

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT-00-CC-MA-0719-2007
(ARISING FROM HCT-00-CC-CS-0753- 2007)

CRANE BANK LTD.....APPLICANT/2nd DEFENDANT
VERSUS
KABUYE VICTORIA (MRS)RESPONDENT/PLAINTIFF

BEFORE: HON. JUSTICE LAMECK N. MUKASA

RULING

This is an application brought by Notice of Motion under Order 9 rule 12, Order 52 rules 1 and 3 of the Civil Procedure Rules and Section 98 of the Civil Procedure Act seeking orders that:-

1. The exparte judgement as against the 2nd Defendant be set aside.
2. Leave be granted to the Applicant/2nd Defendant to file a defence.
3. Costs for this application be provided for.

The grounds of the application are briefly that:-

1. The Managing Director of the Applicant received summons in H.C.C. S. No. 753 of 2007 on the 21st September, 2007 and the alleged service had been affected on a receptionist of the Applicant company who only stamped the summons with the Applicant's Stamp on the 13th September 2007 awaiting receipt by the Applicant's Managing Director.
2. Upon receipt of summons from the said employee, a one Agatha Bugenyi, on the 21st September 2007, the Applicant's Managing Director promptly instructed the Applicant's lawyers M/S Nangwala, Rexida & Co Advocates to defend the Applicant.

3. The Applicant's lawyers immediately filed a Written Statement of defence on the 4th October 2007 within the fifteen days from 21st September 2007.
4. The Applicant has a good defence to the suit in the sense that:-
 - (a) The Applicant does not owe the Respondent any duty or legal or other relationship and the suit is misconceived and bad in law.
 - (b) The Applicant only had fiduciary relationship with YWCA as an accountholder and as a trustee for its funds and operation of the alleged account to which it lawfully and rightly carried out its duties.

The application is supported by three affidavits. One sworn by Agatha Bugenyi, a receptionist of the Applicant company, another by A Reza Kalan the Applicant's Managing Director and the third by Kemigisha Assumpta an advocate with M/S Nangwala, Rexida & Co Advocates. The Respondent filed two affidavits in reply. One deposed by Leah Kiseri, the Ag. Executive Director of the Uganda Young Women's Christian Association (YMCA) and the second by Gaswaga Julius a Court Process Server.

Representation was Mr. Rexida for the applicant and Mr. Kitumba-Magala for the Respondent.

In his submission Counsel for the Applicant submitted that the Exparte Judgement entered against the Applicant was upon an ineffective service of the summons. He urged that service on a receptionist or a secretary in a company is not effective service. He contended that effective service was on 21st September 2007 when the Principal Officer of the Company received the summons. That the Written Statement of Defence was filed within 15 days and thus in time. On the other hand Counsel for the Respondent argued that there was proper service upon the legal officer of the applicant. He referred to the affidavit in reply sworn by Gaswaga Julius. Alternatively Counsel argued that the summons were left at the registered office or business place of the Applicant.

Order 9 rule 12 of the Civil Procedure Rules gives court unlimited or unrestricted discretion to set aside an ex parte judgement. However, Court can only set aside an ex parte judgment under the rule if the Applicant:-

- (a) satisfies Court that there is a reasonable explanation why the ex parte judgement was entered against him.
- (b) has produced to Court evidence that he has a prima facie defence to the claim.

See: Masaka Farmers and Produce Ltd Vs Aloysius Tamale & Anor (1992 – 93) HCB 203.

The Court record shows that the Deputy Registrar of this Court pursuant to the Registrar's powers under Order 50 rule 2 of the Civil Procedure Rules entered judgment against the Applicant pursuant to Order 9 rule 11(2) to the Civil Procedure Rules for failure to file a defence. Judgement was entered on the basis of an affidavit of service dated 20th September 2007, wherein the process server, Gaswaga Julius states that on 13th September 2007 he proceeded to effect Court process upon the Applicant Company at Crane Chambers, Legal Department on 2nd Floor. The 5th paragraph states:

“That a Secretary in the legal department of Crane Bank Ltd. received both the plaint and a copy of the summons to file defence and acknowledged service and a photostat copy of the same is herewith attached as proof to that effect.”

The ex parte judgement was entered on 3rd October 2007. The Applicant filed a Written Statement of Defence on 4th October, 2007.

In Gaswaga Julius' affidavit in reply he states:

“4. THAT on the 13th September 2007, when I went to serve Court papers in respect of HCCS No. 753/2007, I introduced myself to M/S Agatha Bugenyi, and told her the purpose of my visit to the Bank.

