

secondly without due process and questionable filing of court process which can only be remedied if court sets aside the execution by consent agreement and grants leave to appear and defend the suit.

The applicant did not know of any court process against him yet the applicants' office which is at Plot 56-60, Ambassador House has at all times been known to the respondent.

The respondent intentionally made no effort to serve any of the applicants with court process so that they would not challenge the alleged Acknowledgement of the Debt the basis of the summary judgment and subsequent decree, execution and warrant of arrest.

On scrutiny of the court record they discovered grave inconsistencies in the alleged service of the court process indicating that the rules were not followed hence there was no lawful service of the court process.

There is an inconsistency with the alleged dates of service on record as proof of the said service which shows that the alleged service was a lie.

The substituted service was not warranted hence a nullity because the respondent at all times knew the applicants' offices.

The acknowledgement of the alleged debt by the applicants was obtained from them by coercion and duress by armed men on the 5th day of March 2014 under the stewardship of the respondent's agents, Mr. Clayton Onama Lakony.

The applicant made a withdrawal of the money under reasonable and honest belief that it was transferred by a business partner in Sudan for the purchase of goods for export to Southern Sudan.

The applicant has since January 2013 cut off all communications with the bank on this matter as it appeared that the bank was not willing to follow due process of the law to get to the root of the matter.

There are substantive issues of law, fact and mixed law and fact for the court's determination which if leave to appear and defend is not granted will occasion a grave injustice.

The respondent filed an affidavit in reply sworn by Mr. Clayton Omona Lakony it's Manager of Loss and Recovery who deposed that;

The respondent shall raise a preliminary objection that the application is premature, misconceived, and bad in law as it is not maintainable.

The applicant on the 6/01/2014 jointly and severally acknowledged the double payment of US\$100,000 and agreed to refund the same starting with US\$ 1,000 and thereafter US\$ 5,000 in monthly installments.

The applicants on 05/03/2014 paid cash of US\$ 10,000 to the respondent leaving a balance of US\$ 90,000 which is still due and owing.

In reply to paragraphs 2 - 8 the 1st and 2nd applicants were served at their known office and acknowledge receipt of the same and, by the order of this Court on 25/05/2014 substituted service was effected on the 3rd, 4th, and 5th defendants in the Daily Monitor on 29/05/2014 and all returns were made as the law requires the premise of which a default judgment was entered. The inconsistency in dates was due to the error of Advocate and does not go to the merits of the suit.

The consent settlement was signed at the applicants' Lawyer's office at Ambassador House and was entered into in the spirit of good faith which the parties agreed to abide by.

There are no triable issues since the applicant committed to pay back the money that was twice transferred to their account and any stoppage of payment was an afterthought to deny the respondent use of their money that was used to the benefit of the applicants.

Applicant's submissions

Counsel for the applicants submitted that the applicants pray that the following issues be determined;

Whether the summary judgment in default was duly entered by court

Counsel in his submission raised the question of service on each of the defendants/applicants and whether the substituted service was warranted. Counsel submitted that according to **Order 36 rule 11 of the CPR** the respondent ought to have filed an affidavit of proof of service. Counsel relying on the case of *David Ssesanga Vs Greenland Bank Ltd Misc App. No. 406 of 2010* argued that it was practicable to serve the applicants personally but the respondent instead served by substituted service. Counsel submitted that according to the decision in *Valery Alia Vs Alionzi John HCCS No. 157 of 2010* a judgment entered without proof of service is bad in law.

Counsel for the applicants cited **Order 5 rule 18(1) of the CPR** submitting that substituted service cannot be effected in the ordinary way. Counsel submitted that the respondent's agents

lied to the court in the application for substituted service and court cannot condone such an illegality. Counsel in conclusion prayed that the substituted service be pronounced ineffective and a finding be made that there was no service.

Whether there is just cause to set aside the summary judgment in default

Counsel for the applicants had a three pronged approach to this question;- firstly whether the inconsistencies suffice to set aside the judgment, secondly whether there are any triable issues, and thirdly whether the defendant has a defence in law.

Counsel argued that **Order 36 rule 11 of the CPR** states that Court may after a decree is extracted still set aside the judgment and decree where there was ineffective service of summons or for any good cause. Counsel argued that there are so many filing, and procedural irregularities surrounding the filing and service of the summary suit, application for the default judgment and taxation of the bill of costs. Counsel added that this amounts to a good cause. Counsel also relied on the case of **Kisawuzi Henry Vs Moses Kayondo Misc App No.45 of 2011** urging that the inconsistencies were grave and go to the abuse of the summary process.

