THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

[COMMERCIAL DIVISION]

MISCELLANEOUS APPLICATION No. 090 OF 2014

[Arising Out Of Civil Suit No. 525 OF 2014]

MOHAMED BAZIDUSE

LULIBEDDA MUTUMBA :: APPLICANT / DEFENDANT

VERSUS

MK. FINANCIERS LIMITED :::::::::::::::::::::::::::::::: RESPONDENT / PLAINTTIFF

The applicant brought this application by Notice of Motion under Order 36 rule 11 and Order 52 rule 1-3 of the CPR and Section 98 of the CPA. The applicant seeks orders that:-

1. *The exparte judgment and decree passed against the applicant on 13th August 2014 be set aside.*
2. *Costs of the application be provided for.*

The grounds of the application as set out in the Notice of Motion are that:-

The applicant has never been served with summons, the decree was passed during court vacation, the applicant is not indebted to the respondent as alleged or at all, the applicant has a complete defence to the suit, the applicant is threatened with execution and has already been arrested and released by the Deputy Registrar, Executions, there is need to set aside the decree and it is in the interest of justice that the application be granted.

The application is supported by the affidavit of the applicant dated 30th September 2014.

He deposed that on the 22nd of September 2014 he was arrested by bailiffs and was produced before the Registrar Executions and later released after making a deposit of UGX 5,000,000/=. He also deposed that he accessed the court file on which he found a plait in summary suit for UGX 53, 128,000/= allegedly accrued under a false agreement plus a false affidavit of service and decree dated 13/8/2014. He added that he found a loan agreement allegedly signed by him yet the signature was a forgery. He agreed to the fact that he signed a friendly loan agreement dated 3rd August 2011 and that debt is still outstanding. He deposed further that the said loan was guaranteed by the respondent and the respondent paid him only UGX 6,000,000/= leaving a balance of UGX 20,000,000/= which is still due and owing. He further deposed that he has never been served with summons by Alex Kamukama as alleged and the signature on the summons

attached to the affidavit of service is forged. He stated that the decree was wrongly signed during court vacation. In conclusion, the applicant prayed that the default judgment be set aside and suit be heard inter-parties.

The respondent filed an affidavit in reply sworn by Mr. Male H. Mabirizi K. Kiwanuka the Managing Director of the respondent. He stated that there is no application before court in law because the application is fatally defective because it bears falsehoods in the affidavit in support. He added that the application is a waste of time intended to obstruct the legal execution process which can be proved by the applicant's failure to take any reasonable step to fix the application for hearing since 2nd October 2014. He further stated that the applicant signed the loan agreement and the loan money was advanced to him in two installments; the first on 30th July 2011 and the second on 1st August 2013 and has been issued demand notices which he has ignored. He deposed that the signatures that are alleged to be forged were taken to the Police Forensic Directorate and proved to be the applicant's own signatures according to the laboratory report dated 2nd October 2014. In response to the issue of service raised by the applicant, the deponet argued that the process server knows the applicant whom he personally served in the presence of the deponent. Regarding the issue of the decree passed during court vacation, the deponet deposed that courts remain open in court vacation and it is upon the court to decide what matters to handle. He also stated that court vacation is a mere technicality that cannot override the substantive justice of entering court judgments. Further more, he deposed that the applicant has not attached any proposed defence to the application and court cannot act on mere assumptions. In conclusion, the deponent seeks the dismissal of the application and in the alternative, if court is inclined to grant leave, the same should be conditional on deposit of the balance of UGX 48,128,000/=.

The respondent filed a supplementary affidavit deposed by Mr. Male H. Mabirizi K. Kiwanuka. He deposed that the applicant's affidavit in support of the application was commissioned by Mr. Augustine Semakula who is still serving a suspension by the Law Council. He stated that the affidavit is rendered defective for being commissioned by an unlicensed person. In conclusion, the respondent deponed that in case court is not inclined to strike out the application on the illegality of commissioning by a suspended commissioner, the applicant shall apply to cross examine the deponent on his affidavit to uncover the illegalities therein.

