THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT-00-CC-MA-687-2012

(Arising from Miscellaneous Application No. 649 of 2012)

(All Arising from Civil Suit No. 367 of 2012)

KENSINGTON AFRICA LIMITED::::::::::::::::::::::::::::::APPLICANT

VERSUS

1. **PANKAJKUMAR HEMRAJ SHAH**
2. **SAWAN PANKAJ ZAKHARIA::::::::::::::::::::::::::RESPONDENTS**

BEFORE: HON. LADY JUSTICE HELLEN OBURA

RULING

The applicant brought this application under Article 126 of the Constitution of the Republic of Uganda 1995, Sections 33 of the Judicature Act, Section 98 of the Civil Procedure Act, Order 36 rules r 3 (1) & (2) and 11 as well as Order 52 rules 1 and 2 of the Civil Procedure Rules(CPR) seeking for orders that the ex parte judgment and decree entered against it in the suit be set aside, the execution of the decree be set aside/stayed and the applicant be granted unconditional leave to appear and defend the suit.

The gist of the grounds of this application as stated in the notice of motion and the affidavit in support deposed by Jaimit Vasavada, the applicant's Finance Director are that: there is an illegality apparent on the face of the record; the ex parte judgement and decree were entered against the applicant without service being effected on the applicant; the affidavit of service on the Court record is false,

perjurious and the respondents did not follow the prescribed procedures of effectively serving court process; the respondents acted fraudulently; the applicant has a full and complete defence to the respondents' suit and the money claimed is neither due nor owed as alleged.

Other grounds are that: there exists triable matters and conflicting evidence that cannot be resolved in such a summary manner; the judgment and decree do not agree and this is an illegality; there has been gross miscarriage of justice from which the applicant will suffer substantial loss and irreparable damage if the impending execution by garnishee is not stopped; the application has been brought without delay and the applicant is willing to abide by any terms set by court for the grant of the orders sought. Lastly, that it is in the interest of justice and fairness that the orders sought by this application are granted to ensure that the main suit is determined after hearing both parties on all matters on controversy between them.

The respondents filed an affidavit in reply to oppose the application deposed by Sawan Pankaj Zakharia. The respondents also filed a supplementary affidavit deposed by Okocha Robert, a law clerk working with M/s Kwesigabo, Bamwine and Walubiri Advocates, the firm representing the respondents.

The background to this application is that the respondents filed a summary suit vide H.C.C.S No. 367 of 2012 against the applicant for recovery of US $ 50,856. It is alleged that the applicant was served with summons but did not apply for leave to appear and defend the suit. Consequently, a default judgment was entered on the 20/09/2012 and a decree issued. The respondents applied for a garnishee order nisi which was granted by the registrar of this Court. The applicant now seeks to set aside that ex parte judgement, the decree as well as its execution and to be allowed to appear and defend the suit.

On 18th February 2013 when this matter came up for hearing Mr. Bernard Bamwine represented the respondents while Mr. John Musiime held brief for Dr. Akampumuza for the applicant. Both counsel agreed to file written submissions in the matter.

In the written submissions, counsel for the applicant proposed the following issues for determination of the Court:

1. Whether there was proper and/or effective service of the summons of this Court.
2. Whether the applicant had not shown sufficient/good cause for this Court to set aside its default judgment, decree and execution.
3. Whether that applicant has not shown good cause for this Court to grant leave to appear and defend the suit.
4. Remedies.

Since counsel for the respondents had no objection to the issues as proposed, I will proceed to resolve them as framed. As to whether there was proper and/or effective service of the summons of this court, counsel for the applicant submitted that the affidavit of service of Okocha Robert is full of falsehoods as he claims to have served the applicant's "Stuff Accountant" Mr. Rahul Dubey which position does not exist in the applicant company. The second falsehood pointed out was that Mr. Okocha claims to have received summons in summary suit on 10/9/12 but served them on the applicant on 7/9/12. It was also submitted for the applicant that the affidavit of service does not meet the requirements of Order 5 rule 16 of the CPR.

