

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO. 2491 OF 2023
ARISING FROM EMA NO. 0582 OF 2023
ALL ARISING FROM CIVIL SUIT NO. 0275 OF 2023

ROSE SENGENDO APPLICANT

VERSUS

HAJI SEBBAGALA HARUNA RESPONDENT

(Before: Hon. Justice Patricia Mutesi)

RULING

Background

This application is brought under **Section 98 of the Civil Procedure Act Cap 71** and **Order 36 rule 11 and Order 52 rules 1, 2 and 3 of the Civil Procedure Rules S.I. 71-1** seeking:

1. An order setting aside the default judgment, vacating the orders therein and also setting aside the execution of the decree in Civil Suit No. 0275 of 2023 (“the main suit”).
2. An order validating the application for leave to appear and defend.
3. An order providing for the costs of this application.

Briefly, the grounds of this application are that:

1. The applicant was served with the main suit and she responded by filing an application for leave to appear and defend within the prescribed time.
2. Unfortunately, that application remained in draft form on ECCMIS despite assurances from the registry staff that it had just not been fixed.
3. This Court passed a default judgment against the applicant and execution of the resultant decree commenced.
4. The notice to show cause was served on the applicant’s clerk who did not appreciate its significance and instead informed the applicant who was upcountry at the time that it was the hearing notice for her application for leave to appear and defend.
5. The applicant, accordingly, instructed her counsel to appear for her at the hearing of her application for leave to appear and defend, only for him to

arrive at the Court and learn that the matter was coming up for a notice to show cause why execution should not issue.

6. The applicant believes that ECCMIS is still young and that she should not have to pay for the Court's failure to validate her application for leave to appear and defend the main suit in time.
7. It is just and fair for this application to be allowed since the applicant has a sound defence to the claims in the main suit.

The application is supported by the affidavit of the applicant who is an advocate of the High Court of Uganda and all courts subordinate thereto. She told the Court that she was served with court process in the main suit sometime in April 2023. She responded by filing an application for leave to appear and defend and she was assured by her clerk, Fiona Kalungi, that the same was filed in time on ECCMIS at the Court registry. In the meantime, the respondent reached out to her and they started negotiations to settle the case amicably.

She stated that her clerk kept on checking with the registry and that she would always be told that her application was pending validation and fixing. Sometime in early October 2023, she was out of town when her clerk told her that she had been served with a hearing notice for her application for leave to appear and defend. She instructed her lawyer, John Wanyama, to appear for the hearing, but when he reached the Court on 12th October 2023, he learnt that a judgment in default had already been issued and execution had commenced. Upon further inquiry, Mr. Wanyama was informed that the application for leave to appear and defend had not been validated. He tried stopping the execution with no success.

She believes that the ECCMIS is a new system with a number of faults and that it would be unfair if she was shut out because the Registrar of the Court did not validate her application for leave to appear and defend. She believes that that application has high prospects of success since it raises triable issues on the accuracy of the debt claimed in the main suit. She concluded that her property which is valued at more than UGX 500,000,000 is in danger of being sold off for a loan that is less than UGX 50,000,000.

The respondent filed an affidavit in reply opposing the application. He told the Court that the applicant was duly served with court process in the main suit but that she failed to file an application for leave to appear and defend. Since the applicant is an advocate of this Court, she had access to ECCMIS and did not have to wait for updates and follow-ups from her clerk. The applicant failed to personally

follow up her application in Court and her lawyer, John Wanyama, is on court record acknowledging that he was properly briefed on what the 12th October 2023 hearing was all about before he appeared in Court.

The respondent denied any talks with the applicant on amicable settlement of the dispute. He stated that the applicant refused to pick his calls and those of his lawyers and that they failed to get a hold of her. Since the applicant has acknowledged the debt in paragraph 15 of her affidavit, this application is brought in bad faith to delay justice. He confirmed his view that the applicant does not have a bonafide defence to the main suit.

Issue arising

Whether the default judgment and decree in the main suit should be set aside.

Representation and hearing

At the hearing, the applicant was represented by Ms. Judith Tumusiime of M/S Sengendo & Co. Advocates while the respondent was represented by Mr. Fahad Siraj of M/S Astute Advocates. Counsel filed written submissions to argue the application. I have fully considered those submissions, the laws and authorities cited therein and all the other materials on record.

