THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-MA-66-2013

(*Arising from HCT-00-CC-CS-0177-2012*)

1. KASULE ABDUL RAJAB

2. GULBERG HIDES & SKINS LTD::::::::::::::::::::::::APPLICANTS

VERSUS

KWONG FAT YUEN HONG LTD::::::::::::::::::::::::::::::::RESPONDENT

BEFORE: HON. LADY JUSTICE HELLEN OBURA

RULING

The applicants brought this application under section 33 of the Judicature Act, section 98 of the Civil Procedure Act, Order 9 rule 12 as well as Order 52 rules 1 and 3 of the Civil Procedure Rules (CPR) seeking for orders that:

1. Exparte Judgment and decree in Civil Suit No. 177 of 2012 entered against the applicants be set aside.
2. The applicants be granted leave to file a defence for the suit to be heard on the merits
3. The execution of the Decree in H.C.C.S No. 177 of 2012 be set aside and the applicant be discharged from civil prison.
4. In the alternative, the execution of the Decree in H.C.C.S No. 177 of 2012 be stayed.
5. Costs of the application be provided for.

I wish to observe from the onset that the parties kept referring to the Civil Suit number as **177** of 2012 and **117** of 2012 interchangeably but a copy of the plaint shows that the number is 177 of 2012.

The grounds of the application as stated in the motion include the following:

1. That the summons in H.C.C.S No. 177 of 2012 was not duly served on the applicants.

2. That the applicants have a strong defence to the suit with a high likelihood of success.

3. That it is just and equitable that the application is granted.

The application is supported by the affidavit of Mr. Kasule Abdul Rajab, the first applicant and the Managing Director of the 2nd applicant. The gist of the affidavit in support is that the 1st applicant learnt of the suit on 19th December 2012 when he was arrested and brought to court to be committed to civil prison in execution of the decree. He claims that summons was never served on the applicants and that they are not indebted to the respondent as alleged in the respondent's suit. The 1st applicant also filed an additional affidavit contending that he was diagnosed with haemorrhoids as per annexture "A" attached thereto and can neither withstand prison conditions nor acquire proper treatment in prison.

The application was opposed and the respondent filed an affidavit in reply deposed by Carolynn Kintu who maintained that the applicants have at all material time been aware of the suit. She referred to annexture "A" to her affidavit and averred that on the 7th October 2012 the 1st applicant wrote to the respondent's director notifying him of the fact that he was being looked for because he was indebted to the respondent and cannot therefore feign ignorance. In response to the additional affidavit in support, an affidavit was deposed by Carolynn Kintu to the effect that the 1st applicant is not suffering from grave illness, was not anaemic and that annexture "A" did not show that he could not access proper medical attention from prison.

The brief background to this application is that the respondent filed Civil Suit No. 177 of 2012 in this court for the recovery of USD 425,000, general damages, exemplary damages, interest and costs arising from the applicants' alleged breach of contract of delivery of goods. The applicants did not file a defence and consequently the respondent obtained an ex parte judgment and decree against them. The execution of the decree ensued upon which the 1st applicant was arrested and committed to civil prison. It is that judgment and decree that the applicants now seek to set aside in this application so that they can be allowed to defend the suit.

This matter came up for hearing on the 18th of February 2013 with Mr. Alex Tuhimbise representing the applicants while Mr. Davis Wesley Tusingwire represented the respondent. Both counsel agreed to file written submissions in the matter which they did and this ruling is based thereon.

The issues before this court are basically two, namely;

1. Whether there are sufficient grounds for setting aside exparte judgement and decree obtained in H.C.C.S No. 177 of 2012.
2. Whether the 1st applicant should be released from civil prison.

On the first issue counsel for the applicant rightly argued that the general rule according to Order 5 rule 10 of the CPR is that service of summons should be effected on the defendant in person and where service on the defendant is not practicable then service should be on the defendant's agent empowered to accept service. He submitted that there was no service on the applicants in person but rather on a one Nangiga who is unknown to the 1st defendant and is not an officer/secretary of the 2nd applicant.

