**THE REPUBLIC OF UGANDA**

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

**(COMMERCIAL COURT DIVISION)**

**HCT- 00- CC-MC- 0792 OF 2002**

**(Arising From Civil Suit No. 526 of 2012)**

**NATIONAL SOCIAL SECURITY FUND ..... ……APPLICANT**

**VERSUS**

**J.B. BYAMUGISHA ADVOCATES .....…….RESPONDENT**

**BEFORE: HON. MR. JUSTICE W. M. MUSENE**

**RULING:**

This was an application under S. 14(I) and 33 of the Judicature Amendment Act 2002 is S. 98 of the Civil Procedure Act. And 0.36 rules 11 of the Civil Procedure Rules. It arises out of Civil Suit No 526 of 2012, and the Applicant is National Social Security Fund. The Respondent is J. B. Byamugisha Advocates. Mr. Paul Rutisya represented the Applicant, while the Respondent was represented by Mr. Albert Byamugisha. The Application was seeking orders that:-

(a) The Judgment and Decree entered in default in Civil Suit No. 526 of 2012 be set aside and the suit be heard on the merits.

(b) Execution of the Decree in Civil Suit No. 526 of 2012 be stayed.

(c) The Applicant be granted level to appear and defend.

(d) Cost of the application be provided for.

The application was supported by an affidavit sworn by Mr. Isaac Ogwang, a legal and regulatory compliance manager of the Applicant. And on record is an affidavit in reply sworn by Mr. Joseph Byamugisha, an Advocate of the courts of Judicature and Managing owner of J. B. Byamugisha Advocates.

According to Mr. Paul Rutisya for the Applicant, the National Social Security Fund filed Misc. Cause No 27 of 2011 before the Registrar seeking orders that the Respondents Advocate client Bill of Costs for handling Civil Suit No 12555 of 1998 and the Arbitration arising there from be taxed jointly. And that when the matter came up for hearing on 19.10.2011 before the Registrar, Applicant and Respondent's Counsel agreed to consolidate the bill in Misc. Cause No 25 and 27 of 2011. He however, added that the Applicant learnt that the bill of costs in Misc. Cause No 27 of 2011 had been taxed by the Registrar separately on 28.8.2012 and allowed at Ugx3679,816,359/=.

It is the contention of the Applicant that they were never notified of the Taxation date, and that no formal Taxation Ruling was delivered by the Registrar in M.C. Misc. Cause No. 27 of 2011. And that the Applicant only learnt of the taxation on being served with a plaint in Civil Suit No. 526 of 2012 for recovery of the said award on 20.11.2012.

It was further submitted that in the meantime, the Respondent obtained Judgment in default in that suit No 526 of 2012 for want of an application for leave to appear and defend the suit.

As far as application for setting aside default judgment under O. 36 r 11 of the Civil Procedure rules, the grounds were that the service of summon was not effective and or for any other good cause.

In their written submissions in reply, Counsel for the Respondent denied that the Taxing Officer made any Order for consolidation but that she issued separate certificate of taxation. They also added that by the allegation by Isaac Ogwang in the supporting affidavit that they learnt of the completion of the Taxation upon being served with the plaint in Civil Suit No 526 of 2012 was not correct and was on invention by applicants counsel. The Respondent added that they wrote to the Applicant demanding for payment of the taxed costs of Shs379,817,359 before HCCS No 526 of the 2012 was filed. And that they dully served the Statutory Notice of Intention to sue.

And that as far as the Application to set aside default Judgment was concerned, O. 29 r 2 of the Civil Procedure rules provided for served in a suit against a corporation to be on a Secretary or any other Director or other Principal Officer of the Corporation by leaving it at the place where the Corporation carries on business. According to the Respondent therefore, the process server served the court process on the corporation Secretary of the Applicant, Mr. David Nambale on the 13.11,2012. And that the indication that service had been effected on 20.11.2012 was not correct.

Counsel for the Applicant on the above point submitted that even if the court was to find that service has been effected on 13.11.2012 that the Registrar acted erroneously when she entered the default Judgment based on unclear facts.

So as far as the first prayer of setting aside the default Judgment and decree is concerned, the findings and holding of this court is that service of court process on the Corporation Secretary of national Social Security Fund was proper and lawful as provided under O. 29 r. 2 of the Civil Procedure rules. Although Mr. Isaac Ogwang in his affidavit in support denies that the process server did not make any visits to the office of the Corporation Secretary to collect the signed /received copies, this court holds that it should have been Mr. David Nambale himself who was served to swear an affidavit in denial. In the absence of any affidavit or statement of denial by Mr. David Nambale that he was not served on 13.11.2012, then this court finds the affidavit of Isaac Ogwang unacceptable in that regard.

