THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-MA-314 -2012

(Arising from HCT-00-CC-CS-129-2011)

1. **KINGSTONE ENTERPRISES LTD**
2. **SWACOFF INTER TRADE (U) LTD**
3. **ANDREW WALUNGAMA::APPLICANTS**

VERSUS

METROPOLITAN PROPERTIES LTD::RESPONDENT

BEFORE HON. LADY JUSTICE HELLEN OBURA

RULING

This is an application brought under Order 9 rules 27 & 29 and Order 52 rules 1, 2, & 3 of the Civil Procedure Rules (CPR) and Section 98 of the Civil Procedure Act Cap. 71 (CPA) for Orders that;

1. Exparte Judgment and decree in Civil Suit No. 129 of 2011 be set aside.
2. Execution proceedings against the applicants in the said suit be stayed.
3. The Applicants be allowed to appear and defend the suit on its merits.
4. Provision be made for the costs of this application.

The grounds of this application are contained in the affidavit in support deposed by the 3rd applicant, Mr. Andrew Walungama. Briefly they are that the applicant/defendant did not have notice of service of summons having been resident in Nairobi. Consequently, the main suit was heard and determined exparte in the absence of the applicants/defendants and/or their counsel and yet the plaintiff's pleadings are full of falsehoods as the applicants/defendants are not indebted to the plaintiff. Furthermore, that the decretal sum was a mere part payment for services performed by the applicant/defendant for which there was no obligation to refund. Lastly, that it is in the interest of justice that ex-parte judgment and decree issued in Civil Suit No. 129 of 2011 be set aside, execution of proceedings against the applicants be stayed and the applicants be allowed to appear and defend the suit on its merits.

The application was opposed as per the grounds stated in the affidavit in reply deposed by Mr. Haider Somani, a director of the respondent. The respondent contended that the US $ 100,000 referred to in Annexture B to the applicant's affidavit was not connected to the US $ 50,000 claimed in Civil Suit No. 129 of 2011. He contended that US $ 100,000 were to be paid personally to the 3rd applicant if he obtained a lease offer from the Uganda Land Commission for Plots 150-156 Kiira Road which lease offer he had not obtained to-date. It was also stated by the respondent that the claim against the applicants arose out of their failure to perform their contractual obligations and for failure to honour their unconditional guarantees as contained in the Memorandum of Understanding dated 27th November 2008. He contended that substituted service on the applicants was effective and the applicants knew and acknowledged their indebtedness as contained in the decree as per annextures A and B.

When this matter came up for hearing, Mr. Wabusa Eddie represented the applicants while Mr. Kiboijana Richard represented the respondent. Both counsels proposal to file written submissions was accepted by this Court. The submissions were filed and the matter set down for a ruling.

In his written submissions, Mr. Kiboijana representing the respondent raised a preliminary objection on a point of law. It was his contention that the procedure adopted by bringing this application under Order 9 rule 27 and 29 of the CPR was incurably wrong. He prayed that the application struck out with costs.

He argued that the application is seeking to set aside the ex-parte judgment and decree obtained in Civil Suit No. 129 of 2011 under summary procedure (Order 36) and yet it is brought under the provisions of Order 9 which relates to ordinary suits. He submitted that it is trite law that Order 36 of the CPR rules is self contained and does not require supplement of other rules. He cited Order 36 rule 11 of the CPR as the rule that deals with setting aside a decree obtained under summary procedure as well as circumstances under which it can be set aside. He relied on the case of **East Mengo Growers Co-operative Union Ltd v Nyangweso Francis, [1996] HCB 50** where Ntabgoba J. (as he then was) held that:

> ***(i) The procedure adopted by bringing the application under order 9 rule 20 CPR (to set aside a decree obtained under summary procedure) instead of order 33 (present order 36) was incurably wrong.***
>
> ***(ii) Order 33 (present order 36) of the Civil Procedure Rules is self contained and does not require the supplement of other rules.***

He prayed that the application be struck out with costs for being incurably wrong.