The applicant's counsel relied on the decision in of ***D. Mbonigaba v CH. Nkinzehiki Civil Suit No. 687 of 1971*** where an affidavit of service was held to be defective since the process server did not disclose whether or not at the time of service of summons, the person on whom summons was served was personally known to him nor the name and address of the person so identifying the person served in addition to witnessing the service as required by Order 5 rule 16 of the CPR. Relying on paragraph 6 of the affidavit in support, the applicant's counsel argued that there was no proper service without the company's seal or stamp accompanied by signature of a principal officer of the corporation as provided for in Order 29 rule 2 of the CPR.

Conversely, counsel for the respondents argued that there was proper and effective service of summons on the applicant since Mr. Rahul Dubey, who is alleged to have been served with summons accepted service and wrote on it the word, "Received" on 7/9/2012. It was further argued that even though Mr. Rahul Dubey did not write his name, he mentioned his name and post to the process server at the time of service. It was submitted for the respondents that Mr. Rahul being an accountant is a principal officer of the applicant in terms of Order 29 rule 2 CPR, was the principal person to whom settlement of the debt was charged and he made email promises and

assurance on behalf of the applicant to pay the debt. It was contended for the respondents that Order 29 r 2 does not say that every corporation receiving service must append its seal or stamp on the summons as this is only good practice which varies from one company to another. The respondents' counsel also argued that the discrepancy in the dates of 10/9/2012 and 7/9/20120 in paragraph 2 of the process server's affidavit were a typing mistake which did not affect the substance of the affidavit.

In response, counsel for the applicant submitted that the affidavit of service mentions nothing of Mr. Rahul Dubey being known to the process server thus making the affidavit of service defective. In addition, it was argued that the respondents know the good practice of the applicant company that it stamps and signs to acknowledge receipt and there is ample evidence of that practice on court record. It was also contended for the applicant that the submission that the discrepancy in dates was a human typing mistake was evidence from the bar which should be ignored.

Order 36 rule 11 CPR under which this application was brought gives this court discretion to set aside a decree issued in default of an application for leave to defend and if necessary stay or set aside execution and give leave to the defendant to appear and defend the suit if satisfied that the service of the summons was not effective, or for any other good cause.

In the instant case the applicant denies being served with summons in the suit while the respondents insist that there was effective service of summons on the applicant. In determining whether the service was effective, I am guided by the decision of the Supreme Court of Uganda in ***Geoffrey Gatete and Angela Nakigonya v William Kyobe Civil Appeal No. 7 of 2005*** particularly in the judgment of Mulenga JSC who examined order 36 rule 11 and explained that the term *"Effective Service"* means service having the intended or desired effect and the contrary is true. Madrama J. applied this principle in the case of ***David Ssesanga v Greenland Bank Ltd (In Liquidation) HCMA No. 406 OF 2010*** and held that effective service must produce the desired effect, which is to make the defendant aware of the suit.

The applicant's Finance Director in paragraph 2 of the affidavit in support averred that the default judgment was entered against the applicant when the applicant was

not aware of any pending case against it. This averment was not denied by the respondents in their pleadings as no specific response was made to it. The position of the law is that facts that are neither denied nor rebutted by the opposite party are presumed to be accepted. See ***Massa v Achen [1978] HCB 297.*** I am therefore inclined to accept that the applicant was not aware of the suit at the time the default judgment was entered. That being the case, the service of summons on the applicant did not produce the desired effect of making the applicant aware of the pending case. Consequently, I find that there was no effective service of summons on the applicant.

I am also inclined to agree with the applicant's counsel that the affidavit of service of Mr. Okocha Robert, annexure "A1" to the supplementary affidavit is defective for not having complied with the law. The most significant part of the affidavit states as follows:

> *"4. That on reaching Legal and Administrative Department office I saw Mr. Rahul Dubey together with lady who did not disclose herself to me, to whom I introduced myself and the purpose of my visit; and he also introduced himself to me as Mr. Rahul Dubey and his position as Stuff Accountant. I tended to him the said summons in summary on plaint.*
>
> *5. That after perusing through he accepted service by appending his signature on my copy of the said summons in summary suit in plaint on behalf of the defendant hereto attached and marked A for Court record and as proof of service thereof".*

Order 5 rule 16 of the CPR provides;

