THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT-00-CC-MA-625-2013

(*Arising from HCT-00-CC-CS-0185-2013*)

1. SENANA INVESTMENTS LTD
2. FARIDA NABIRONGO::::::::::::::::::::::::::::::::::::::APPLICANTS

VERSUS

GKO MEDICINES LTD::RESPONDENT

BEFORE: HON. LADY JUSTICE HELLEN OBURA

RULING

The applicants brought this application under the provisions of Order 9 rule 12 of the Civil Procedure Rules (CPR) and section 99 of the Civil Procedure Act, seeking for orders that:

1. The Ex parte Judgment, Decree and Taxation entered against the applicants/defendants in HCCS No. 185 of 2013 be set aside and the intended execution of the said decree be stayed.
2. The applicants be permitted to file their Written Statements of Defence out of time/ time within which to file the defence be enlarged so that the defendants can file their Written Statements of Defence; and
3. The costs of the application be provided for.

The grounds of the application as stated in the motion and the affidavit in support deposed by Ms. Farida Nabirongo, the Managing Director of the 1st& 2nd applicants are that the 2nd applicant/defendant who is also the principal of the 1st

applicant/defendant was out of Uganda during the time the summons were advertised and was thus not aware of the suit until 17th July 2013. Secondly, that owing to failure to file Written Statement of Defence, judgment was entered in favour of the respondent/plaintiff and execution of the decree arising there from has been applied for. Thirdly, that the judgement and the awards/orders made therein were erroneous and therefore contrary to the duly established procedure and the law.

The fourth ground is that the applicants/defendants are not indebted to the respondent in the sum alleged or at all as they have never dealt with it in regard to the suit goods or in any way whatsoever. Fithly that the applicants/defendants are not in possession and/or control of the suit goods the same having been handed over to the landlord by the respondent/plaintiff. The sixth ground is that the applicants/defendants have acted without delay to apply to set aside the judgement, decree and taxation sought to be enforced by the respondent/plaintiff. Lastly, that it is in the interest of justice that the judgment, decree and taxation be set aside in order that the applicants/defendants may defend the suit as they have a good and meritorious defence to the claim.

The application was opposed on the grounds stated in the affidavit in reply deposed by Mr. Gilbert Ohairwe, the respondent's Managing Director. The gist of the grounds are that the respondent sold to the applicants properties which included office equipment, fixtures and fittings worth Shs. 100,000,000/= but the applicants have refused to pay for the same despite several demands. Consequently, the respondent filed Civil Suit No. 185 of 2013 seeking for recovery of the money. Further, that the respondent failed to serve the summons on the applicants in the ordinary manner as a result of which the respondent obtained an order for substituted service and the summons was published in the newspapers.

The applicants did not file a defence and consequently the respondent applied for and obtained an ex parte judgment and decree against them. The matter then proceeded for execution. Another ground is that according to the advice given to the deponent by his advocates, the respondent's bill of costs was taxed in accordance with the Advocates (Remuneration and Taxation of Costs) Rules and it is not excessive as claimed by the 2nd applicant in his affidavit. The last ground for

opposing the application is that the respondent's suit has merit and if the decree is set aside and execution stayed it will suffer injustice.

The applicants filed an affidavit in rejoinder deposed by Ms. Cynthia Harriet Musoke, an advocate practicing with AF Mpanga & Co. Advocates, the law firm which represents the applicants. In a nutshell, she deposed that there is no evidence on the court record to show that the respondent applied and obtained an order for substituted service just as there is no proof that there were attempts to serve court process on the applicants at their other place of business where the suit goods are situated at Plot 12 Bombo Road, Kampala. Furthermore, that Civil Suit No. 185 of 2013 being an ordinary suit was not set down for formal proof as the usual practice of court requires but was instead determined by entering a summary judgment without first proving the claim. The deponent also averred that the amount awarded in taxed costs is not only glaringly excessive but it is also based on consideration unknown in law.