In response, Mr. Wabusa submitted that most suits like the present one are filed under Order 9 of the CPR. According to him this was the presumption since the applicants were not availed with the summons or plaint.

It is unbelievable that counsel for the applicant did not bother to look at the court file and more specifically the plaint before he filed this application. I am not at all surprised because the submission that he filed left a lot to be desired about his grasp of the law and professionalism. His arguments were so shallow and not based on the principal of law that govern applications like this one. It was the duty of counsel for the applicant to read and internalise the court record in order to ascertain the law under which the suit was brought. That would have enabled him to bring this application under the appropriate law.

Be that as it may, looking at the orders sought for in this application, there is no doubt that the applicant intended to set aside the decree, stay execution and seek leave for the applicant to be allowed to appear and defend the suit as provided for by Order 36 rule 11 of the CPR. While I

agree that the procedure adopted by bringing this application under Order 9 rules 27 and 29 of the CPR was a mistake on the part of the applicant's counsel, I do not find that it is fatal. It has been held that no action may be defeated by use of wrong procedural mode and the judge has the discretion to hear it either in court or in Chambers. See **Kinyanjui & Another vs Thande & Another [1995 – 98] EA 159.** See also **Francis Wazarwahi Bwengye v Haki .W. Bonera Civil Appeal No.33 of 2009.**

In the case of **Tarlol Singh Saggu v Roadmaster Cycles (U) Ltd CACA No. 46 of 2000** the Court of Appeal citing with approval the decision of Sir Charles Newbold P in **Nanjibhai Prabhudas & Co. Ltd v Standard Bank Ltd [1968] 1 EA** 670 held that:

> ***"The court should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity unless the incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature."***

The Supreme Court of Uganda emphasized in the case of **Re Christine Namatovu Tebajjukira [1992 – 93] HCB 85** that:

> ***"The administration of justice should normally require that the substance of disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights."***

It is trite that courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy. Unless the other party will be greatly prejudiced, and/or cannot be taken care of by way of an order for costs, hearing and determination of disputes should be fostered rather than hindered: see **Banco Arabe Espanol vs Bank of Uganda SCCA No. 8 of 1998.**

Based on the above position of the law, it is my view that bringing this application under the wrong law has not in any way prejudiced the respondent. For those reasons, I overrule the preliminary point of law and proceed to consider the application on its merits.

I need to point out from the onset that although this application was brought under Order 9 rules 27 & 29, I will for purposes of considering whether it merits grant of the orders sought address my mind to the provisions of Order 36 rule 11 of the CPR which is the correct law under which it should have been brought. O.36 r.11 provides that:

> ***"After the decree the court may, if satisfied that the service of the summons was not effective, or for any other good cause, which shall be recorded, set aside the decree, and if necessary stay or set aside the execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the court so to do, and on such terms as the court thinks fit".***

Clearly under that rule, before this application can be allowed, this court must satisfy itself that either service of summons was not effective or the applicants must show any other good cause that prevented them from applying for leave to appear and defend the main suit.

Although counsel for the applicant did not allude to these requirements, from his submission he was challenging the mode of service of summons on his clients. As far as good cause is concerned, it could be discerned from his submission that he was relying on the merit of the applicant's case. In fact he argued this application as though it was mainly an application for leave to appear and defend the suit without bothering so much to first convince this court to set aside the default judgment by stating the reason why the applicants failed to make an application to appear and defend the main suit.

I have not had the benefit of looking at the file for the main suit from which this application arose. It was said to be in the execution registry and our effort to retrieve the same were futile. For that reason, I have not been able to look at the pleadings and the documents attached thereto so as to ascertain the nature of the respondent's claim in the main suit and how it arose. I have had to rely on what is stated in paragraph 7 of the affidavit in reply and the submission by the respondent's counsel.