In rejoinder, Mr. Mohamed Bazinduse Lulibedda Mutumba deposed that the affidavit in support was commissioned by Mr. Augustine Semakula on 30th September long after the expiry of his suspension which happened on the 31st August. He added that the five million deposited was not

part payment of the decretal sum but was deposited as security in court. Furthermore, he deposed that he has never been served as alleged and has never received demand notices as also alleged. He stated that the expert opinion is not evidentially very useful as the expert relied on photocopies and scanned signatures and therefore the findings were not conclusive. He also stated that the process server does not know him and had never served him. In conclusion, he deposed that he had a meritorious defence to the suit.

Mr. Male H. Mabirizi K. Kiwanuka filed an affidavit in rejoinder to the preliminary objection and Sur rejoinder in which he deposed that:-

The affidavit deposed by John Wabwire in Misc Appl. No. 835 of 2014 is contradictory to the affidavit in support and permeated by falsehoods and should be struck out with costs. He added that Mr. Semakula Augustine's suspension is to end on 29th October 2015 and the practicing certificate issued on March 25th 2014 is of no effect since a letter dated 16th June 2014 by the Chief Registrar cancelled the same Certificate. He deposed that therefore Mr. Augustine Semakula has no valid Practicing Certificate. In regard to the payment made by the applicant, he deponed stated that it was partial satisfaction of the decree and the outstanding balance is UGX 48,128,000/=. He also emphasized that the applicant was known to the process server and was duly served in his presence. In relation to the ruling made in court vacation, he stated that summary judgments and decrees do not require hearing of parties. He concluded by stating that the attached defence is a sham being vague, general and evasive and does not provide a reasonable answer to the plaintiff's claim.

Counsel for the applicant submitted that there are four grounds on which the application was made which are;

The applicant has never been served with summons, the decree was passed during court vacation in absence of a certificate of urgency, the applicant is not indebted to the respondent as alleged or at all and the applicant has a complete defence to the suit. On first ground Counsel cited **Order 36 rule 11 of the CPR** which provides for setting aside decrees on a ground of non service of summons. Counsel submitted that the applicant repeats that the applicant has never been served and the affidavit of service of Alex Kamukama is full of falsehoods. He prayed that the court believes the applicant.

On the second ground of passing the decree in court vacation, Counsel submitted that the plaint was filed on 29/7/2014, alleged to have been served on 30/07/2014 and decree signed on 13/08/2014 all of which fall within the court vacation. The respondent did not obtain a certificate of urgency. He submitted that **Rule 3 of the Judicature (Court Vacation) Rules** provide that

each year the court shall be in vacation from 15th July to 15th August. He added that **Rule 4** of the same rules provides that during vacation the court shall deal with criminal business but shall only sit for the discharge of civil business as shall, in the opinion of the presiding Judge, be of an urgent nature. He submitted that the decree was irregularly obtained and on this ground alone, the decree should be set aside.

On the ground of non service Counsel relied on Order 36 rule 11 of the CPR which is to the effect that court may set aside a decree if satisfied that the service of summons was not effective. He submitted that the applicant stated that he was never served with summons. He further deposed that he found a plaint in summary suit for UGX 53,128,008/= allegedly accrued under a false agreement plus a false affidavit of service and decree. Counsel submitted that on the other hand, the respondent insists that there was service done as stated in paragraph 22 of Male Mabirizi's affidavit in reply. He submitted that the service is strongly contested and cited the case of ***Samwiri Massa Vs Rose Achen [1978] HCB 297*** submitting that where certain facts are sworn in an affidavit, the burden to deny them is on the other party. He urged that the applicant denied service of summons and therefore prayed that court believes the applicant.

Regarding denial by the applicant of being indebted to the respondent, Counsel for the applicant submitted that the applicant denies ever receiving the loan or signing a loan agreement. He specifically stated that the applicant denies ever taking the loans in the sum of UGX 27,128,000/= and UGX 26,000,000/= and therefore the claim is false and untenable. He further submitted that this is a triable issue. Counsel relied the decision of ***Figuerido & Co. Ltd Vs Moorings Hotel Ltd [1983] HCB 64*** where court held that the applicant is entitled to leave to appear and defend if it is satisfied that there is a triable issue of fact or law.