On another note, she also deposed allegedly based on the information received from the 2nd applicant that the applicants have never agreed or contracted with the respondent or its agent to purchase the suit properties and has never taken possession of them. Finally, she deposed based on the same source of information that the applicants have not refused to pay any money to the respondent as there is no obligation to warrant such payment and as such no money is due and payable to the respondent by the applicants jointly or severally.

When this matter came up for hearing on the 20th of August 2013, Mr. Lawrence Tumwesigye represented the respondent while Mr. Frederick Mpanga represented the applicants. Both counsel agreed to file written submissions in the matter which they did and I have considered them in this ruling.

As to whether there is just cause to set aside the exparte judgment, the applicants' counsel argued that this court is not limited or restricted in the exercise of its discretion in respect of this application. For that submission, counsel cited the case of ***Nicholas Roussos vs Gulamhussein Habib Virani Nazmudin Habib Virani CACA No. 9 of 1993*** where the Supreme Court stated what constitutes just cause and also emphasized that under Order 9 rule 12 Court enjoys unlimited and

unrestricted discretion in determining what would constitute just cause. The applicants' counsel also referred to the case of ***Patel vs EA Cargo Handling Services (1974) E.A 75*** which was quoted with approval in the case of ***Nicholas Roussos vs Gulamhussein Habib Virani Nazmudin Habib Virani (supra)*** where Dufus P. held that there are no limited or restriction on the judge's discretion except that if he does vary the judgement he does so on such terms as may be just. Furthermore, counsel for the applicants cited ***Kimani vs McConnel (1966) EA 547*** where Harris J is quoted to have established the test upon which the exercise of discretion under rule 12 is to be based.

Counsel for the applicants also submitted that just cause can be constituted by the fact that the service of summons in respect of HCCS No. 185 of 2013 was ineffective in respect of the applicants/defendants. It was argued for the applicants that the law requires that service of summons upon several defendants should be upon each defendant such that substituted service by way of publishing the summons in a local newspaper when the 2nd applicant was abroad was ineffective service. He referred to the case of ***Geoffrey Gatete and Angela Maria Nakigonya vs William Kyobe SCCA No. 7 of 2005*** for the definition of effective service and argued that since the defendant was abroad at the time of publishing the summons in a local newspaper such service would not be effective as the person would not get opportunity to see the advertisement.

This court's attention was also drawn to the case of ***Kampala City Council vs Apollo Hotel Corporation [1985] HCB 77*** for the distinction between an individual defendant and an officer of a corporate as well as a liberal interpretation of service in respect of the 1st applicant.

It was further submitted that the applicants have not in any way delayed or obstructed the course of justice since the 1st applicant returned to Uganda on 31st May 2013, learnt of the ex parte judgment on 17th July 2013 upon the bailiffs serving her with a warrant of attachment and sale of moveable property and instructed Messrs. AF Mpanga Advocates to represent the applicants leading to the filing of this application on 22nd July 2013.

Counsel also submitted that the applicants have triable issues against the respondent since the suit property was handed over to the landlord and not the applicants moreover there has never been any agreement between the applicants and respondents. It was further submitted that the suit property is still held within the premises occupied by the applicants on account of the landlord and can be delivered to the respondent.

Finally, the applicants' counsel submitted that there are several procedural irregularities in the handling of HCCS No. 185 of 2013 such that the execution of the judgment, decree and taxation entered would be an injustice to the applicants. The first irregularity pointed out was that the respondent's counsel applied for ex parte judgement under Order 9 rule 4 of the CPR yet that rule is only applicable to suits against infants and lunatics none of which the applicants are. The second irregularity is that the application for substituted service was prematurely brought given that the summons had been issued on 11th April 2013 and the application was made on 18th April 2013 before the expiry of the summons on 2nd May 2013. It is contended for the applicants that the process server could not have complied with Order 5 rule 15 of the CPR in exhausting all due and reasonable diligence on the 16th April 2013 to try and serve the summons upon the applicants. The last irregularity highlighted by the applicants is that the respondent's suit filed by way of ordinary plaint was never set down for formal proof as the usual practice of the court requires.

