

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO 599 OF 2015
ARISING FROM HCCS NO 260 OF 2015**

- 1. MARGARET MIREMBE LUBWAMA}**
- 2. KAJUBI LUBWAMA EDWARD}.....APPLICANTS**
- 3. WALUSIMBI HERBERT}**

VERSUS

PRISCILLA LOPDRUP}

Suing through her attorney}

PEACE SYLVIA LUTAAYA}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicants filed this application under Order 36 rule 11 of the Civil Procedure Rules as well as Order 52 rules 1 and 2 of the Civil Procedure Rules for orders that the ex parte judgment and decree in HCCS 206 of 2015 be set aside. Secondly the Applicant is for the Applicants to be granted leave to appear and defend the main suit and for the costs of the application to be provided for.

The grounds of the application are that the Defendant/Applicant was not served with summons to apply for leave to appear and defend the suit which is a good cause to set aside the judgment and decree. Secondly the Respondent has a reasonable defence to the Plaintiff's claim. Thirdly there are triable issues of law and fact which arise and the Applicants should be permitted to defend the suit. Fourthly the second and third Applicant's dispute being indebted to the Respondent/Plaintiff since the agreement, the basis of this suit is unlawful, an

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illegality and therefore unenforceable. Finally that it is only fair, reasonable and just as well as equitable that the orders sought in the application are granted.

In the affidavit in support Mr Walusimbi Herbert the 3rd Applicant deposes that he was never served with summons to file an application to appear and defend the suit as alleged by the Respondent/Plaintiff's advocates. Secondly he attached a copy of the proposed defence. The ground of the defence is that the agreement on the basis of which the claim arises is unlawful, an illegality and unenforceable. He admits that the Respondents and the first Applicant executed an agreement between themselves stipulating rights and liabilities where in the Respondent agreed that if the first Applicant failed to pay money to the Respondent, the Respondent was free to the collateral in the form of land comprised in block 207 plot 1862 Mengo district, Kyadondo C. On 30 January 2015 the first Applicant was arrested and detained at Jinja police station and later referred to Kibuli police station. He was called as her brother to stand as the surety for her release. While at the police he was told to sign an undertaking. He signed unknowingly that the parties had a loan agreement between themselves as at the time the claim was conning between the Respondents. He later discovered that the parties did execute a loan agreement. The undertaking he signed as a guarantor is illegal and unenforceable because it was procured by false information and under duress and coercion. On the basis of information of his counsel he deposes that the Respondent should enforce the loan agreement and not the undertaking that was illegally procured.

The second affidavit in support is that of Kajubi Lubwama Edward who deposes that he is the second Defendant/Applicant. And that he has a very good defence to the whole suit. He was never served with summons to file an application to appear and defend the suit as alleged by the Respondent's advocates. He disputes being indebted to the Respondent/Plaintiff because the agreement was unlawful and an illegality and therefore unenforceable. He has been in civil prison since 30 June and his life is steadily deteriorating due to Blood Pressure and asthmatic attacks under the prison conditions.

The affidavit in reply is that of Peace Sylvia Lutaaya, the authorised attorney of the Respondent. She deposes that because the first Respondent did not file an affidavit in support of the application, the application was only defended by the second and third Respondents and therefore the first Respondent does not oppose the ex parte judgment and decree.

On the basis of information of Edison Mwine, the court process server and Mr Isaac Twikirize who is the Plaintiff's debt collector, all the Defendants were duly served with court summons in the manner deposed to in the affidavit of service attached. The Applicants are jointly and severally indebted because the second and third Applicants undertook in writing on 31 January 2015 that if Margaret Mirembe the first Applicant does not pay Uganda shillings 80,000,000/= latest by 30 April 2015, they had an unequivocally guaranteed and undertaken to personally pay the debt and this undertaking further applied if she failed to pay. The first Applicant is the daughter to the second Applicant and sister to the third Applicant. The agreement of the alleged money lending does not relate to the claim in the suit. The suit arises from a transaction where the first Applicant as an employee of the Respondents bank and with previous knowledge of the Respondent represented herself that she would fix for the Respondent her Uganda shillings 100,000,000/= on a fixed deposit account which she did not do. This transfer was done on 15 December 2014. The first Applicant/Defendant was arrested for having committed an economic claim of stealing money from a customer account and she wilfully undertook to refund the money and went ahead to pay Uganda shillings 20,000,000/= leaving a balance of Uganda shillings 80,000,000/= which they agreed to pay in three months and it was not a money lending transaction.

The undertaking was wilfully made and the second and third Defendant/Applicants wilfully guaranteed and undertook to pay and this was a transaction done when the Applicants were even represented by one advocate Mr Emma Angwella. In the premises she deposes that the Applicants are not trustful people as the title deed they gave as security was a forgery. The same title registered in the names of the first Applicant was already sold to G-7 Trading Company Limited

and yet the Messieurs Rapid Advisory Services Ltd, claimed they have the original certificate of title as security for a loan. In the premises there are no bona fide triable issues of law or fact to entitle the Applicants to leave to appear and defend the suit. Furthermore the court has discretionary power to give the conditional leave to appear and defend the suit and the Applicant ought to be given conditional leave to appear and defend the suit if at all.

