

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

**HCCS NO. 157 OF 2010**

**VALERY ALIA) ..... PLAINTIFF**

**VS.**

**ALIONZI JOHN) ..... DEFENDANT**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA**

**RULING**

The plaintiffs claim against the defendant is for the payment and or recovery of **Uganda shillings 138,100,000/=** being the amount due on a lease contract for two motor vehicle trucks at a sum of **Uganda shillings 1,100,000/=** per week for each motor vehicle, a claim in conversion and detinue, special damages of **Uganda shillings 35,836,000/=**, damages for conversion and detinue, general damages for breach of contract, inconvenience and suffering, exemplary damages, interest thereon at the rate of 30% per annum and costs of the suit.

The facts constituting the cause of action are that on the 4th of November, 2008, the plaintiff agreed to lease to the defendant motor vehicle registration numbers UAH 044 Y and UAB 866 A. An agreement was duly executed between the parties on 9 November 2008. The vehicle was handed over to the defendant under the terms of the agreement. The defendant had vacated to Arua and started spending long periods of time without availing the vehicles for inspection by the plaintiff or making any payments as agreed.

The defendant became unavailable and in due time the plaintiff failed to trace the defendant for months and proceeded to establish the whereabouts of his trucks. Motor vehicle number UAB 886 A was fund vandalised and abandoned in a remote part of Arua district. The second truck registration number UAH 024Y was

found abandoned 7 km inside a forest in the Southern Sudan. The facts of the suit are sufficiently contained in the written submissions of the plaintiff's counsel.

The defendant was not served in the ordinary way. On 30 August 2010 the plaintiff's counsel obtained leave to serve a renewed summons against the defendant by way of substituted service by publication in any local daily widely circulating in Uganda. This was in miscellaneous application number 431 of 2010. The affidavit of the deponent in that application affirmed by Mr Ogoola Abdullah shows that on the 4<sup>th</sup> of May 2010, he received copies of the plaint and summons to file a defence for service upon the respondent. The respondents address was not known to him and he inquired from Brian Kaggwa an advocate who also did not know the address of the defendant. He contacted the plaintiff and they travelled together with the plaintiff to Arua district where they established that the defendant had travelled to the Sudan. Efforts to trace the defendant proved futile. The registrar granted an order for substituted service on 25 August 2010.

In a letter dated 23<sup>rd</sup> of September 2010 Messieurs Impala Legal Advocates wrote to the registrar of this honourable court and filed the letter on 1 October 2010 on the court record in which they attach the New Vision advertisements of Tuesday, 7 September 2010 advertising summons to file a defence. On 1 October 2010 the honourable registrar entered interlocutory judgement under order 9 rule 8 of the Civil Procedure Rules.

Again in a letter dated 13<sup>th</sup> of January 2011 and filed on court record on 13 January 2011 Messieurs Impala Legal Advocates wrote to the registrar to fix the case before a judge for formal proof of the debt. The matter was mentioned several times before it proceeded on 21 February 2012. The plaintiff called one witness namely the plaintiff himself and closed his case. Learned counsel for the plaintiff filed written submissions.

I have since then perused the court file thoroughly. Whereas Messieurs Impala Legal Advocates applied by letter dated 23 September 2010 for interlocutory judgment and attached a copy of the New Vision advertisement dated 7 September 2010, there is no formal compliance with order 9 rule 5 of the Civil Procedure Rules. Order 9 rule 5 provides as follows:

"Where any defendant fails to file a defence on or before the day fixed in the summons and the plaintiff is desirous of proceeding upon default of filing the defence under any of the rules of this Order, he or she shall cause an affidavit of service of the summons and failure of the defendant to file a defence within the time prescribed to be filed upon the record."