> *"The serving officer shall, in all cases in which the summons has been served under rule 14 of this Order, make or annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which the summons was served, and the name and address of the person, if any, identifying the person served and witnessing the delivery or tender of the summons."*

My understanding of Order 5 rule 16 and paragraph 3 of Form 9 of Appendix "A" to the CPR is that the process server should state in the affidavit of service whether the person who accepted service was personally known to him and if not, the name and address of the person who identified the one on whom service was made and witnessed delivery of the summons. This is not the case with the affidavit of service of Mr. Okocha. It is therefore defective in so far as Mr. Okocha did not state whether Mr. Rahul Dubey was personally known to him and if not, whether he was identified by another person who also witnessed the service of the summons on him.

I also find no indication on the summons in summary suit to show that the person served was indeed Mr. Rahul Dubey. The signature could have been appended by any other person since the authors name is not stated. Order 29 rule 2(2) CPR ought to have been complied with since the applicant is a corporation. I am not satisfied that Mr. Rahul Dubey is the principal officer of the applicant company as there is no basis for believing so.

For the above reasons, I find the affidavit of service defective. It was therefore irregular to rely on it to enter a default judgment against the applicant when there was no proper/effective service of summons. Thus the first issue is answered in the negative and on that ground alone this court would be inclined to set aside the default judgment, decree and execution. However, I will still proceed to consider the second issue merely to deal with the allegation of irregularity and illegality as there is already sufficient cause to set aside the judgment, decree and execution without delving into the arguments raised in the 2nd issue.

It was submitted for the applicant that the affidavit in support of the plaint did not comply with the requirements of Order 36 and Order 19 rule 3 CPR in so far as it did not substantiate or attach any evidence to support the claim. On another point, he also contended that there are illegalities on the face of the record in two ways, firstly that the registrar of this Court acted without jurisdiction in issuing a decree nisi and any proceedings that led to it are a nullity. Secondly, that the judgment and decree do not agree in as far as the judgment was entered under the hand and seal of the Court on 20/9/2012 whereas the decree was signed and sealed on 24th September 2012. Counsel for the applicant cited the case of ***Banco Arabe Espanol v Bank of Uganda [1996] HCB 12*** where it was held that the order was defective since it does

not bear the date of the day the decision was delivered. The decree was not properly extracted as required by law and therefore a nullity. The applicant also relied on the case of ***Makula International v His Eminence Cardinal Nsubuga Civil Appeal No. 4 of 1982*** to argue that a court of law cannot sanction what is illegal. Lastly, the applicant's counsel cited the case of ***Evans v Bartlam [1973] AC 473 at 480*** where Lord Atkin stated:

> *"Unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have power to revoke the expression of its coercive power where that had only been obtained by failure to follow any of the rules of procedure."*

Counsel for the respondents in response argued that the plaint is clear and its annextures which support the claim. He argued that once the annextures have been attached to the plaint, they need not be again attached to the affidavit in support of the plaint. Referring to paragraph 2 of the affidavit in support of the plaint the respondents' counsel contended that the whole plaint and annextures thereto are included in the affidavit as a matter of drafting style.

It was also submitted for the respondents that there is no illegality or error on the face of the record because the registrar derived her jurisdiction from practice Direction No. 1 of 2003 to decide the garnishee proceedings and the mere fact that the decree was given a different date from the judgment does not constitute an illegality but rather an innocent mistake on the registrar's part which is remedied under section 99 of the CPA. Counsel for the applicant added that this is a mere technicality swept away by article 126(2)(e) of the Constitution. He submitted that the Supreme Court in the case of ***Attorney General& Uganda Land Commission v James Mark Kamoga & Another C.A No. 8 of 2004*** noted such a discrepancy in passing and went to the substance of the case.