In response, counsel for the respondent argued that Order 5 rule 18 of the CPR was duly complied with and therefore the summons against the applicants were effective and proper. It was submitted for the respondent that the applicant's manager refused to accept service thereby showing no respect for court process and necessitating a substituted service order which was duly granted. Counsel for the respondent argued that the summons was accordingly published and the fact that the 2nd applicant had allegedly gone to China does not affect the propriety of substituted service.

The respondent's counsel disagreed with the applicants' argument that the ex parte judgment was not entered under the correct rule and contended that the Registrar entered an ex parte decree under Order 9 rule 6 of the CPR. The applicant's

counsel submitted that the advocates letter applying for judgment had stated Order 9 rule 4 which was a typing error and was subsequently corrected. He also added that the typing error was not fatal to the judgment since such judgment can even be entered by Court on its own motion without the plaintiff having to write a letter.

Additionally, counsel for the respondent submitted that the court was not obliged to set down the suit for formal proof since formal proof is a requirement under Order 9 rule 8 where the plaint is drawn with a claim for pecuniary damages only which was not the case in the matter before this court. It is the respondent's case that the plaint was drawn claiming liquidated damages of Ug. Shs. 100,000,000/= and it was for that reason that the Registrar had to enter judgment in accordance with Order 9 rule 6.

Concerning the bill of costs, the respondent's counsel submitted that the Registrar did the taxation in accordance with the Advocates (Taxation and Remuneration of Costs) Rules and so it is incorrect to state that the amount allowed was excessive. He argued that it would be irregular to challenge taxation in these proceedings.

As to whether the exparte decree can lawfully be set aside, counsel for the respondent cited the case of ***Remco Ltd vs Mistry Jadva Parbat and Co. Ltd [2002] 1 EA 233*** for the holding that where the default judgment is regular, the Court has no right to set it aside. However, it can exercise discretion to set it aside upon such terms as are just and that when exercising discretion the court should consider among other things, the facts and circumstances both prior and subsequent, and all the respective merits of the parties. The respondent's counsel submitted that the court should consider the fact that the properties are being used by the applicants and under the doctrine of part performance there was an agreement or arrangement that they would pay for them.

The respondent also contended that the applicants have no valid defence to the suit because they do not deny having interacted with the respondent's Managing Director as well as the respondent's Manager when they demanded payment. He relied on ***Baiywo vs Bach [1986-1989] EA 27*** where it was held that it is not enough to merely allege that the applicant has a defence to the suit, he must demonstrate by affidavit that he has a good defence.

In rejoinder the applicants' counsel reiterated his earlier submissions adding that the case of ***Remco Ltd vs Mistry Jadva Parbat and Co. Ltd (supra)*** supports the applicant's case in so far as it provides that if there is no proper or any service of summons to enter appearance the resulting default judgment is an irregular one which must be set aside *ex debitio* without exercising discretion. Counsel for the applicant argued that the taxation award was excessive given that the basic instruction fees in a claim such as this would ordinarily have been Ug. Shs 2,187,500/= but a total award in costs was Ug. Shs. 11,951,000/= yet the instructions alone were awarded at Ug. Shs 12,000,000/=. In that regard, the applicants' counsel relied on ***Makula International Ltd vs Cardinal Nsubuga & Anor SCCA No. 4 of 1981 at page 16-20*** and argued that the taxing officer did not follow the procedure enunciated in the said case and thereby arrived at a wrong calculation which was grossly exorbitant, in contravention of SI 267-4 and is therefore illegal. It is the applicant's contention that no prejudice will be suffered by the respondent/plaintiff because the suit was not determined on its merits and there will not be recalling of witnesses since no formal proof was done.