In rejoinder Walusimbi Herbert deposes that the contents of the affidavit in opposition to the service by Twikirize Isaac and Edson Mwine are false because the said persons are unknown to him or the second Applicant. Secondly the undertaking is being challenged because it was made while the first Applicant was in police custody that he and the second Applicant were called upon to stand for her release as sureties according to a copy of the police bond attached. They signed under duress the undertaking as guarantors for repayment of the loan. Prior to signing they did not know that the first Applicant and the Respondent had a loan agreement. They were dragged into the transaction which was unknown to them and forced to and signed while at the police station where the claim was that of obtaining money by false pretence. The guarantee was executed on the same day as the release of the first Applicant though it is dated 31st of January 2015. He and the second Applicant are not the registered proprietors of block 207 plots 1862 and have never pledged it as collateral for any loan.

Furthermore the amount of money mentioned in the undertaking is characterised as a loan between the first Applicant and the Respondent. Furthermore on the basis of information of his counsel, he deposes that in a summary suit where there is no agreement to grant interest, the court would be misdirected to grant interest. In the premises issues of law arise for trial. One is whether the Respondent is entitled to the interest under the summary suit? Secondly whether the second and third Applicants guaranteed the purported loan willingly? Thirdly whether the first Applicant was in custody at the time of the said loan agreement dated 31st of January 2015? Fourthly whether the second and third Applicants ever owned land comprised in block 207 plots 1862? Lastly whether the first

Applicant and Respondent had a loan agreement dated 15th of December 2014 prior to the undertaking of the 31st of February 2015.

Ruling

I have carefully considered the Applicant's application, the affidavit evidence for and in opposition to it, the written submissions of counsel and the law.

The application has been made under the provisions of Order 36 rule 11 of the Civil Procedure Rules which provides as follows:

"After the decree the court may, if satisfied that the service of the summons was not effective, or for any other good cause, which shall be recorded, set aside the decree, and if necessary stay or set aside execution, and may give leave to the Defendant to appear to the summons and to defend the suit, if it seems reasonable to the court so to do, and on such terms as the court thinks fit.

The provision allows the court to set aside the decree on the ground that service of summons was not effective or for any other good cause. The question therefore to be considered is whether to set aside the decree on the ground that service was not effective (if at all) or for any other good cause or on both grounds.

On the basis of the facts the Applicants counsel contended that service was not effective. This is because the court process server did not properly ascertain where the home of the second and third Defendant is.

The Respondent's counsel raised some issues about the schedule for the filing of written submissions. However both parties have filed their submissions and the non-compliance with the schedule of the court has not prejudiced the parties since both sides have been heard. In answer he contended that from the evidence on record, service was effective.

Secondly the Applicant's counsel submitted on whether there was any just cause to set aside the default judgment. He relied on the argument that the basis of the claim which is an agreement dated 31st of January 2015 was being challenged on

the ground of the circumstances under which it was obtained. Secondly the first Applicant was under police custody for obtaining money by false pretence yet the first Applicant and the Respondent had executed a loan agreement dated 15th of December 2014. Thirdly the Respondent was aware that putting the first Applicant under police custody meant that the family would come to her rescue. The second and third Applicant's were forced to sign the agreement to secure the release of the first Applicant.

On the other hand the Respondent's counsel relies on the undertaking of the second and third Defendants/Applicants. He contended that the undertaking was made in the presence of the advocate and the first Defendant/Applicant was their family member as she is a daughter to the second Applicant and a sister to the third Applicant. They failed to pay. He contended that there was no undue duress or influence because the lawyer who represented the second and third Defendants should have challenged the undertaking if there was duress.

There are several other arguments for and against the application. I have carefully considered the question of service on the Defendants. It is a matter of fact that the Defendants never put in an application for leave to appear and defend the suit.

This application is being determined when the main file is not available to establish what transpired before a default judgment was entered. As far as the question of service is concerned, the facts are controversial and it is established that the Defendants were not personally served because court process was left at the alleged residence of the Defendants. Before concluding the matter, I would consider whether there is any just cause for setting aside the default judgment of the court on the ground of duress.