It was also argued that the Court of Appeal in the case of ***Banco Arabe Espanol v Bank of Uganda (Supra)*** did not address its mind to section 2 and 99 of the CPA but considered Article 126(2) (e) of the Constitution and did not strike out the appeal because the discrepancy of the decree not being properly extracted as required by law was treated as a mere irregularity. Finally, it was argued that since there is no illegality the decision in ***Makula International (Supra)*** was not applicable. The

court was referred to the case of ***J.F Ijjala v Corporation Energo Project (1988-1990) HCB 157*** where it was held that:

> *"In exercising discretion as to whether the ex parte judgment should be set aside or not, where there is a regular judgment, the court will unusually satisfy itself that there is a defence on the merits before judgment is set aside."*

In rejoinder, the applicant's counsel submitted that the annextures attached to the plaint cannot verify the contents of an affidavit because they have to be affixed to the affidavit, serialised and numbered and sealed by the Commissioner for Oaths when the affidavit is sworn in compliance with Order 19 rule 3(1) and paragraph 8 to the Commissioner for Oaths Schedule. It was argued that the failure to comply with the law on affidavits is a material irregularity and not a matter of drafting style.

I have considered the above arguments and I find no material irregularity in the plaintiffs' failure to annex the documents supporting their claim to the affidavit in support and have them sealed by the Commissioner for Oaths. This is because the Court of Appeal while considering a similar objection which it overruled for lacking merit in ***Uganda Corporation Creameries Ltd and Henry Kawalya v Reamation Ltd Civil Appl. No. 44 of 1998*** held that rule 8 though mandatory, is procedural and does not go to the root as to competence of affidavits. Engwau JA, observed as follows:

> *"In my view, whether or not those annextures have been securely sealed with the seal of the advocate who commissioned the affidavits thereof, does not offend rule 8 because they were not exhibits produced to a court during a trial or hearing in proof of facts. In any case the annextures in the present case are not in dispute. Even if those annextures were detached, the affidavits thereof would still be competent to support the Notice of Motion.* ***Rule 8 though mandatory, is procedural and does not go to the root as to competence of affidavits."*** (Emphasis added).

Similarly, I do not find merit in the alleged error on the face of the record because the registrar is clothed with the power to handle garnishee proceedings under Order 20 of the CPR. The error on the decree can also be corrected and so it should not be

treated as an illegality. In any event, I do not see how those errors account for the applicant's failure to file an application for leave to appear and defend the suit. On the whole, I do no find merit in the objections. Otherwise, I have taken note of the argument on the triable issues that was raised to strengthen the applicant's case to set aside the default judgment and I agree that there is need to conclusively hear and determine them in the main suit.

Turning to the third issue, it was submitted for the applicant that it is reasonable to grant unconditional leave to the applicant to appear and defend the suit because it raised triable issues. Counsel for the applicant cited the case of ***Maluku Interglobal Trade Agency v Bank of Uganda [1985] HCB 65*** for the principles to be considered before an application for leave to appear and defend is granted. He pointed out a number of triable issues which I will not reproduce in this ruling since the written submissions form part of the records.

In answer to the alleged triable issues, the respondent's counsel submitted that the plaint and it annexes being the documents in support of the claim is clear adding that not all the plaintiffs have to swear an affidavit in support of the plaint. He submitted that both respondents signed the contract in which their names are printed as purchasers on annexture "A" to the plaint. As to the alleged breach of contract, it was submitted for the respondents that Annexture "C" and "D" to the affidavit in reply show that there was breach by the applicant and that a cancellation and refund of deposit was agreed as envisaged in annexture C to the plaint. Annexture B to the plaint was also highlighted as the cancellation letter that was duly signed by the applicant's General Manager and its Financial Controller at the time, therefore the applicants cannot allege that there was no cancellation. Counsel for the respondents submitted that a cancellation can take any form.

As regards payment of stamp duty counsel for the applicant contended that this has since been paid basing on several authorities which show that stamp duty can be paid at anytime it comes to the notice of the court and the party charged with the duty and that once paid the issue rests as settled. Various cases were cited for that position. See ***Wasukira & 2 Others v M/s Harmony Group Ltd (Mbale) HCCS No 40 of 2009; Lamusa Magidu v Alamanzani Nsadhu & Another (Jinja) HCMA No. 20 of 2009; Sunderji Nanji Ltd v Mohamedali Kassam Bhaloo (1958) EA 762 at 764.*** It was further submitted that the penalty clauses in the reservation contract do

not apply since the parties agreed to cancel the contract under clause 5(d). It was argued that the default clause would have applied if the plaintiffs were in breach but there was no breach as the defendant failed to make the reserved house ready upon which the parties agreed to terminate the reservation contract and for the defendant to refund the deposits which was partly paid.