In this case the plaintiff has not complied with order 9 rule 5 of the Civil Procedure Rules. The rule is mandatory in that it requires the affidavits to prove two things namely: service of the summons and failure of the defendant to file a defence within the time prescribed. The suit cannot proceed without an affidavit of service on the court record as envisaged by rule 5 of order 9 of the Civil Procedure Rules. Secondly, interlocutory judgement cannot be entered unless there is compliance with rule 5 of the order. This was held in the East African Court of Appeal in the case of **Kanji Naran vs. Velji Ramji (1954) 21 EACA at pages 20**. **In that case** the deputy registrar of the Supreme Court of Kenya entered judgement under the Civil Procedure Rules 1948 in favour of the respondent/plaintiff. The appellant moved to set aside the decree which had been issued supporting his application by affidavit that he had never been served with a copy of the summons or plaint when he was asked by an advocate's clerk to sign his name on the back of the summons form. The clerk had not sworn an affidavit of service on the court record and no evidence was called upon the service. An application was made to set aside the judgement and the learned judge refused the motion to set aside the decree on the ground that they were no merits disclosed by the defence. The Court of Appeal held that the order of the deputy registrar was a bad one and could not stand. They stated:

"That the learned trial judge appears to have thought that he had discretion in refusing the motion, whereas, in fact, he had none, because in the absence of proper service the order of the registrar was unlawful. The whole trouble in this case appears to have originated in the lack of any affidavit of service by the person purported to have made service. We are told that when service in Kenya is effected by a court process server the practice has been to rely on his endorsement that service was duly effected. Such a practice, in our opinion, has obvious dangers and where

service, as in the instant case, was attempted by an advocate's clerk, it should, in our opinion, have been supported by an affidavit of service. We also point out that under order 9 rule 3 when the plaintiff is desirous of proceeding in default of entry of appearance he may be required by the court that an affidavit of service of the summons be filed upon the court record. We think that as a general practice this should be required in every case."

In Uganda the requirement under order 9 rule 5 of the Civil Procedure Rules file an affidavit of service upon the court record is a mandatory requirement. I also wish to add that service of summons under order 5 of the Civil Procedure Rules is not satisfied by service of the summons signed by the registrar of the court only. Certain items are meant to accompany the summons. Order 5 rule 2 provides as follows:

"Every summons shall be accompanied by a copy of the plaint, a brief summary of evidence to be adduced, a list of witnesses, a list of documents and a list of authorities to be relied on; except that an additional list of authorities may be provided later with the leave of court."

In this case the letter of Messieurs Impala Legal Advocates dated 23 September 2010 applied for interlocutory judgement and to which the newspaper advert was attached only had attached a copy of the summons signed by the deputy registrar advertised in the newspaper. The summons were not accompanied by a copy of the plaint, a brief summary of evidence to be adduced, a list of witnesses, a list of documents and a list of authorities to be relied upon. Paradoxically the summons reads: "Whereas the above named plaintiff has instituted a suit against you upon the claim the particulars of which are set out in the copy plaint attached hereto."

No copy of the plaint was advertised. Even if it was advertised, it was not attached to the letter. It follows that there was no proof before court that summons together with the plaint had been served upon the defendant. The summons is an order of the court requiring the defendant to file a defence within the prescribed time of 15 days and warning of the consequences of non-compliance with the filing of a defence. It is a fundamental rule of justice that before anybody can

defend himself or herself, he or she has to be notified of the particulars of the claim against him or her. Article 28 of the Constitution of the Republic of Uganda provides that in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. It is therefore my judgement that non-compliance with order 5 rule 2 of the Civil Procedure Rules renders the proceedings an irregularity. It is not sufficient to advertise the summons issued by the registrar. The summons has to be accompanied by a copy of the plaint in the newspaper advert. In the absence of an affidavit of service, I cannot say that the order of the registrar dated 25<sup>th</sup> of August 2010 and signed on 30 August 2010 was complied with. The requirement to file an affidavit of service on the court record under order 9 rule 5 of the Civil Procedure Rules is mandatory.

In this case therefore interlocutory judgment was irregularly entered. Learned counsel for the plaintiff or the court did not realise this anomaly in time to save the plaintiffs additional costs of proceeding. However, the irregularity was realised before judgement. The interlocutory judgment entered by the deputy Registrar dated 1<sup>st</sup> of October 2010 is hereby set aside.

Before I conclude this matter, the plaintiffs amended plaint is for recovery of **Uganda shillings 138,100,000/=**, and **Uganda shillings 31,150,000/=** special damages. The basis of the claim is the lease contract for the hire of motor vehicles. Formal proof under order 9 rule 8 of the Civil Procedure Rules envisages a claim for pecuniary damages. The head note of rule 8 of order 9 of the Civil Procedure Rules reads "Assessment of damages." Rule 8 reads as follows:

"Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and the defendant fails or all defendants, if more than one, fail to file a defence on or before the day fixed in the summons, the plaintiff may, subject to rule 5 of this Order, enter an interlocutory judgment against the defendant or defendants and set down the suit for assessment by the court of the value

of the goods and damages or the damages only, as the case may be, in respect of the amount found to be due in the course of the assessment."