Counsel for the applicant contended that the respondent's objections relating to the Commissioner of Oaths (Mr. Semakula) are misplaced. He submitted that **Section 14(b) (ii) of the Advocates Act** which allows the client to engage another advocate in a case such as this where the advocate is a party to certain proceedings. He submitted further that the affidavit still stands according to the authority of ***Mutyabule Charles Naluswa Vs Ahmed Kawoya Kaugu Mugaino Election Petition No. 09/2011.*** He added that the Notice of Motion can stand on its own with the affidavit in rejoinder.

In conclusion, Counsel for the applicant prayed that the exparte decree be set aside and the applicant be allowed to file a defence and defend himself.

The respondent the respondent who represented himself first raised a preliminary point of law regarding the competency of the application. He contended that the validity of the affidavit in support of the application is questionable since it was purportedly commissioned by Mr. Augustine Semakula, while serving a suspension from legal practice imposed upon him by the Law Council. He added that such an affidavit is invalid. He cited ***Section 1(4) of the Commissioner for Oaths (Advocates) Act*** and the case of ***Prof. Syed Hum Vs The Islamic University In Uganda SCCA No. 47 of 1995*** and argued that an advocate who is suspended from practice just like in this case, cannot retain his authority to commission oaths and his doing so is an illegality which cannot be sanctioned by a court of law. Counsel also urged that in absence of a valid affidavit, the application by way of Notice of Motion cannot stand on its own. He cited the case of ***Mohammed Majambere Vs Bhakresa Khalil, Misc. Application No. 727 of 2011*** where court held that an application which is left with no valid supporting affidavit must be struck out with costs. Counsel submitted that the same fate faces this particular application.

In conclusion, Counsel submitted that the application be struck out with costs.

In reply to the respondent's submissions, Counsel for applicant stated that there is no fundamental contradiction to warrant the applicant's evidence to be declared false. In response to the issue of service of summons, Counsel urged that the evidence by the handwriting expert was based on photocopies. Counsel opined that, the handwriting expert opinion is therefore not conclusive evidence on the service of summons. Counsel further contended that the applicant still denies the service of summons because the allegation that the process server went through a green gate is false since there is no such gate at the applicant's office. He submitted that non-service of summons can suffice as a good defence to the suit. Counsel added that the Court needs to allow the applicant defend himself on the alleged indebtness. He submitted that the defence is not general and evasive as alleged.

In conclusion, Counsel prayed that the application be allowed and the applicant be awarded costs of the application and the main suit.

Decision of Court

This application was brought under Order 36 rule 11 and Order 52 rule 1-3 of the CPR and Section 98 of the CPA. The applicant seeks orders that the exparte judgment and decree passed against the applicant on 13th August 2014 be set aside and costs of the application be provided for.

I have considered the arguments of Counsel as well as the evidence affidavit before this Court.

Counsel for the applicant advanced major grounds which are that; the applicant has never been served with summons, the decree was passed during court vacation, and the applicant is not indebted to the respondent as alleged or at all and the applicant has a complete defence to the suit.

The respondent who represented himself contended that the service was done as deposed in the affidavit of Mr. Male H. Mabirizi K. Kiwanuka

The applicant brought this application under **Order 36 rule 11** of the CPR which gives Court power and jurisdiction to set aside a decree for any other good cause. The applicant denies being indebted and also denies ever being served. In the affidavit in reply by Mr. Male H. Mabirizi K. Kiwanuka, he pointed to a laboratory report dated 02/10/2014 in which five questioned documents were examined. Among the documents questioned was a loan payment agreement purportedly made between Mr. John K Wanjala Wabwire and Mr. Mohammed Bazinduse, MK Financers Limited and Mr. Male H. Mabirizi K. Kiwanuka (marked Exhibit 1). Additionally, a photocopy of summons to file a defence under Civil Suit No. 525 of 2014 addressed to Mohamed Basinduse Lulibedda dated 30th/07/2014(marked exhibit Q3) was examined. However, as urged by Counsel for the applicant, these were photocopies which were not used for analysis and as indicated by the hand writing expert they are subject to manipulation.

It is my considered opinion that if these documents were found unreliable but rather subject to manipulation by the handwriting expert, Court cannot rely on the same to make a decision based on them as evidence. This is simply because among the findings in the report, the first observation stated as follows;

> *"Photocopies have certain limitations in the analytical process and some of the documents submitted such as exhibits Q2, Q3, Q4 and Q5 are in photocopy form. These documents were not used for analysis because they are a subject of manipulation."*

Regarding the issue of the decree passed during Court vacation, it is now I believe settled that handling a matter *per se* during court vacation does not necessarily invalidate the action.