In rejoinder, the applicant's counsel argued that evidence must be given in compliance with Order 36 rule 2 of the CPR where there are joint purchasers as alleged by the respondents. Thus, evidence must be properly given that both of the joint purchasers cancelled the agreement. It was also the respondent's submission that there was never cancellation of the agreement entered for House No. 50 as alleged. It was further submitted that annexture A to the plaint and the cancellation of the agreement have no evidential value for failure to pay stamp duty on them. It was further argued for the applicant that even if payment of stamp duty was made, it would be ineffectual as there was no court order to that effect.

The applicant's counsel contended that the cases cited by the respondent's counsel were not applicable here because in all those cases the matter of stamp duty was ordered by court before entering final judgment and decree unlike in the matter at hand. Relying on the case of ***Proline Soccer Academy v Lawrence Mulindwa & 4 Others HCMA No. 456 of 2009*** the applicant's counsel argued that like in the above case, the respondents herein had no cause of action in their plaint and no stamp duty was paid for the cancellation of the agreement yet the registrar based her decision on them.

It is now settled that in an application for leave to appear and defend, the applicant must prove that there is a bona fide triable issue of fact or law that he will advance in defence of the suit. In ***Churanjilal & Co. v. A. H. Adam (1950) 17 EACA 92,*** the Court of Appeal for East Africa ruled that a defendant who has a stateable and arguable defence must be given the opportunity to state and argue it before court. That decision was followed by the High Court of Uganda in the case of ***Maluku Interglobal Trade Agency v. Bank of Uganda (supra)*** where the principle was concisely stated as follows:-

> *"Before leave to appear and defend is granted the defendant must show by affidavit or otherwise that there is a bona fide triable issue of*

fact or law. When there is a reasonable ground of defence to the claim, the defendant is not entitled to summary judgment. The defendant is not bound to show a good defence on the merits but should satisfy the court that there was an issue or question in dispute which ought to be tried and the court should not enter upon the trial of the issues disclosed at this stage."

Mukasa J. applied the above principles in the case of ***Maria Odido v Barclays Bank of Uganda Ltd HC Misc. Application No. 645 of 2008.*** He further observed that at this stage the court is not required to inquire into the merits of the issues raised, however the issue so raised should be real and not a sham. Court must be certain that if the fact alleged by the applicant were established there would be a plausible defence and if the applicant has a plausible defence he should be allowed to defend the suit unconditionally.

In applying the dictum to the facts in this case, it is my considered view that the applicant has raised some issues that would merit judicial consideration. Although counsel for the respondents contends that the applicant has no defence on the merits, at this stage it is not the duty of this court to inquire into the merits of the issues raised. The applicant claims that the respondents are not party to the contract which still subsists and has never been breached. This is disputed by the respondents. Essentially a question of law and fact is paused for this court to ascertain whether there was a contract between the parties, whether the respondents were parties to that contract, whether the contract was breached or terminated among other things.

Additionally, the applicant claims that the monies owed are not due. Denial of indebtedness *per se* is a defence that is good enough for purposes of obtaining leave to appear and defend a suit under summary procedure as was held by the Court of Appeal of Uganda in ***Photo Focus (U) Ltd v Group Four Security Ltd CA No. 30 of 2000.*** In the circumstances, I am satisfied that there are issues which ought to be tried in the main suit and so the applicant is entitled to leave to appear and defend the suit.

In the result, this application is allowed and the default judgment, decree and its execution are set aside. The applicant is granted unconditional leave to file a defence in the suit within 10 days from the date of this order. Costs of this application shall be in the main cause.

I so order.

Dated this 11th day of July 2013.

Hellen Obura

JUDGE

Ruling delivered in chambers at 3.30 pm in the presence of Ms. Akurut Irene who was holding brief for Dr. James Akampumuza for the applicant and Mr. Kizito Sekitoleko who was holding brief for Mr. Bernard Bamwine for the respondents.

JUDGE

11/07/13