5. THAT she referred me to the Legal Officer one Nalwaga Prosy who sits on the same floor (2nd Floor) whom I informed that I had court papers to serve.
6. THAT she received the papers from me perused through and afterwards advised me to take them to Agatha to receive and stamp them.
7. That I went back to Agatha who received the Court papers and stamped them after which she handed back to me my copy of service.
8. THAT if I had not been advised and directed by the Legal Officer Nalwoga Prosy, I would have not effected the service.”

In her affidavit in support of the application Agatha Bugenyi states:-

“2 THAT on the 13th September 2007, a gentleman approached me while at the Applicant Company’s Office with documents which he said he wanted to give to the Managing Director.

4. THAT I told him that the Managing Director was not available at that time and I requested him to leave me with the documents which I would pass on to the Managing Director.
5. THAT he gave me papers and I stamped on his copy but did not stamp or sign the ones he left with me”

Agatha Bugenyi and A Reza Kalan in their respective affidavits state that Agatha Bugenyi is a receptionist with the Applicant Company. The Applicant contends that service on her was not effective service. The Respondent on the other hand contends that there was proper service on the Legal Officer of the Applicant Company, one Nalwanga Prosy. Alternatively that summons were left at the business premises of the Applicant.

First and foremost to obtain judgment in default the plaintiff must first satisfy the Registrar that the summons in the suit had been effectively served on the defendant against whom judgment is being sought. As regards service on corporations Order 29 rule 2 of the Civil Procedure Rules provides:-

“Subject to any statutory provision regulating service of process, when the suit is against a corporation, the summons may be served.-

- (a) on the secretary or any director or other principal officer of the corporation; or
- (b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office, then at the place where the corporation carries on business.”

Under sub-rule 2 (a) above service must be on a secretary, any director or other principal officer of the corporation. In his affidavit sworn in opposition to this application the Process Server says that he had effected service on the Legal Officer of the Applicant Company one Nalwanga Prosy who directed him to hand the papers to Agatha Bugenyi. A legal officer in my view qualified for a principal officer of the Company, most especially in cases like this one where papers being served were legal documents. I however find it strange that in the affidavit of service upon which the exparte judgement was based there is no mention of service on either the Legal officer or the said Nalwanga Prosy. The affidavit of service talks of only a Secretary in the legal department. It is this secretary who is stated to have received and acknowledged service. This must have been Agatha Bugenyi talked about in the Process Servers affidavit in reply. The Secretary envisaged in sub-rule 2(a) above must be a principal officer, not a Secretary at the level of a receptionist. In Kampala City Council Vs Apollo Hotel Corporation (1985) HCB77 Odoki J. (as he then was) held that under Order 26 rule 2(a) (now Order 29) such process must be served on senior officers of the corporation who are responsible for the management of the corporation and therefore who are in a position to take action on behalf of the corporation. The Blacks Law Dictionary 7th Ed page 1355 defines “Secretary” to mean:

“A corporation officer in charge of official correspondence, minutes of board meetings, and records of stock ownership and transfer.”

And “Corporation officer” as

“An officer of a corporation, such as a CEO, president, secretary or treasurer.”

Section 1 (y) of the Companies Act defines “Officer” in relation to a body corporate to include “A director, manager or secretary.”

The officer served as per the affidavit of service on which the exparte judgment was based was a mere secretary in the legal department who did not qualify for a principle officer of the company. It was this affidavit intended to satisfy the Registrar that there was effective service and therefore which should have properly described the Officer served so as to prove that she satisfied the provision of sub-rule 2 (a). The affidavit did not satisfactorily describe the secretary so served. In the circumstances the statements in the affidavit in reply that service was effected on the Legal Officer of the Applicant, one Nalwanga Prosy appears an afterthought designed to defeat the averments in both Agatha Bugenyi and A Raze Kalan’s respective affidavits that summons were served on Agatha Bugenyi a receptionist. In Sherali Bandali Jaffer and others Vs Yefusa Weraga Seggane (1972) 2 ULR 108 summons to be served on a limited liability company were left with an office attendant. It was held that service on an office attendant was not effective under Order 26 (now 29) rule 2(a) CPR. In the circumstances of this case I find that there was no effective service on a principal officer of the Applicant company.

It now remains to consider whether it was service under rule 2(b) of the said order. Under this arm of the rule summons may be served by leaving it at or by sending it by post to the registered office of the corporation or if there is no registered office, then at the place where the corporation carries on business. The summons were clearly on 13th September 2007 left with Agatha Bugenyi at her place of work with the applicant. Therefore it is not disputed that the summons were left at the Applicant’s place of business. I have looked at the summons issued in the instant suit. They were addressed to the applicant and two others. Sub-rule 2(b) requires the summons so addressed to the defendant to be left at the Registered Office of the defendant. I have studied