In the case of ***Benjamin Leonard Mac Foy Vs United Africa Company Ltd Appeal No. 67 of 1960,*** the Court of Appeal in Sierra Leone (whose decision though not binding is persuasive) while addressing the issue of delivery of a statement of claim during the Court vacation, Lord Alfred Thomas held that;

"…….. the Court has discretion whether to set it aside or not. It will do so if justice demands it but not otherwise."

Further, back home the issue has been addressed in a number of cases. In ***Bahimbise Vs Rwabinumi (Civil Application (reference) No. 4 of 2009***, Okello JSC had this to say:-

"We note, however, that sub-rule (2) of Rule 21 does not indicate what would be the consequences of violation of the rule by hearing a case during vacation.

In our view, the sub-rule is directory and not mandatory and it appears to us that its purpose is essentially to allow time to Courts to do house clearing without normal busy activities."

It is my considered opinion therefore that the impugned decree though signed during court vacation was not prejudicial to interests of the defendant since the latter had not filed a defence. Accordingly the objection in this regard is overruled.

I will now turn to the question of whether or not to set aside the judgment and grant leave to the applicant to appear and defend the suit.

As seen in the application, service of summons is contested. In his affidavit in support, the applicant alleges that the signature on the summons purportedly served on him is forged and that the description of his office on Buganda Road is wrong as there is no green gate. In relation to the alleged forgery of the applicant's signature on the summons, the respondent sought the services of the Forensic Document Examiner and filed a report marked annexture E with his affidavit in reply dated 10th October 2014. As determined earlier court cannot and will not rely on the report. However what needs to be determined is whether service summons on the defendant was effective.

Under O 36 r 11, court is enjoined if satisfied that service of summons was not effective or for some other good cause to set aside the decree. Factors to be considered in deciding how to exercise its discretion are:-

1. Why default was committed.
2. Conduct of the parties.
3. Whether the applicant has a defence on the merits.
4. Whether the respondent could be compensated by costs for the delay.

(see ***Trust Bank Vs Portway Stores Ltd [2001] ICA 216 (CCK))***

If it's shown that the service did not lead to the defendant becoming aware of the summons the service is not effective (see ***Geoffrey Gatete Vs Kyobe [2007] 1 HCB 54 (SC)).***

In order to set aside an ex-parted judgment court must consider whether:-

i. Applicant had sufficient reason for absence or

ii. Whether applicant has good defence

Where applicant applies for leave to defend he should attach a draft written statement of defence showing that defence. (see ***Manzi Vs Nile Bank Ltd [1994] IKALR 123).***

Basing on the evidence before me it is my view that the applicant/defendant was indeed not aware of the summons and accordingly service was not effective, this in my view is sufficient reason for his absence.

The applicant denied the amount claimed as well as service of the summons. This in my opinion can suffice as a good cause to secure the setting aside of the decree and have the applicant appear to defend the suit. In the case of ***Maluku Interglobal Trade Agency Vs Bank of Uganda [1985] HCB 63*** Odoki J (as he then was) held that;

> *"Before leave to appear and defend is granted, the defendant must show by affidavit or otherwise that there is a bonafide triable issue of fact or law. When there is a reasonable ground of defence to the claim the plaintiff is not entitled to a summary judgment. The defendant is not bound to show a good defence on the merits but should satisfy court that there was an issue or question in dispute which ought to be tried and court should not enter upon the trial of the issues disclosed at this stage."*

The fact that the amount if any claimed is still in dispute is in my view sufficient cause to have the application granted and leave to defend the suit is thereby granted.

Court also takes cognition of the right to fair hearing enshrined in ***Article 21 of the Constitution of Uganda*** which the applicant should not be denied.

In the final result, I order that;

The default judgment entered and decree issued on 13th August 2014 is hereby set aside.

The application for leave to appear and defend H.C.C.S No. 525 of 2014 is hereby granted. The applicant should file a defence within ten days of this ruling.

Costs shall be in the cause.

I so order.

B.Kainamura

Judge

15.10.2015