

(Arising from HCT-05-CV-CS-0102-2023)

2. BYORUGANDA JULIUS ::::::::::::::: APPLICANTS

MUSHANGA SACCO LTD :::::::::::::::::::: RESPONDENT

RULING

[1] This application was brought by the Applicants for orders that this court sets aside the default judgment and decree in respect of HCT-05-CV-CS-0102-2023 against them and the ensuing execution therefrom be also set aside.

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At the Mbarara High Court, the Respondent herein moved court and obtained a default judgment on the fact that the Applicants had not sought for leave to appear and defend **HCT-05-CV-CS-0102-2023**.

That as a result of the said default judgment, the Applicants were arrested and committed to civil prison in execution of the said judgment of this court.

[3] In an affidavit deposed to by Mr. Mutungi Moses the credit supervisor of the Respondent, the instant application was opposed on the fact that the application was a non-starter, bad in law and incurably defective. That the application does not disclose any sufficient cause for setting aside this court's judgment and decree in **HCT-05-CV-CS-0102-2023** and the resulting execution. That the Applicants were effectively served with summons in **HCT-05-CV-CS-0102-2023** on **23rd August 2023** and **28th August 2023**. That **Misc. Application no. 435 of 2023** which was filed by the Applicants for leave to appear and defend **HCT-05-CV-CS-0102-2023** was filed out of time without leave of this court. That the allegations of the transfer of **Misc. Application no. 435 of 2023** to the Bushenyi High Court circuit was false and not backed by any cogent evidence.

Analysis and decision of the court.

[4] I have examined the record of **HCT-05-CV-CS-0102-2023** from which the instant application arises. I note that the said summary suit was filed on **8th August 2023** and summons in the suit were signed by the learned Deputy Registrar of this court on **10th August 2023**.

According to **Order 5 Rule 1 (2)** of the Civil Procedure Rules, the Plaintiff who is the Respondent in the instant matter had **21 days** within which to serve the summons upon both Applicants herein.

The provisions of the aforementioned **Order** are mandatory in nature.

(See **Bitamisi Namuddu vs Rwabuganda Godfrey Supreme Court Civil Appeal No. 16 of 2014 per Jotham Tumwesigye Ag. JSC**).

The twenty-one days in the instant matter were to expire on **30th August 2023**.

According to the affidavit of service this court found on the record of **HCT-05-CV-CS-0102-2023** deposed to by a one Brighton, the 3rd Defendant in the suit was served with summons on **23rd August 2023** while the 1st and 2nd Defendants (the instant Applicants) were served on **28th August 2023**.

[5] It is the law that where a Defendant denies having been served, the onus is on him or her to prove to the satisfaction of court that the service was ineffective. (See **Busingye & Ors vs Williams Katotsire (2001-2005) HCB 108 and Wadamba vs Mutasa & 2 Ors (HCT-04-CV-CA 32 of 2015)**). In the instant application, no averments were made by both Applicants disputing the fact that they were served with summons in **HCT-05-CV-CS-0102-2023**.

It therefore follows that from **28th August 2023** when the 1st and 2nd Respondents were served with summons, they had ten days within which to file an application for leave to appear and defend **HCT-05-CV-CS-0102-2023**. These days were to expire by **4th September 2023**

while on the part of the 3rd Defendant, his statutory clock was to expire on **1st September 2023**.

[6] According to the record of **Misc. Application no. 435 of 2023** (an application for leave to appear and defend), the application was filed on **15th September 2023**.

This was clearly outside the statutory ten days provided for under **Order 36 rule 3 (2)** of the Civil Procedure Rules. This was done without leave of court.

In **Post Bank (u) Ltd vs Abdu Ssozi Supreme Court Civil Appeal No. 8 of 2015** made general observations on the effect, purpose and thrust of **O.36** of the Civil Procedure Rules in the following terms;

“Order 36 was enacted to facilitate the expeditious disposal of cases involving debts and contracts of a commercial nature to prevent defendants from presenting frivolous or vexatious defences in order to unreasonably prolong litigation. ...Defendants in cases which fall under Order 36 are protected by being given the right to apply to court for leave to appear and defend the suit. When the court receives their application and is satisfied by the defendant’s affidavit that the defendant has raised a genuine triable and not a sham or frivolous issue, it will grant the defendant leave to appear and defend the suit. (Order 36 rule 4). If the court is not satisfied that the defendant has raised a triable issue, it will refuse to grant leave to appear and defend the suit, and the plaintiff will

be entitled to a decree in the amount claimed in the plaint with interest, if any. (Order 36 rule 5) If the defendant fails to apply for leave to appear and defend in the time prescribed (which is 10 days), the plaintiff is entitled to a decree for an amount claimed in the plaint with interest, if any. (Order 36 rule 3(2)).” (Emphasis mine)

From the foregoing binding decision of the Supreme Court, summary suits are meant to settle suits involving liquidated debts, contracts of a commercial nature expeditiously and to prevent defendants from presenting frivolous or vexatious defences in order to unreasonably prolong litigation.

[7] According to affidavit in support of the motion in the instant application under **paragraph 4, Misc. Application no. 435 of 2023** was separated from the main suit **HCT-05-CV-CS-0102-2023** and erroneously transferred alone to the Bushenyi High Court. In **paragraph 5** thereof the Applicants further depose that the Respondent herein moved court to believe that the Applicants had not filed an application for leave to appear and defend **HCT-05-CV-CS-0102-2023**. That as a result, on **13th November 2023** this court erroneously entered judgment against them while there was a pending application in the form of **Misc. Application no. 435 of 2023**. Further that as a result of the said judgment, the Applicants have been arrested and committed to Civil Prison in execution of the default judgment which was entered erroneously. That on **13th February 2024**, this court

was informed of the existence of **Misc. Application no. 435 of 2023** but however the same was ignored.

In reply, the Respondent averred under **Paragraph 8** of the affidavit of Mutungi Moses the credit supervisor of the Respondent that the Application was not backed by any evidence.

[8] I have perused both counsel's submissions in the matter and I take judicial notice of the fact that some files were indeed transferred to the Bushenyi High Court circuit. This exercise is still ongoing and the likelihood of files being either in Bushenyi or Mbarara erroneously is high.

Upon consultation with the Bushenyi High Court, it was pointed out to me that **Misc. Application no. 435 of 2023** was transferred back to Mbarara on **27th February 2024**.

The above notwithstanding, as I already pointed out at the beginning of this ruling, **Misc. Application no. 435 of 2023** was filed out of time regardless of its location or position at the time when the default judgment was entered against the Applicants.

[9] It is therefore my considered opinion that the learned Assistant Registrar of this court was justified in making the orders as she did in **HCT-05-CV-CS-0102-2023**.

This application is therefore devoid of merit and accordingly dismissed.

Having dismissed the instant application, it therefore follows that **MA 47 of 2024** and **MA 435 of 2023** stand dismissed.

I make no order as to the costs of the instant application.

I so order.

Dated, delivered and signed at Mbarara this ^{5th} day of ^{April} 2024.



Joyce Kavuma
Judge