land. The unchallenged evidence of the appellant shows that he was living and working in Sweden, outside the jurisdiction of the court when the substituted service was effected. Clearly, such a service could not have been effective on the appellant who was living and working outside this country. Service outside jurisdiction is provided for specifically under Order 5, rule 23 of the Civil Procedure Rules. It is not by publication in a national newspaper. The appellant had no known agent, for purposes of that suit, living within Uganda. In the circumstances, I am of the view that the trial judge erred to find that the substituted service was effective on the appellant, despite his physical absence from Uganda. That was a misdirection. In result, I would allow the appeal, set aside the trial judge’s order dismissing the application. In its place, I would substitute an order allowing the application and setting aside the *ex parte* judgment and all

its attendant orders in High Court civil suit number 79 of 2001. The appellant be allowed to file his

defence and the suit heard and determined on merit.

For the appellant:

*Information not available*

For the respondent:

*Information not available*