Counsel submitted with regard to whether there are any triable issues that the respondent's claim possesses so many triable issues which if not granted will occasion miscarriage of justice. With regard to the question whether there is a defense to the case, Counsel submitted that a draft written statement of defense was attached to the affidavit. Counsel in addition argued that the applicants already have a defence to the effect that there was no reason for them to suspect that the amount was a double payment made 5 months in between its last transaction and the time the double payment was made.

Lastly addressing the issue of remedies, Counsel for the applicants prayed that; the Summary Judgment be set aside because the service of summons was not duly done as is required by law, unconditional leave to appear and defend the suit be granted to the defendants as there are triable issues and the execution and all processes following the default judgment against the applicants be set aside.

Respondent's Submissions

Counsel for the respondent first raised a preliminary objection regarding the affidavit in support of the application which was deposed by a Muslim. Counsel argued that instead of affirming, the deponent swore and therefore there is no evidence on record. Addressing the

grounds of the application, Counsel made a reply on the issues as raised by Counsel for the applicants and stated that;

There are minor inconsistencies with the dates which arose as a result of a slip of a pen and emphasized that the 3rd, 4th and 5th applicants were served by substituted service and the 2nd applicant personally signed and stamped the summons.

In reply to the issue of whether there are triable issues; Counsel submitted that the applicants acknowledged the double payment and entered into the agreement for refund dated 13th December 2013 and 6th January 2014 respectively willingly and consciously. Counsel in addition submitted that the application raises no triable issues to warrant grant of leave to appear and defend.

In reply to the issue of remedies, Counsel for the respondent relied on the decision in ***Hon. Theodore Ssekikubo and others Vs AG & Others Constitutional Appl. No. 06 of 2013*** and submitted that the applicants have not established any of the principles provided in the case. Counsel further argued that the applicants never disputed the commitments made to the respondent and their failure to honor them. In conclusion Counsel prayed that the application be dismissed with costs.

Decision of Court

This application was brought under **Order 36 rule 11 and Order 5 rules 15 & 18 of the CPR**. The applicants seek orders that ; the Summary Judgment in default be set aside, unconditional leave to appear and defend be granted to the applicants to set aside the execution against the applicants or in the alternative stay execution of the Consent Agreement pending hearing of the Summary Suit against the applicants and costs of the application be provided for.

I have duly considered the arguments of both Counsel as well as the affidavit evidence relied on.

Counsel for the applicant raised major grounds which are that; the applicants were not served and were not aware of the proceeding against them and that the consent agreement was entered into through coercion and duress.

Counsel for the respondent first raised a preliminary objection challenging the validity of the evidence of the affidavit in support of the application which the deponent swore instead of

affirming since he is a Muslim. With regard to the application, Counsel opposed it on the ground that the applicants were effectively served and the agreement was entered into in the spirit of good faith.

The applicant brought this application under **Order 36 rule 11 of the CPR** which gives court power to set aside a decree for good cause or for non service of summons.

I will first consider the preliminary objection raised by Counsel for the respondent. I have addressed my mind to **Section 5 the Oaths Act** and the sections that follow that relate to how evidence by persons of different beliefs should be given on oath. It was the argument of Counsel for the respondent that the deponent was a Muslim who swore the affidavit instead of affirming. I however take note of the decisions of Court in the case of ***Suggan Vs Roadmaster Cycles (U) Ltd [2002].EA 25*** where Mpagi – Bahigeine JA (as she then was) held that;-

“ it is trite that defects in the jurat or any irregularity in the form of the affidavit cannot be allowed to vitiate an affidavit in view of Article 126(2) (e) of the 1995 Constitution, which stipulates that substantive justice shall be administered without undue regard to technicalities”.

In ***Gagawala Wambuzi Vs Lubogo HCT-03-CV-EP-0008/2011***, Anglin Flavia J while addressing a similar issue had this to say;-

“The witness swore the affidavit as a Christian and yet he is a Muslim and should have affirmed. For that reason Counsel argued that this is fatally defective. I am not persuaded by this argument for that reason I find it to be a technicality. The word “affirm” has the same meaning as “swear”.....”