Determination of the issue

Whether the default judgment and decree in the main suit should be set aside.

Setting aside of default judgments and decrees in summary suits, like the main suit, is governed by Order 36 rule 11 of the Civil Procedure Rules. This provision accords the Court a discretion to set aside a default judgment and decree in a summary suit if it is satisfied that the service of summons on the defendant was not effective or that there is some other good cause for such action.

In this case, the applicant admitted that she was duly served with court process in the main suit. Her contention is that there is good cause for setting aside the default judgment and decree since she filed her application for leave to appear and defend the main suit in time but the same was not validated and fixed for hearing. She asserts that this prejudiced her since the default judgment and decree were issued by the Court yet her application for leave to appear and defend the main suit is still pending validation, hearing and disposal to this day.

The phrase “good cause” is to be construed contextually depending on the facts and circumstances of each case. Often, “good cause” relates to, and includes, factors which occasion a party’s inability to take a particular step in litigation. However, the phrase could also be given a wider construction to include other factors necessitating the exercise of the Court’s discretion, such as the interests of justice, fairness and equity and the unique significance of a dispute to the greater public. (See **Badaza George v Mwende Yeko, HCMA No. 360 of 2017.**)

I will now examine the truthfulness and accuracy of the applicant’s claims to determine whether there is any good cause justifying setting aside of the default judgment and decree in the main suit. It is trite law that whoever desires the Court to believe a given fact has the duty to prove that fact (**See Section 103 of the Evidence Act, Cap 6**). I note that the applicant failed to specify and prove the date and time when she was served with summons in the main suit and when she filed her said application for leave to appear and defend.

An application for leave to appear and defend must be filed within 10 days from the date of service of summons in a summary suit. See Form 4 of Appendix A of the Civil Procedure Rules and **China Railway No. 3 Engineering Group Co. Ltd v Segken Services Ltd, HCMA No. 161 of 2020**. I have reviewed the affidavit for service of summons in the main suit filed on 26th April 2023. It reveals that Mr. Ochieng Rogers Banda, a certified court process server duly served the summons on 18th April 2023. This implies that the applicant had to file her application for leave to appear and defend on or by 29th April 2023 (10 days later).

The applicant did not disclose the draft number for her application for leave to appear and defend. Upon reviewing the record, I found that that that application was filed on ECCMIS on 3rd May 2023 vide Draft Misc. Application No. 0907 of 2023. This filing was clearly out of time and this, perhaps, explains why the Registrar of the Court did not validate and fix the application for hearing.

The applicant did not file any application for extension of time within which to file the said application. In the present application, she has also not given the Court any reasons for her noncompliance with the prescribed filing timelines. Even if this Court wanted to loosen those timelines, it has to do so for sufficient reason and not on its own whims. While litigation timelines are not set in stone, they play a critical role in ensuring speedy resolution of disputes which culminates into efficient access to justice.

I am convinced that even if the application for leave to appear had been validated and fixed for hearing, it was bound to be struck off the Court record for having been filed out of time. The applicant, therefore, could not have suffered any prejudice or injustice from the Court's decision not to validate and fix that application for hearing. Filing of court documents outside the prescribed timelines is no filing at all unless it is sanctioned by the Court. Although the applicant has now prayed for validation of the said application in the present application, I am reluctant to order that validation because, as I observed earlier, she has not explained her reasons for the late filing at all.

Accordingly, since the applicant did not file an application for leave to appear and defend within the prescribed time, the Court was right to enter a default judgment and to issue a default decree against her, pursuant to Order 36 rule 3(2) of the Civil Procedure Rules. This application has not disclosed any good cause why that default judgment and default decree should be set aside.

Consequently, this application fails and I make the following orders:

- i. This application is hereby dismissed.
- ii. Costs of this application are awarded to the respondent.
- iii. **Miscellaneous Application No. 2490 of 2023; Miscellaneous Application No. 2682 of 2023 and Miscellaneous Application No. 2684 of 2023** which were filed by the Applicant seeking substantive, temporary and interim orders of stay of execution pending the determination of the present application, have been overtaken by events and are accordingly dismissed.



Patricia Mutesi

JUDGE

(11/03/2024)