In his written submissions, Mr. Wabusa framed two issues for determination in this application. These are:

1. Whether the applicants are indebted to the respondent.
2. Whether the applicants were duly served with court process.

I prefer to deal with the issue of service of the summons first as it is paramount in determining the 1st leg of this application. I did not comprehend the submission of Mr. Wabusa on this issue. He opened his submission by stating that the issue is answered in affirmative because the respondent knew the home of the 3rd applicant where they could have served him with the summons. He then went on to submit that the respondent chose to serve the 3rd applicant by substituted service though at the time the suit was instituted he being a businessman did not access the newspaper to discover the existence of the suit as he was operating mostly in Kenya and DRC.

He also submitted that the affidavit of service of the respondent was full of lies because the respondent claimed to have unsuccessfully looked for the 3rd applicant yet his home was known. He argued that none of the family members of the 3rd applicant were asked about the 3rd applicant's whereabouts. His view was that it was a lie for the respondents to claim that they did not know the 3rd applicant's home when he needed to be served but at the time of execution they managed to get to his home to attach his vehicle. He maintained that the 3rd applicant was not aware of the suit as the summons were served by way of substituted service yet the 3rd applicant was in Kenya at the time.

He relied on the case of **Nyombi vs Anna Mary Nalongo Civil Suit No. 819 of 1986** where it was held that unlike O.9 r 24, O.9 r 9 of the CPR gave court wider powers to set aside a judgment entered in pursuance of the preceding rules of that order. Of course that authority relates to judgments entered under Order 9 as opposed to this case where it was entered under Order 36. The authority is therefore of no relevance to this case.

It was also the submission of Mr. Wabusa that the suit disclosed no cause of action and given a chance to appear and defend the same, the applicants have a good defence and would raise a

preliminary objection that the respondent has no claim against the applicants. He cited the case of **Semakula Haruna vs Stanbic Bank (U) Ltd HCCS No. 432 of 2009** where Madrama J. ruled that part of the plaint disclosed no cause of action and was subsequently dismissed with costs.

In reply, Mr. Kiboijana submitted that there was proper and effective service since the applicants were served by way of substituted service as ordered by court. He relied on Order 5 rule 18 (2) and stated that substituted service under court order is effectual service. He argued that the summons was advertised in the newspaper as ordered by court, the process server having failed to trace all the applicants at their last known addresses or at their registered addresses. He submitted that the 3rd applicant's assertion that he was in Nairobi was not supported by evidence as he did not attach any passport entries to his affidavit in support of the application.

Furthermore, counsel for the respondent argued that the 1st and 2nd applicants are companies registered in Uganda and could not be said to be having all their directors and principal officers resident in Nairobi. According to him the 1st and 2nd applicants had not shown why they did not file applications for leave to appear and defend the suit.

He also submitted that there was no convincing explanation from the applicants as to why they did not apply to appear and defend the suit. He cited the case of **Violet K. Mukasa V Erizafani Matovu [1992-1993] HCB 235** where Tsekooko J. (as he then was) held that service of court process by substituted service was as good as service on the party personally. He further held that in an application to set aside ex parte judgment, the applicant must adduce evidence, to the court's satisfaction, that he was barred from appearing in the suit by good cause. It was not sufficient to merely state that the applicant was in London at the time the substituted service was effected without stating what she was doing there or giving a thorough explanation of the circumstances.

In rejoinder, Mr. Wabusa reiterated his earlier submission but added that the 3rd applicant is the main party in both companies and did not receive court process apart from the warrants of attachment.

I wish to observe that the submissions filed by counsel for the applicant were largely not backed by the 3rd applicant's evidence. For instance the submissions that none of the family members of the 3rd applicant were asked about the 3rd applicant's whereabouts was evidence from the bar. Others which this court found unbelievable and just ignored were also not based on the affidavit in support of this application. I find that these are evidence from the bar which is inadmissible.