The other ground advanced by Counsel for the applicant was reference to Mr; Isaac Ogwang's affidavit that Misc. cause No 27 of 2011 was consolidated with Misc. Cause No 27 of 2011. I have studied the record of proceedings on 19.10.2012 before Her Worship Margaret Tibulya, Deputy Registrar attached to the affidavit of Joseph Byamugisha in reply as JB5 Mr. Isaac Ogwang was not present in count that day but M/s Josephine Nabisinja is on record as representing National Social Security Fund. The submission by Counsel for the applicant with reference to Mr. Ogwang's affidavit that National Social Security Fund was not a party to the taxation of costs is therefore not correct. The record bears M/s Josephine Nabisinja as representing the Applicant at the time. In the premises, in view of the finding that service on the corporation Secretary was proper service under the Civil

Procedure rules, and in the absence of any other sufficient cause, I find that the default Judgment was properly entered and decline to set aside the same.

The second prayer was for stay of execution Decree in Civil Suit No 526 of 2012. In their written submission counsel for the Applicant averred that the applicant is threatened with execution.

The law, under O.43 rule 4(3) of the Civil Procedure rues is that Court making an Order for stay of execution must satisfied:-

(1) That the substantial loss may result to the Applicant unless the order is made.

(2) That the application has been made without unreasonable delays; and

(3) That security has been given by the Applicant for due performance of the Decree Order as may ultimately be biding upon him or her.

With all due respect, Counsel for the Applicant apart from starting they are threatened with execution, has not made any submissions about whether the Applicant will suffer substantial loss or not. In the case of **Tropical Commodities Suppliers Ltd. And Others Vs International Credit Bank Ltd. (In Liquidation) (204) 2 E.A. 331**, Ogoola J. (as he then was) held that substantial loss does not respect any particular amount or size, and that it cannot be quantified by any particular mathematical formula. It refers to any loss, great or small, that is of real worth or value, as distinguished from loss without value or loss that is nominal. In the present case, the Applicant will be paying for legal services rendered by the Respondent, which in my view is value for money and therefore no substantial loss of such.

On whether the Application has been made without unreasonable delay, Counsel for the Respondents submitted that the same was brought more than three(3) months, and so the Applicant was guilty of delay. Counsel for the Applicant did not touch on the aspect of unreasonable delay. And in the absence of any averment in the supporting affidavit that the Applicant is willing to provide security for the due performance of the decree, then I find and hold that the application has not satisfied any of the requirements for grant of an order of stay of execution. Stay of Execution prayer is accordingly hereby disallowed.

Lastly, on the prayer that Applicant be granted leave to appear and defend, it was submitted by Counsel for the Applicant that the Defence raises triable issues. They quoted the case of **Kotecha Vs Mohamed (202) IEA 112**, where it was held that the defendant is entitled to be granted leave to appear and defend where a good defence is showed on the merits or where a difficult point of law is involved, or any other circumstances showing, reasonable grounds of a bonafide defence. In reply, counsel for the Respondent also quoted the case of Maluku Interglobal Trade Agency Ltd Vs Bank of Uganda (1983) HCB 63, where it was held that the defence must be stated with sufficient particularity to appear genuine. It was emphasised that General or Vague statements denying liability will not suffice. So whereas the Applicant in the present case submitted that the amount awarded by the Registrar in HMMC No. 27 of 2011 is manifestly excessive, and that the contract for provision of legal series had not been approved by the Attorney General, according to the affidavit in reply by Joseph Byamugisha, para 6, the parties consented before the Deputy Registrar on 19-10-2011 that their respective bills be taxed. So where the parties, including the Applicant now consented to taxation of the respondent's advocate client bill of costs and even went ahead and

agreed on all other items save for instructions fees and additional one third, then they cannot be permitted to make a u-turn and complain that there was no authority from Attorney General. Why did they consent before the deputy Registrar is the question.

And having consented and the Taxing Officer issuing a certificate of issuing a Certificate of Taxation which has not been varied or set aside by court, then the Applicant now cannot turn round to challenge the same. In the premises, I am inclined to agree with Counsel for the Respondent that there was no dispute as to the retainership since the Advocate/Client Bill of costs was taxed by consent.

And as regards the appointment, the affidavit of Byamugisha in reply has attachments of Applicants Board of Directors appointing M/s Byamugisha and Rwaheru Advocates as its lawyers, which appointment was accepted in a letter dated 6/11/1987. The two letter were attached and marked "JBI" and JB2" respectively.

In the circumstances, and in view of what I have outlined above, I do hereby dismiss the application with costs.

Hon. Mr. Justice W. M. Musene

**HIGH COURT JUDGE**

5th April, 2013