In the alternative but without prejudice to the above, it was submitted that in order to have effected service upon the said Nangiga, she would not only have to be an agent of the applicants but a recognised agent within the meaning of Order 3 rule 2 of the CPR.

He argued that the affidavit of service sworn by Okello Gabriel does not state that the said Nangiga had any power of attorney from any of the applicants and therefore could not have been an agent for purposes of effecting service of summons in the instant suit.

The applicant's counsel concluded that there was no service of summons on the applicants and the ex parte judgement that was entered ought to be set aside. For that position he relied on ***Remco Ltd v Mistry Javda Parbat & Co. Ltd & Ors [2002] 1 E.A 233 at 234*** where it was held that if there is no proper or any service of summons to enter appearance; the resulting default judgement is an irregular one which the court must set aside *ex debito justitiae* without exercising discretion.

Furthermore, counsel for the applicants argued that the applicants have a strong defence to the suit with a high likelihood of success since the applicants are not indebted to the respondent contrary to what is alleged in the suit. He also submitted that there are important points of law to be determined in the suit, that is, whether it was proper for the respondent to sue the 2nd applicant, a limited liability company together with the 1st applicant its Managing Director for the 2nd applicant's debts. He cited the case of ***Frederick Sentamu v Uganda Commercial Bank & Anor [1983] HCB 59*** to the effect that a limited liability company is a separate legal entity from its directors, shareholders and other members and the individual members of the company are not liable for the company's debts.

On the other hand, counsel for the respondent submitted that there was proper and effective service upon the applicants basing on the contents of the affidavit of Okello Gabriel stating that the process server telephoned the 1st applicant and director of the 2nd applicant who talked to a one Nangiga on the applicants' premises and told her to receive summons and the plaint on their behalf. It was submitted for the respondent that since Nangiga did acknowledge receipt of the summons it can be rightly concluded that she had authority to receive process on behalf of the applicants.

Counsel for the respondent also disagreed with the applicant's submission that there ought to be an affidavit indicating that there has been no defence filed. It was argued for the respondent that the practice is that an affidavit of service is a must have but the fact that no defence has been filed can be set out in a formal letter. In addition, it was submitted that there is no prejudice that would be occasioned by writing a letter instead of an affidavit informing court that no defence has been filed.

In regard to the applicants' contention that they have a good defence, counsel for the respondent argued that it is not enough for the applicants to allege that they have a strong defence and they are not indebted without any further disclosure. It was further submitted for the respondent that the 1st applicant sought from the respondent's director more time to sort himself up with his past employee. In addition it was submitted for the respondent that no draft written statement of defence has been attached to indicate that the applicants have a good defence with a real likelihood of success as required. Reference was made to the Supreme Court decision in ***Acali Manzi v Nile Bank 1994 KALR 123*** where it was held that in applications to set aside a default decree, the applicant should attach a draft written statement of defence showing good cause.

Relying on the case of ***David Ssesanga v Greenland Bank Ltd (In Liquidation) HCMA No. 406 of 2010*** the respondent's counsel argued that the service was effective although the applicants decided to be evasive since they were at all material times aware of the suit. It was argued that the 1st applicant wrote to the respondent's director notifying him of the fact that he was being looked for in relation to a debt owed to him and therefore could not feign ignorance since he asked for more time to find an employee of his whom he alleged had also defrauded him.

In rejoinder, counsel for the applicants reiterated his earlier submissions and maintained that there was no service on the applicants. As to whether the applicants have a strong defence, the applicant's counsel submitted that paragraph 10 of Carolynn Kintu's affidavit in reply is hearsay and inadmissible since annexture "B" which she relied on to

make her assertions was neither addressed to her nor the firm she works yet she does not state the source of her information.