the affidavits of service by Gaswaga Julius and his affidavit in reply. None of the two affidavits state that the place where the summons were left with Agatha Bugenyi was the applicant's registered office. The registered office of the corporation envisaged under the rule must be such office as is registered pursuant to the provisions of sections 107 and 108 of the Companies Act. Though the place where the summons were left could pass for a place where the Applicant company carries on business; to satisfy the requirements of the sub-rule, if there is no registered office, then that fact ought to have been deposed to. It is only then that service in the alternative by leaving it at the place where the applicant carries on business would have been effective and good. It is trite that he who alleges has a duty to satisfy the court on a balance of probabilities that which he asserts. If the applicant has a registered office then service elsewhere not being its registered office would be bad and not effective. In absence of any averment as to information relating to the Applicant registered office I find that the respondent has failed to discharge that burden. In the premises the Respondent failed to show that there was effective service of the summons on the applicant in the manner provided by Order 29 of the Civil Procedure Rules. See Harriet Nankabirwa Vs Uganda Ecumenical Church Loan Fund Ltd HCT-00-CC-MA-No 241 of 2004. Both Agatha Bugenyi and A Reza Kalan in their respective affidavits in support state that Agatha Bugenyi gave the summons to Reza Kalan on 21st September 2007. Reza Kalan is described as the Managing Director of the Applicant Company thus within the officers envisaged by Order 29 rule 2 (a) CPR. Service of summons is intended to bring to the notice of the party served that a suit has been filed against him/her and to require such party to file his/her Written Statement of defence within the prescribed time. Considering all the above I find that the summons in this case were effectively received by the Applicant Company on 21st September 2007 which was therefore the effective date of service.

The Applicant must also show that he has a prima facie defence to the Respondent's claim. Court's discretionary power is intended to promote the ends of justice. In Jannadas Sodha Vs Gordhandas Hemraj (1952) 7 ULR 11. Justice Ainley stated:

“—The nature of the action should be considered, the defence if one has been brought to the notice of the Court, however irregularly, should be considered, the question as whether the plaintiff can reasonably be compensated by costs for any

delay occasioned should be considered and finally --- it should always be remembered that to deny the subject a hearing should be the last resort of the court---.”

Reference was made to the above statement with approval in Sebei District Administration Vs Gasuhali & Others (1968) EA 300.

In the instant case the Respondent, Kabuye Victoria, filed the suit against the Applicant, Stanbic Bank Uganda Ltd. and Harriet Nansikombi Kawalya Kagwa. She described herself as a Treasurer on the Board of Directors of the Uganda Women’s Christian Association of Uganda and states that she is suing on the board’s behalf vide a Board Resolution dated 6th September 2007. The Respondent’s claim in the plaint is that on 4th February 2006 she opened up an account with the Applicant No. 014420250300 with a clear mandate of how the account was to be operated which includes the President of the Board of Directors, the Treasurer of the Board of Directors and the Executive Director who is the principal signatory to the Account. The respondent contends that the Applicant deliberately refused to operate the Account in accordance with the mandate thereby causing the Association inconveniences, embarrassments, financial losses and damage.

The applicant had on 4th October 2007 filed a Written Statement of Defence. The same copy is annexed to A. Reza Kalan’s affidavit in support of the application. The Applicant therein denies owing the respondent any duty or any legal relationship to the Respondent. The Applicant contends that it only has a fiduciary relationship with YMCA as an account holder and is a trustee to the Association’s funds with a duty to ensure the proper operation of its account. That it has lawfully and rightfully blocked the operation of the account in line with its own obligations.

The nature of the case involves very serious issues relating to the management and administration of funds of a public organisation. It involves serious principals of banking relating to the bank-customer relationship. The duties and obligations of a bank towards its customer. It also involves the issue of Respondent’s locus in filing this suit. I agree with Mr. Rexida that these are serious matters which deserve to be resolved on merit. In Fr. Francis

Payer Vs Kawalya Mwebe and Others HCCS No. 194/ 94 (1995) IV KALR 143 Kireju J. having found that it was apparent that the defendant were in fact served with the summons to enter appearance went on to hold that justice however, required defendants who had shown an interest in being heard be given the opportunity. In the instant case the Applicant's Managing Director became aware of the existence of the suit against the Applicant on 21st September 2007. He on 25th September 2007 without any delay, instructed M/S Nangwala Rexida & Co Advocates to file the Applicants Written Statement of Defence which was done on 4th October 2007. The conduct of the Applicant's Managing Director and lawyers clearly show that the applicant is interested in being heard.

All in all I find this an appropriate case where the exparte judgment should be set aside. Therefore the exparte judgment against the Applicant in H.C.,C.S. No. 753 of 2007 is hereby set aside and the Applicant is granted leave to file a Written Statement of Defence. The applicant is awarded costs of this application.

Hon. Mr. Justice Lameck N. Mukasa

Judge

14th December. 2007