The rule deals with a plaintiff which has a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages. What are pecuniary damages? In the case of **Uganda Baati versus Patrick Kalema High Court, Commercial Division, Civil Suit Number 126 of 2010** I noted that the terms "liquidated demand" and "pecuniary damages" may be distinguished. This is what I said:

According to Stroud's judicial dictionary, the terms "liquidated demand" inter alia means and includes, the amount on a bill of exchange, definite interest on a contract or under a statute, a sum certain in money, a statutory demand for the payment of a total debt and an amount due on a judgment.

The application of the rules in cases of liquidated demands and pecuniary damages, as distinguishable grounds of claims in an application for judgment in default of a defence, was considered in the case of **Abbey Panel & Sheet Metal Co Ltd v Barson Products (a firm) [1947] 2 All ER 809** per Somervell LJ. at page 809:

"...In the second place, where a plaintiff is claiming pecuniary damages plus a liquidated demand and does not exercise his right to sign final judgment in respect of the latter, but signs an interlocutory judgment in respect of the whole claim, I do not think the defendant can claim to have the final judgment which is subsequently given set aside as irregular. *Under the rules, the plaintiffs are entitled to final judgment against the defendants in respect of the liquidated demand covered ex hypothesis by the final judgment.* It may be that the court could itself take the objection when the inquiry takes place and make the plaintiffs sign a separate final judgment in respect of the liquidated demand, but, if the court includes the liquidated demand in the final judgment, I can see no grounds for allowing the defendants to challenge the judgment in respect of an amount

included in it for which, under the rules, the plaintiffs were clearly entitled to a final judgment against them.” (Emphasis added)

Evershed LJ at page 810

“The intended scope and purpose of RSC, Ord 13, rr. 3–7 inclusive, appear to me to be reasonably plain. They provide that where a plaintiff has in his writ *made a claim against a defendant for one or more of the following, viz, (a) a debt or liquidated demand, (b) detinue, and (c) pecuniary damages, and such defendant, though properly served, does not choose to appear to the writ, then the plaintiff may, without having to take any further steps against that defendant, obtain judgment against him for his claim—in the case of a liquidated demand, a final judgment; in the other cases, an interlocutory judgment subject to assessment by the court of the monetary amount he is entitled to recover.*” (Emphasis added)

The plaintiff is entitled to a final judgment against the defendant in respect of a liquidated demand even if there is a claim for pecuniary damages in the suit. In other words, the deputy registrar can enter final judgment for the liquidated demand and set up the claim for pecuniary damages for formal proof after entering interlocutory judgment in respect thereof.”

In this case, the hire of the vehicles was for a definite amount and the sums under that claim constitute liquidated damages. In the above case I also noted that where there is a claim for liquidated damages together with a claim for pecuniary damages, the registrar can enter default judgement in respect of the liquidated demand and set down the suit for assessment of damages in respect to the claim for pecuniary damages. Halsbury's laws of England volume 12 (1) fourth edition reissue page 267 and paragraph 808 defines liquidated and unliquidated damages and penalties as follows:

"The parties may agree by a contract that a particular sum is payable on the default of one of them. If the agreement is not obnoxious as a 'penalty', such a sum constitute 'liquidated damages' and is payable by the party in

default. The term is also applied to sums expressly made payable as liquidated damages under a statute. In every other case, where the court has to quantify or assess the damages or loss, whether pecuniary or non pecuniary, the damages are 'unliquidated'."

The claim under a lease or hire of a vehicle pursuant to a written contract with a definite sum payable monthly or weekly as in this case will give rise to a liquidated demand upon default to pay the sums certain in money.

Be that as it may, there is no affidavit of service on the court record and the court cannot conclude that proper service was ever effected. In the premises after vacating the interlocutory judgement, the file is sent back to the registrar for appropriate action.

Ruling delivered in open court this 26<sup>th</sup> day of March 2012

Hon. Christopher Madrama

Judge

Ruling delivered in the presence of:

Jason Kiggundu holding brief for Brian Kaggwa

Ojambo Makoha Court Clerk

Christopher Madrama

Judge

26<sup>th</sup> of March 2012.