I agree with the position taken by courts above, and accordingly the preliminary objection fails and the affidavit in support of the Notice of Motion will be considered by court.

I will now turn to the grounds of the application which basically raise the issues of duress and coercion as well as non-service of the summons by the respondent.

In the affidavit in support of the application, the 2nd applicant Mr. Ezzeldin Mohamed Ahmed deposed that the amount of \$ 100,000 which is in issue was acknowledged by duress and coercion while in the custody of armed men.

Black’s Law Dictionary 17th Edition defines duress of person as;

“Compulsion of a person by imprisonment, by threat, or by a show of force that cannot be resisted [Emphasis mine]”

In *Maureen Tumusiime vs Macario Detoro and Another [2006] HCB Vol. 1 at 127* Court held that;

“Duress of a person may consist in violence to the person or threats of violence or imprisonment, whether actual or threatened. Proof of duress, like fraud requires a standard that is more than a mere balance of probabilities, though not beyond reasonable doubt....”

Clearly the standard of proof required to prove duress should be more than a balance of probabilities though not beyond reasonable doubt. The evidence on record regarding duress is not persuasive. I note that the agreement alleged to have been procured by coercion is not the only document on the court record where the Managing Director of the 1st applicant Mr. Ezzeldin Mohamed Ahmed admits to the fact that there was a double payment made to the 1st applicant’s account by the respondent. For example there are headed letters dated 13/12/2013 and 06/01/2014 from the 1st applicant’s Managing Director discussing the swift transfer of USD 100,000 twice and the way forward to have the amount reimbursed. I am therefore of opinion that the allegation of duress has not been proved to the required standard as set out above.

The applicants also raised the allegation of non service which I will discuss in detail. The Court record shows two affidavits of service; one that was deposed by Mr. Mukova Moses dated 2nd May 2014 which he swore after service on the 2nd applicant and the other dated 12th June 2014 by the same deponent after substituted service in the Newspapers.

Order 36 rule 11 of the CPR provides that;

“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.”

In the case of **David Ssesanga Vs Greenland Bank (in Liquidation) Miscellaneous Application No 406 Of 2010** where a similar question of effective service was discussed at length, court held that;-

*“What the court needs to be satisfied about is whether the service of summons in the particular circumstances of the case was effective or whether there was some other good cause to set aside the decree. Was service of summons effective or was there some other good cause why the decree should be set aside or why execution be stayed or set aside and defendant be given leave to appear and defend the suit? In my judgment where the question of service is decided the court does not have to look into other matters like whether there are triable issues, which go to the merits of the suit. Those issues can only be dealt with if the court finds that service was good. Whether or not there was proper service is a fundamental question affecting the right to be heard and should be tried first. It deals with the basic principles of natural justice, which principle is one of fundamental rights and freedoms enshrined under article 28 (1) of the Constitution of the Republic of Uganda. Clause 1 thereof provides that: “In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.” The question of fair hearing includes an element of a right to be heard in the matter. The common law adage for this is “**no one should be condemned unheard**”. It is not only the right to be heard but a right to a fair hearing.”*

I have addressed my mind to the fact that **Order 5 rule 9 of the CPR** requires that where there are several defendants service should be done on each individual.

In the decision of **Ssesanga** (supra) court also held that;

*“The objective for service of summons on the defendant is for the court to hear the parties and for the defendant to exercise a right to be heard. A party has a right to be heard unless he or she elects to waive that right. Following the case of **Geoffrey Gatete and Angela Maria Nakigonya Vs William Kyobe Supreme***

Court Civil Appeal No. 7 of 2005, the object of service under Order 36 is to make the defendant aware of the suit.”

In my opinion the service made cannot be said to have been ineffective. The record shows that service was done on the 1st applicant at his place of business according to the evidence of the process server. The 2nd applicant accepted service for himself and on behalf of the 1st applicant.

The 3rd, 4th, and 5th, applicants were served through substituted service by order of court dated 27th May 2014. The extended summons was advertised in the Daily Monitor News Paper of 29th May 2014.

In my view both service was effective.

It is also my finding that the applicants admitted receipt of the double payment in a number of documents. Accordingly I am of the opinion that the applicants have neither proved good cause to warrant the setting aside of the decree nor depicted the existence of a defence to warrant the grant of leave to appear and defend the suit.

In the result, this application fails and is accordingly dismissed with costs.

B. Kainamura

J U D G E

13.11.2015