

REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-MA-0827-2006

(Arising from HCT-00-CC-CS-0480-2006)

YUDAYA INTERNATIONAL LTD

APPLICANT

VERSUS

ATTORNEY GENERAL

RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. The applicant/plaintiff filed the original civil suit on 8th August 2006. Summons was issued on 7th August 2006 for service upon the defendant. On the 14th September 2006 this suit was dismissed without notice under Order 5 Rule 1 (3) of the Civil Procedure Rules as there was neither proof of service on the court record nor an application for extension of the time for service of summons.
2. The applicant now seeks, in this application, an order of this court, setting aside the order of dismissal, and reinstating the original suit. This application is made under Section 14(2) (c) of the Judicature Act, Chapter 13, Section 98 of the Civil Procedure Act, Chapter 71 and Order 52 Rule 1 and 3 of the Civil Procedure Rules. It is supported by an affidavit sworn by Ms Kellen Kalemera, a director of the applicant.
3. The applicant puts forth 6 grounds in support of this application. Firstly that service of the summons was effected on the respondent on 11th August 2006. Secondly that the Respondent failed to file a defence before the day fixed in the summons. Thirdly that the applicant filed an affidavit of service and applied for interlocutory judgement, seeking to set down the suit for formal proof. Fourthly that the plaintiff was astonished to establish that on 14th September 2006 this suit had been dismissed for want of proof of service. Fifthly the plaintiff and defendant had agreed to the filing of an out of time written

statement of defence. Lastly that it is in the interests of substantive and natural justice that this application be allowed.

4. This application proceeded in the absence of the defendant who had been served. Mr. Tendo appeared for the applicant. Mr. Tendo conceded at the hearing that at the time this suit was dismissed the applicant had not filed the affidavit of service. Ground three of the application cannot therefore stand.
5. Order 5 Rule 1 (3) of the Civil Procedure Rules states,
 - ‘Where summons have been issued under this rule, and
 - (a) service has not been effected within twenty one days from the date of issue; and
 - (b) there is no application for an extension of time under sub rule (2) of this rule; or
 - (c) the application for extension of time has been dismissed, the suit shall be dismissed without notice.’
6. The power to dismiss without notice is exercised when after the expiry of the period for filing of an application for extension of the time for service there is no proof on the court record that service was effected in the 21 days and there is no application for extension of the time for service. Obviously if the party files the necessary papers as anticipated by the rules, no dismissal without notice would occur.
7. What happens where, as in this case, the plaintiff in effect alleges that he served but did not file an affidavit of service? He may come to court as he has done seeking to show that he had in fact served but for some reason he failed in his duty to avail proof of service in a timely manner, and seeks the indulgence of the court to set aside the dismissal of the suit. The court may accept his plea and perhaps may not. If his plea is not accepted, he has the option of filing the suit afresh, if he is still within time.
8. For the court to exercise its discretion in favour of such an applicant, the applicant must, at the minimum, explain why he failed to act in a timely manner or provide some kind of justification upon which a court can act. In this instant case he has provided a myriad of grounds, all of which do not explain why he did not offer proof of service in a timely manner. Worse still it is contended in ground no.3 and on the affidavit filed in support, paragraphs 3 and 4 read together, that the affidavit of service was filed in spite of which the court dismissed the suit. This is disingenuous.

9. The application for interlocutory judgement and the supporting affidavit which is what is referred to in paragraphs 3 and 4 of the affidavit and ground no.3 of the notice of motion was filed on 1st November 2006, long after this suit had been dismissed without notice in accordance with Order 5 Rule 1(3) of the Civil Procedure Rules.
10. I am unable to see how all the other grounds put forth by the applicant provide any basis for this court to exercise its discretion in favour of the applicant. It is possible that service had been effected but no proof thereof was provided in a timely manner and no explanation is offered for this lapse. It is immaterial to this application whether the defendant had sought the consent of the other party to file a defence out of time, and in fact did not file such defence. So is the alleged astonishment of the applicant at the dismissal of the suit.
11. This application is dismissed.

Dated, signed and delivered this 24th day of January 2007

FMS Egonda-Ntende
Judge