I have carefully considered the documentary evidence. The first Applicant was released on police bond on 2 February 2015 and was to report back on 12 February 2015. The police bond was subsequently renewed. Secondly she was a suspect for having committed economic crimes according to the police bond papers. By agreement dated 31st of January 2015 between the Respondent and

the first Applicant, the first Applicant acknowledged owing the Respondent Uganda shillings 100,000,000/= which was paid to her on 15 December 2014 and she paid back on 31 January 2015 Uganda shillings 20,000,000/=. She undertook to pay the balance of Uganda shillings 80,000,000/= in three instalments. The first instalment would be Uganda shillings 30,000,000/= on or before 28 February 2015. The second instalment of Uganda shillings 30,000,000/= would be paid on or before 30 March 2015. The third instalment of Uganda shillings 20,000,000/= would be paid on or before 30 April 2015. In the event of default, the first Respondent agreed to have the whole amount become payable immediately. As security she handed over her certificate of title. The agreement indicates that she also presented two guarantors namely the second and third Applicants who unequivocally guaranteed and undertook to personally pay the debt or any balance to the Respondent in the event of default. The agreement is signed by the second and third Respondents as guarantors.

In the affidavit in reply by Peace Sylvia Lutaaya who is the attorney of the Respondent, the Plaintiff relies on the above undertaking. However in the affidavit in opposition, she deposes that the agreement of the alleged money lending does not relate to the suit claim. The suit claim arises from a transaction where the first Applicant as an employee of the Respondent's bank Messieurs Stanbic Bank Uganda limited represented herself as a person who could help her fix Uganda shillings 100,000,000/= on a fixed deposit account which she did not do. She agrees that the first Defendant/Applicant was arrested (according to the police bond) for having committed an economic crime of stealing money from the customer's account and she willingly undertook to refund the money and went ahead to pay Uganda shillings 20,000,000/= leaving a balance of Uganda shillings 80,000,000/= that she agreed to pay in three instalments. According to her undertaking was wilfully made and the second and third Defendants wilfully guaranteed and undertook to pay.

Regarding whether the second and third Applicants were served, she attaches the affidavit of Edison Mwine of the Messrs Pearl Advocates and Solicitors. The affidavit of service indicates that summons was served on the second and third

Defendants on 29 April 2015 in the presence of one Isaac Twikirize a debt collector of the Plaintiff who knew the Defendants and their residence. He attached the summons on the front door of the first Defendants and also left copies with the house attendant.

I have further carefully perused the record and the file for the main suit which is the summary suit is not on the court record.

It is not disputed that the 1st Applicant was arrested. More so the Respondent agrees that the transaction was one where she is alleged to have taken money from the Respondent's account which should have been put on a fixed deposit account for the Respondent. She was arrested. The undertaking signed by the Defendants/Applicants is dated 31st of January 2015. The police bond releasing the first Applicant is dated 2nd of February 2015. When was she arrested? Why did she sign an undertaking two days before she is released on police bond? Why did the second and third Defendants sign? Secondly the first Applicant paid the Respondent Uganda shillings 15,200,000/= which the Respondent acknowledged on the 31st of January 2015.

Strangely there is a loan agreement between the first Applicant and the second Applicant written to be between the periods 15th December to 15th January 2014. In the agreement the first Applicant states that she borrowed Uganda shillings 100,000,000/= from the Respondent and pledged her land title.

The affidavit in reply of the attorney of the Respondent introduces another controversy as to how the Applicant obtained this money. It is alleged that she is guilty of economic crimes. In any case she was arrested by police. That is how and when the 2nd and 3rd Applicants came into the picture. Being the relatives of the first Applicant they claim that they were coerced into signing the undertaking.

There is a common law principle which may be considered. In the case of **Smith and another versus Selwyn [1914 - 15] All ER Rep at page 229**, the principle is that an action for damages based upon a felonious act committed against the Plaintiff by the Defendant is not maintainable unless he has been prosecuted or a reasonable excuse has been given.

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What is the reasonable excuse in this case and secondly was a felonious offence committed? The police process was used and the circumstances under which it was used need to be established as to whether it was pursuant to following up a debt in a civil agreement or pursuant to an alleged commission of an offence. As relatives of the first Defendant/Applicant the 2nd and 3rd Applicant's came to the rescue of their relative but was it on a sound and constitutional basis? This is a matter that deserves to be tried and the 2nd and 3rd Applicant's have established just cause to set aside the default judgment as against them. Furthermore in light of the finding of the court on just cause, there is no need to consider whether the first and 2nd Applicants were effectively served.

The first Applicant has not made any representations in this matter and there seems to be a loan agreement in which she seems to acknowledge to be indebted to the Respondent.

In the premises the judgment and decree of the court in HCCS No. 260 of 2015 is set aside as against the 2nd and 3rd Applicants for just cause and the controversies inter alia relating to whether there was duress in the signing of the undertaking dated 31st of January 2015 shall be tried before a just conclusion can be reached.

Leave is granted to the 2nd and 3rd Applicants only to file a defence to the main suit within 14 days from the date of this order. The costs of this application shall abide the outcome of the main suit

Ruling delivered in open court on the 4th of December 2015

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Makeeto Denis Counsel for the second and third Applicants

Second Applicant in court

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Evans Tumusiime for the Respondent is absent.

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

4th December 2015