The applicants were served by way of substituted service by order of court. According to Order 5 rule 18(2) of the CPR, substituted service under an order of the court is as effectual as service on the defendant personally. Tsekooko J. (as he then was) echoed the same legal position in the case of **Violet K. Mukasa vs Erizafani Matovu (Supra)**.

I find no fault with the service on the applicants by way of substituted service as it was done after direct service had failed due to the inability of the process server to locate them in their known addresses. The service was done in accordance with the law and it is effective. There is no basis for this court to believe that the process server's affidavit was false. No evidence was adduced to show why the 1st and 2nd applicants did not file an application for leave to appear and defend the suit. Even the 3rd applicant's reasons are not at all convincing since they are not supported by any evidence. That answers the first issue in the affirmative.

As regards good cause that must be shown by the applicant, Mr. Wabusa did not address court on it but instead chose to argue the merit of the case contending that the applicants were not indebted to the respondent in the sum of US$ 50,000 as the said money was an advance payment for contractual undertaking between the 3rd applicant and the respondent.

He also submitted that the respondent was in the first place to explore arbitration as stipulated in the Memorandum of Understanding dated 27th April 2009 between the 3rd applicant and the respondent after which the respondent would have been open to seek legal redress. His argument was that the respondent disrespected terms of the agreement by hiding from the applicants and running to court. He relied on the case of **Total (U) Ltd v Barumba General Agencies Arbitration Application No. 3 of 1998** where it was held that the institution of the arbitrator/advocate is by no means a fanciful stretch of the imagination.

Mr. Kiboijana for the respondent in response submitted that the applicants had not shown good cause to warrant granting the orders sought. He referred to paragraphs 6 and 7 of the plaint which is to the effect that the suit was in respect of US $ 50,000 which was paid by the respondent to the 1st defendant/1st applicant. He argued that this was part payment of the purchase price for land comprised in plot 150-156 Kira Road which it undertook to sell to the respondent after obtaining a title for it. According to him, the 1st defendant/1st applicant undertook to refund the US $ 50,000 to the respondent if it failed to obtain the title. Then the 2nd defendant/2nd applicant together with the 3rd defendant/3rd applicant guaranteed repayment of that money if the 1st applicant failed in its obligations as contained in the Memorandum of Understanding dated 27th November 2008 and annexed to the plaint.

Counsel for the respondent submitted that failure to honour the obligation is the basis of the suit since the applicants have not stated that the 1st applicant obtained the land and/or refunded the respondent's money.

He argued that the alleged payment to the 3rd applicant and the resolution by the respondent attached to the applicant's affidavit have nothing to do with the US $ 50,000 which is the subject matter of the respondent's suit. According to him the dealings between the respondent and the 3rd applicant are not the subject of the suit.

He criticised counsel for the applicant's submission that there was no attempt at amicable settlement or arbitration as hearsay since there was nothing in the 3rd applicant's affidavit to that effect.

Counsel for the respondent also argued that the 3rd applicant falsely deposed that the land comprised Block 209 Plot No. 31 at Bwaise was not pledged as security. Counsel referred to page 7 and 8 of the Memorandum of Understanding dated 27th November 2008 annexed to the plaint where the said land was clearly pledged as security for the guarantee and the respondent was given authority to even dispose it of.

It was conceded that the applicant's assertion that Motor Vehicle No. UAL 890C Toyota Surf was not part of the performance bond is true. However, counsel submitted that the vehicle was attached and sold by way of execution as per the return of the court broker on the court file.

He also contended that the applicants have since September 2011 been aware of the decree. He referred to annexture A and B to the affidavit in reply as letters where the applicants acknowledged their indebtedness of US $ 50,000 to the respondent. Annexture "B" dated 16th November 2011 even talks of the decree in Civil Suit No. 129 of 2011. Mr. Kiboijana's view was that since that time the applicants were aware of the decree and now that part execution had taken place they were merely frustrating the execution process.