I have analysed the pleadings filed in this matter as well as the attachments thereto. I have also given due consideration to the arguments made for and against the application. As to whether there are sufficient grounds for setting aside exparte judgement and decree obtained in H.C.C.S No. 177 of 2012, it is now settled that Order 9 rule 12 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 SCCA No 9 of 1993, Attorney General & Another v James Mark Kamoga & Another SCCA No. 8 of 2004.*** This court is bound to follow the position of the law as expounded by our Supreme Court in the above cases.

The rationale for court's unfettered discretion in such cases 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 the case of ***Kimani v. McConnell (1966) E.A. 547*** Harris J. stated that in the exercise of discretion under r.l0 (our rule 12) one needs to consider whether in light of all the facts and circumstances both prior and subsequent of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment if necessary upon terms to be imposed.

That test was approved by the Court of Appeal for East Africa in ***Mbogo v. Shah (Supra),*** and in ***Patel v. E.A. Cargo Handling Services (1974) E.A***. where Duffus P. at page 76 said;

> ***"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."***

It is therefore the duty of this court to exercise that discretion judicially in light of facts, circumstances and merits of the case at hand.

I do not agree with the respondent's submission that service of summons was effective on the applicants. Effective service means service having the intended or desired effect, which is to make the defendant aware of the suit and respond to it. See: ***David Ssesanga v Greenland Bank Ltd (in liquidation) (Supra); Geoffrey Gatete and Angela Nakigonya v William Kyobe SC. Civil Appeal No. 7 of 2005.*** In the instant case, if indeed service had been effective, the applicants would have been made aware of the suit and the desired effect would have been to file the necessary pleadings to defend the suit but they did not. Of course this court is alive to the fact that there are people who receive service of summons and ignore them but the circumstances of this case does not suggest so. The argument of counsel for the respondent that the 1st applicant was aware of the suit was based on an e-mail which in effect does not even state so. It is a far fetch attempt to interpret the e-mail to suit the respondent's interest.

The 1st applicants in affidavit in support to this application denied knowledge of a one Nangiga on whom service is alleged to have been made. Order 5 rule 10 of the CPR specifically provides that service of summons should be effected on the defendant in person or an agent empowered to accept service. According to the affidavit of service sworn by Okello Gabriel, service was not effected on the applicants in person but on their agent who was authorised to do so on phone in the presence of the deponent. The 1st

applicant denies knowledge of the alleged agent and the fact that he authorised her to receive the summons. Counsel for the applicants in his submission relied on Order 3 rule 1 & 2 of the CPR to argue that Nangiga who allegedly received service is not a recognised agent since there is no evidence that she held any power of attorney empowering her to accept service on the applicant's behalf.

With due respect, I think counsel for the applicants misdirected himself by relying on Order 3 rule 1 & 2 of the CPR which relates to appearances which is not the issue in the instant case. We are dealing with service of summons which is covered under Order 5 and more specifically rule 10. The burden is on the respondent to show that Nangiga had been empowered to accept service. The appearance of her signature on the copy of the plaint is not enough to show that. It is alleged that she had initially declined to receive the documents but when a call was made to the 1st applicant on a mobile number provided by her she was instructed to accept service which she did by appending her signature thereto.

The 1st applicant did not only deny authorising Nangiga to receive service on their behalf but denied knowledge of her. In the circumstances, the person who is best suited to tell this court whether or not she was authorised to accept service is Nangiga herself. She has not sworn any affidavit to deny or support the claim and so this court does not have the benefit of hearing her version. Nevertheless, on a balance of probability I am more inclined to believe the 1st applicant that Nangiga was not empowered to receive service. Consequently, I find that the purported service on the applicants was not effective as the desired result of them being informed about the suit and filing their defence was not achieved.

The other issue for consideration is whether the applicants have a strong defence. It is the applicants' case that they are not indebted to the respondents in the sum claimed. The respondent contends that it is not enough to allege that they have a strong defence as they are not indebted without any further disclosure. In her affidavit in reply Ms Carolyn Kintu relied on annexture "B" to the affidavit in reply to aver that the applicant has in

the past correspondence with the respondent's director not denied liability but has instead raised flimsy excuses by asking the said director for more time to settle.