This application was brought under Order 9 rule 12 of the CPR which provides;

> *"Where judgments has been passed pursuant to any of the preceding rules of this Order or where judgment has been entered by the registrar in cases under Order L of these Rules, the court may set aside or vary the judgment upon such terms as may be just."*

As to whether there is any just cause to warrant setting aside the exparte judgement and decree obtained in H.C.C.S No. 185 of 2013, it is now settled that Order 9 rule 12 of the CPR gives the High Court unfettered discretion to set aside or vary ex parte judgment. See ***Mbogo and Another v Shah [1968] EA 93 (CA), Nicholas Roussos v GulamHussein Habib Virani and Another (supra), Attorney General & Another v James Mark Kamoga & Another SCCA No. 8 of 2004.*** Thus, this court is bound to follow the position of the law as expounded in the above cases. The rationale for court's unfettered discretion in such cases in my view was stated in the case of ***Henry Kawalya v J. Kinyakwanzi [1975] HCB 372*** where Ssekandi Ag. J (as he then was) held:-

> *"An exparte judgement obtained by default of defence is by its nature not a judgment on merit and is only entered because the party concerned failed to comply with certain requirement of the law. The court has power to dissolve such judgment which is not pronounced on the merits or by consent but entered specifically on failure to follow procedural requirement of the law."*

In ***Patel v. E.A. Cargo Handling Services (supra)*** Duffus P. at page 76 stated;

> *"I also agree with this broad statement of principle to be followed. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules."*

In light of the above authorities, it is the duty of this court to exercise its discretion judicially taking into account the facts, circumstances and merits of the instant case.

The main ground of this application is that the applicants were not effectively served with summons. On the other hand it is contended by the respondent that service of summons on the applicants/defendants was effective. Upon analyzing the pleadings and the supporting documents filed in this matter and having addressed my mind to the submissions made by both counsel, I do not agree with the respondent's submission that service of summons on the applicants was effective.

In the affidavit in support of the application for substituted service sworn by the process server, he indicated his failed attempt at direct service of the summons on the defendants. The Registrar of this court who heard the application for substituted service was satisfied that direct service on the defendants had failed. She then granted the application and ordered that the defendants be served by advertising the summons in the New Vision newspaper. The summons was accordingly advertised in the New Vision newspaper of 4th May 2013. It is that service which is being challenged as being ineffective as against the 2nd applicant

who is also the Managing Director of the 1st applicant on the ground that she was in China at the time the hearing notice was published. It is argued based on the principle in ***Geoffrey Gatete and Angela Maria Nakigonya vs William Kyobe*** (supra) that the service was not effective as it did not produce the desired or intended result of making the 2nd defendant aware of the suit so that she could have the opportunity to respond to it.

I have studied a photocopy of the 2nd applicant's passport attached to the affidavit in support of the application as annextures A3 and A4. It does confirm that the 2nd respondent left Uganda on 8th April 2013 and arrived in China on 9th April 2013. There is also another stamp indicating that the 2nd applicant entered Uganda on 31st May 2013 as stated in paragraph 3 of the affidavit. This averment was never controverted by the respondent. I am therefore convinced that the 2nd applicant who is also the Managing Director of the 1st applicant was out of the country when the summons in Civil Suit No. 185 of 2013 was advertised in the newspaper on 4th May 2013. Could it therefore be said that the service on her was effective? I am afraid my answer would be no in view of the authority of ***Geoffrey Gatete and Angela Maria Nakigonya vs William Kyobe*** (supra).

In that case of ***Geoffrey Gatete and Angela Maria Nakigonya vs William Kyobe*** (supra) court was considering a second appeal arising from an application to set aside a consent judgment on grounds, inter-alia; that the service of summons was not effected on the appellants. The suit from which the application arose had been brought under summary procedure and so the law under consideration was Order 36 rule 11 of the CPR which gives court discretion to set aside a decree obtained in default of application for leave to appear and defend the suit entered under Order 36 rule 3 (2) of the CPR.