In rejoinder, Mr. Wabusa submitted that the attachment and sale of the 3rd applicant's motor vehicle was irregular as the said vehicle was not a "party" to the transaction that resulted into this suit! I have put the word party in quotes because I do not know how a motor vehicle can be a party to a suit. According to counsel for the applicant this was a clear manifestation that the applicant has shown good cause for the application to be allowed.

The applicants' counsel also contended that the respondent should have attached land comprised in Plot 31 Block 39 land at Bwaise which was the subject matter of the transaction and a performance bond if at all they had issues with the applicant instead of attaching his motor vehicle of Ug. Shs 40,000,000/= which is far less in value than the amount of US $ 50,000.

First of all I agree with the respondent's counsel that the applicants' submission of no attempt at amicable settlement or arbitration is hearsay. This is because the 3rd applicant did not state this in the affidavit in support of this application. As such the submission was baseless and no regard should be paid to it as it is evidence from the bar.

Secondly, I find no fault with the attachment of the 3rd applicant's motor vehicle since it is property liable for attachment under section 44 of the Civil Procedure Act Cap. 71. Such is not the kind of property excluded from being attached under the law. If at all he was challenging the attachment say on the ground that it belonged to a third party then he should have brought an

objector proceeding other than raising the issue of wrongful attachment this application. I therefore find no merit in that argument.

Thirdly, as regards good cause, the phrase is not defined in the CPR but it is defined in **Black's Law Dictionary, Seventh Edition**, as; *"A legally sufficient reason"*. The authors explained that good cause is often a burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused.

The phrase "*sufficient cause*" that is normally used interchangeable with the phrase "*good cause"* has been explained in a number of authorities. In the cases of **Rosette Kizito v Administrator General and Others [Supreme Court Civil Application No. 9/86** reported in **Kampala Law Report Volume 5 of 1993 at page 4]** it was held that sufficient reason must relate to the inability or failure to take the particular step in time.

In **Nicholas Roussos v Gulamhussein Habib Virani & Another, Civil Appeal No.9 of 1993 (SC)** (unreported), the Supreme Court laid down some of the grounds or circumstances which may amount to sufficient cause. They include mistake by an advocate though negligent, ignorance of procedure by an unrepresented defendant and illness by a party.

Taking into account the above explanation of the phrase good cause, the applicants had the burden to show why their failure to file an application for leave to appear and defend the suit should be excused. This required them to state a justifiable reason why they did not take the necessary action. I have carefully perused the affidavit in support of this application and the submission of counsel for the applicants but I do not see any reasons advanced by the applicants for their inaction.

No effort was made for the 1st and 2nd applicants at all as both the affidavit in support and the submission relate only to the 3rd applicant. Attempts made by the 3rd applicant in my view just faulted the mode of service which I have already dealt with and concentrated on the alleged strength of the 3rd applicant's case which was a good argument for the 2nd leg of this application to do with leave to appear and defend the suit. I find that as far as the 1st leg of this application is concerned, no good cause has been shown. I will therefore not bother to consider the 1st issue

which relate to the 2nd leg of this application because it was dependent on the applicants surmounting the first hurdle of setting aside the default judgment by convincing this court that either service was not effective or that they were prevented by good cause from filing an application for leave to appear and defend the suit.

The applicant failed to do that and this court has no option but to dismiss this application and it is accordingly dismissed with costs.

Before I take leave of this matter, in view of my observation on the submission of counsel for the applicant, I feel duty bound to refer this matter to the office of the Chief Registrar to verify whether Mr.Eddie Wabusa is indeed on the roll of advocates. In the event that he is found not to be on the roll, the matter should be reported to the Law Council for investigation and further management.

I so order.

Dated this 21st day of December 2012.

Hellen Obura
JUDGE

Ruling delivered in chambers at 3.30 pm in the presence of Mr. Andrew Walungama the 3rd applicant. Both counsel were absent as well as the 1st and 2nd applicants and the respondent.

JUDGE
21/12/12