I have analysed annexture "B" abovementioned and I am inclined to agree with the applicant's counsel that it shows no admission of liability by the applicants. First of all, it was irregular for the deponent to depose an affidavit on contentious matter on behalf of a client of the law firm where she works. It is now trite law that advocates should not swear affidavit on behalf of their clients on contentious matters which are usually based on facts within the knowledge of their clients. For instance, in this case it is the respondent who knows the applicants' indebtedness to it. The deponent is relying on an e-mail that she was not a party to thereby making her averment as contained in paragraph 10 of the affidavit in reply hearsay and inadmissible. Besides, she does not fully appreciate the context in which it was written.

Order 19 rule 3(1) of CPR requires affidavits to be confined to statements of fact and belief. In the case of ***Joel Kato & Anor v. Nuulu Nalwooga Supreme Court Civil Misc. Application No. 4 of 2012*** the Supreme Court of Uganda held that the rule on hearsay evidence in court equally applies to affidavits. Also in the case of ***Nsubuga Jonah v The Electoral Commission & Anor HCEP No. 3 of 2011*** it was held that when a statement is made to a witness by a person, who is himself or herself not called as a witness, such evidence is inadmissible particularly where the object of the evidence is to establish the truth of what is contained in the statement. In the instant case, it is the considered view of this court that the respondent's director to whom the e-mail was addressed should have deponed the affidavit as to the contents of annexture "B" instead of Carolyn Kintu.

Secondly, the e-mail (annexture "B") is not at all clear. My understanding of it is that both parties appeared to be demanding money from each other contrary to the allegation that the applicant admitted liability. In the premises, this court cannot rely on that document to conclude that liability was admitted. I instead find that the debt is denied and the applicant would be entitled to have the matter determined on its merit by filing a

defence and adducing the necessary evidence at the hearing. They need not do so at this stage.

Finally, I will now consider the argument for the applicants that there is no affidavit on record stating that the applicants/defendants had failed to file a defence as required by Order 9 rule 5 of CPR and that the non compliance with the above mandatory requirement made the exparte judgement irregular. It was contended that this is not a mere technicality curable under Article 126(2) (e) of the Constitution. The applicants' counsel referred to the case of ***DFCU Leasing Company Ltd v Nasolo Faridah Misc Application No. 74 of 2007*** where it was held that the test applicable before invoking the above article is whether the irregularity is serious enough to prevent the court from hearing the application and determining it on its own merit.

On the other hand it was submitted for the respondent that there was no requirement for an affidavit stating that the applicants had failed to comply with the summons. It was also argued in the alternative but without prejudice, that it is trite law that rules of procedure are only hand maidens of law and not justice themselves thus the omission to file an affidavit should be treated as a technicality that can be dispensed with in accordance with Article 126(2)(e).

The common practice in the courts in regard to Order 9 rule 5 of the CPR is that affidavit of service of the summons is usually filed with a formal letter notifying the registrar that service was effected but summons had not been filed within the time specified in the summons. As a matter of practice, there is no strict requirement that failure of the defendant to file a defence within the prescribed time be stated in an affidavit. For that reason, I find that there was no irregularity in entering the default judgment and as such that cannot be a ground for setting it aside.

On the whole, it is the finding of this court that the justice of this case demands that the default judgment entered in Civil Suit No. 177 of 2012 be set aside on the ground that

service of summons on the applicants was not effective. In addition, the applicants have denied indebtedness to the respondent and so they deserve to be heard on the merits.

In the result, the default judgment and the Decree in Civil Suit No. 177 of 2012 is set aside. The execution of the Decree is also set aside and it is ordered that the 1st applicant be released from the civil prison. The defendants are ordered to file their defence within fifteen days from the date of this ruling. Costs of this application shall be in the cause.

I so order.

Dated this 22nd day of May 2013.

Hellen Obura

JUDGE

Ruling delivered in chambers at 3.00 pm in the presence of Ms. Tibigwisa Damalie for the respondent. Counsel for the applicants and both parties were absent.

JUDGE

22/05/13