Mulega (JSC) in the lead judgment which the other four Justices on the Coram concurred with discussed at length the meaning of effective service. He had this to say at page 6 of the judgment:-

> *"Similarly, the court may order substituted service by way of publishing the summons in the press. While the publication will constitute lawful service, it will not produce the desired result if it*

> *does not come to the defendant's notice. In my considered view, these are examples of service envisaged in Order 36 rule 11 as "service (that) was not effective." Although the service on the agent or the substituted service would be "deemed good service" on the defendant entitling the plaintiff to a decree under Order 36 rule 3, if it is shown that the service did not lead to the defendant becoming aware of the summons, the service is not effective within the meaning of Order 36 rule 11 (See Pirbhai Lalji vs. Hassanali (1962) EA 306".*

I wholly adopt the reasoning in the above case in determining the instant case because the principle applies to service of summons in ordinary suits as well. By virtue of annextures A3 and A4 to the affidavit in support of the application, the 2nd applicant was stated to have been in China on a business trip and this has been proved to my satisfaction. I find that the 2nd defendant's absence from Uganda at the time of publishing the summons in a local newspaper denied her the opportunity to see the advertisement and ultimately to be made aware of the suit. Therefore service of the summons on the 2nd applicant was not effective as the desired result of her being informed about the suit and filing her defence was not achieved.

Consequently, I find that service of summons on the 1st applicant was also not effective since the 1st applicant does not have a mind of its own but could only become aware of the suit through its Managing Director the 2nd applicant.

This court is fortified by the decision in ***Kampala City Council vs Apollo Hotel Corporation (supra)*** that:

> *"A liberal view is taken in cases where an officer of a corporation with multifarious duties to perform fails to enter appearance on behalf of the corporation especially where the applicant has a defence on the merits of the case or where it appears that the applicant had not been trying to deliberately obstruct or delay the course of justice. In such circumstances, the interest of justice requires that the defendant be given a chance to appear and defend the suit.*

I have also taken into account the fact that there is no evidence that the applicants have in any way delayed or obstructed justice. On the contrary the applicants have acted swiftly to instruct counsel to bring this application as soon as the 2nd applicant was served with the warrant of attachment and sale of moveable properties. Besides, the applicants also contest the respondent's claim and argue that there was never a contract, either oral or written with the respondent in regard to purchase of the suit goods. Indeed no such contract or any other document to prove sale was attached to the respondent's pleadings even in the main suit. It is therefore my considered view that the applicants have a prima-facie defence on the merits. In the circumstances, upon this court taking a liberal view of the facts before it, the interest of justice requires that the applicants be given a chance to appear and defend the suit on its merits.

Concerning the procedural irregularities, I do not agree with the respondent that the ex parte judgment was entered under Order 9 rule 6 of the CPR since annexture "C" to the affidavit in support being the letter applying for judgement speaks for itself that the ex parte judgment was entered under Order 9 rule 4 of the CPR which is inapplicable to the instant case. There is nothing on court record to show that the typing error was corrected as alleged. Be that as it may, I take the view that this is a mere procedural error that can be ignored in view of Article 126 (2) (e) of the Constitution and it is accordingly ignored.

On the alleged excessive award of the taxed bill of costs, there is no need to consider it given that this application is granted with the effect that the taxation is automatically set aside. However, I must mention in passing that taxation proceedings cannot be challenged in this application since there is an appropriate procedure for challenging the same.

On the whole, I do find that the justice of this case demands that the ex parte judgment entered in Civil Suit No. 185 of 2013 be set aside on the ground that service of summons on the applicants was not effective and the applicants have denied indebtedness to the respondent and so they deserve to be heard on the merits.

In the result, the ex parte judgment and the decree in Civil Suit No. 185 of 2013 is set aside. The execution of the decree is also set aside and the applicants are granted leave to file their Written Statements of Defence within fifteen days from the date of this ruling. Costs of this application shall be in the cause.

I so order.

Dated this 10th day of December 2013.

Hellen Obura
JUDGE

Ruling delivered in chambers at 3.30 pm in the presence of Ms. Cynthia Harriet Musoke who was holding brief for Mr. Frederick Joshua Mpanga for the applicants, Mr. Lawrence Tumwesigye for the respondent and the 2nd applicant.

JUDGE
10/12/13