

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA**

**COMMERCIAL COURT DIVISION**

HCT-00-CC-MA-0581-2007

(Arising from HCT-00-CC-CS-0613-2007)

Salini Construction Co Ltd Applicant

Versus

Dr. John Nuwagaba Respondent

**BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE**

**RULING**

1. The Applicant is the defendant in the head suit. A default judgement was obtained against it. It seeks to set aside the resultant decree on the ground that there was no service of the summons on its authorised officers and that it has a good defence to the claim. The application is supported by an affidavit sworn by one M England, one of the authorised officers of the company to receive service of court process. This application is opposed by the respondent who has sworn an affidavit in reply.

2. The affidavit of service states that the process was taken by the plaintiff to the offices of the applicant on the 15<sup>th</sup> July 2007. The plaintiff introduced Mr. England to the process server. The process server indicated the purpose of his visit, and Mr. England accepted the papers and instructed his secretary to receive them on behalf of the defendant company. The secretary stamped the papers and signed them, and handed the process server the original copy of the summons.

3. The affidavit of Mr. England denies service as set out in the process server's affidavit. He contended in his affidavit that the first time he saw the papers was when a secretary brought the same to him on 21<sup>st</sup> August 2007 by a secretary of Spencon Services Ltd, a company sub contracting for the applicant, and told her she had received these papers sometime back, but forgot to pass them onto Mr. England.

4. If the applicant's story is accepted, it would obviously follow that there was no proper service on the company as the person who was served was not an officer of the company sued. Neither was she clearly a principal officer of the company. There are, however, a couple of unsatisfactory elements with this story. If she was not an employee of the defendant, how did she get the defendant's stamp to endorse the summons? This person has not sworn an affidavit herself, and there are matters in the applicant's affidavit, that are not based on his own knowledge but on information from other people. Such evidence is contrary to Order 19 Rule 3 (1) of the Civil Procedure Rules.

5. Nevertheless in spite of that unsatisfactory state of affairs, we have two contending stories, based on affidavits whose deponents have not been cross examined. It is rather difficult in the circumstances to dismiss one version just on the basis of another version of what happened. As the respondent chose not to challenge the applicant's version of events by cross examining Mr. England and thus discredit the version of events he put forth with regard to the service of summons, on the basis of the evidence before me, given that the acknowledgement of the receipt of the summons was done by secretary, I find that this did not amount to effective service.

6. In applications of this nature, it is not enough to show absence of service, but the defendant must also show that he has a defence on the merits of the case. The applicant disputes the sums claimed, contending that the agreement it signed with the plaintiff contains a provision that was not agreed upon, which is the basis of the plaintiff's claim. At this stage it is not necessary to carefully evaluate the defence, given that no evidence has been called. Whether the applicant's defence holds against the plaintiff's claim will be determined at the trial.

7. In the circumstances I will allow this application with costs in the cause. The applicant is to file its written statement of defence within 10 days from today. Costs in the cause.

Signed, dated, and delivered this 18<sup>th</sup> day of October 2007

FMS Egonda-Ntende  
Judge

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