THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT - 00 - CC - MA - 1011 – 2014
(Arising out of Civil Suit No. 339 of 2014)

VICOM CENTRE LTD & 2 OTHERS ::::::::::::::::::::::::::::::: APPLICANT

VERSUS

ABC CAPITAL BANK LIMITED ::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

Vicom Centre Limited, Eng. Elly Mubiru, Wilson Kyambade and Mary Mubiru hereinafter referred to as the 1st, 2nd, 3rd and 4th Applicants brought this application against ABC Capital Bank Limited, Respondent hereafter, seeking Court to set aside a Judgment entered against them in Civil Suit No. 339 of 2014.

The Applicants also sought unconditional leave to file a defence to the suit.

The application which is supported by an affidavit of the 4th Applicant is grounded on the following;

1. No proper and effective service of court process was made onto the Applicants.
2. That the impugned substituted service was not necessary and was uncalled for in the circumstances since the Respondent Bank officials knew the Applicants respective residencies.
3. That the Civil Suit No. 339 of 2014 was improperly brought against the 2nd, 3rd and 4th Applicants as guarantors, having sued the 1st Applicant under the same suit.
4. That the 4th Applicant has never guaranteed any loan/credit facility offered to the 1st Applicant by the Defendant bank as alleged and there is no cause of action maintainable against her.
5. That the Applicants have a good defence to the claim and the suit as against them was not only unjustified but also premature.
6. The application has been brought without unreasonable delay and is intended to avail the Applicants a right to be heard.
7. It is unjust in the interest of justice that this application is allowed.

In his submissions Counsel for the Applicants stated that the Applicants got to know of the suit on the day the 4th Applicant was arrested. That since the Respondent knew the Applicant's place of work, they should have served them personally instead of using substituted service.

Furthermore that the 4th Applicant was not a guarantor to the loan and she never signed the document the Respondent purports she signed.

Also that a principle debtor could not be sued together with a guarantor.

He further submitted that since the overdraft was fully secured, the Respondents should rightly have foreclosed.

Lastly, that the Monitor advert was irregular and in contravention of Order 5 Rule 2 and Rule 18 in as much as it did not include the plaint and annextures.

In reply Counsel for the Respondent submitted that attempts were made to effect service as the known address of the Applicants but found it closed and remained closed to-date.

That for being a guarantor the 4th Applicant had herself admitted before the execution division.

Turning to suing all the Applicants, the Respondent's counsel stated that they were free to choose which ever option they wanted as provided by the Mortgage Act.
That the property could not be realized because it was the wrong one.

On the submission that the Applicants only got to know of the suit on the date the 4th Applicant was arrested, the answer lies in the several applications and affidavits scattered all over the case file.
One of these is Miscellaneous Application 757 of 2014. While applying to have the ex-parte judgment set aside Eng. Elly Mubiru deponed that he was informed by a friend that there was a suit against the Applicants in Court whose period of response was about to elapse. Going by the above statement, it is not true that the Applicants got to know of the suit at the time of execution of the judgment. From the wording of Paragraph 9 of the 2nd Applicant's affidavit dated 1st October 2014,

it is clear that the Applicants got to know of the suit even before judgment had been entered.

On service, the Applicant's contend that it was ineffective because since the Respondents knew their address, service should have been effected personally on them.

Furthermore that the substituted service itself was ineffective because it did not include the plaint and annextures in the advertisement. I will first deal with the personal service on the Applicants. When the Respondent applied for substituted service, the Registrar relied on the affidavit of the process server, Batanda Moses. The relevant paragraphs of his affidavit are reproduced hereunder.

> "4. That Mr. Sebikari Richard informed me that the Defendants' last known place of business is at Plot 29/33 Kampala Road, Amber House Ground Floor.
> 5. That I then moved to the mentioned address above and found the office of Vicom Centre Limited closed.
> 6. That I obtained from the Plaintiff the mobile telephone numbers of the 2nd and 3rd Respondents/Defendants; that is 0772-436-061 and 0755-137-720 respectively.
> 7. That I managed to talk to both the 2nd and 3rd Respondents/Defendants over the mentioned telephone
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> lines but they both declined to direct me to their current physical address.
> 8. That the Respondents/Defendants herein are elusive and their whereabouts are unknown to the Plaintiff.

9. That all my efforts to physically serve the Defendants have been rendered futile."

The gist of these paragraphs was that the Applicant's office was closed and therefore service could not be effected personally. What emerges from paragraph 7 is that even when the process server managed to trace the 2nd and 3rd Respondent on their phones, they did not direct him to their new address. That because of their elusiveness, service upon them was not possible. During the hearing of this application, Counsel for the Respondent submitted that to-date the office at Plot 29/33 Kampala Road, Amber house where the Applicants had an office remains closed.

In my view, the order of substituted service was justifiably issued as the only method of process service that remained available to the Respondent. On failure to include in the advertisement the plaint and annextures, Order 5 Rule 2 and Rule 18 of the Civil Procedure Rules were not complied with. It is the provision of those rules that service of summons should be accompanied by the plaint and annextures. The purpose is to enable the Defendant to know what the Plaintiff's claim is. This however is a very expensive procedure which would lead to denying poor litigants access to the Courts. Since the reason for service is to notify the Defendant of the existence of a suit, summons advertised in the press, though not the best way of fulfilling the provisions of Order 5 Rule 2 and Rule 18 of the Civil Procedure Rules, are in my view sufficient notification of the existence of a suit and venue from which the plaint and annextures can be obtained. It is even more impractical where the intended Defendant is elusive, has moved from his last known address and is not willing to direct the process server on where to find him.

And indeed, the 2nd Respondent on receiving information he proceeded to the Court where he obtained the copies of the pleadings. The advertisement having served the purpose of notifying the Applicants of the existence of the case, I have no reason to hold that the service was ineffective.

Counsel for the Applicant also submitted that since there was a principle debtor, the guarantor of the debt could not be sued together with it. In reply, Counsel for the Respondent submitted that the Mortgage Act gave them the liberty to proceed against any of the parties it felt like.

The law relating to guarantors was stated by Lord **Reid in Moschi V Lep Air Services and Ors [1973] AC at Pg 345** as follows:

> *"…If at any time and for any reason the principle debtor acts or fails to act as required by his contract he not only breaks his own contract but he also puts the guarantor in breach of his contract of guarantee. Then the creditor can sue the guarantor, not for the unpaid installment but for damages. His contract being that the principle debtor would carry out the principle contract, the damages payable by the guarantor must then be the loss suffered by the*
>
> *creditor due to the principle debtor having failed to do what the guarantor undertook that he would do."*

It is therefore incorrect for Counsel for the Applicant to say that the principal debtor and guarantor cannot be sued together. I therefore find that the procedure adopted by the Respondent was proper.

Counsel for the Applicant also submitted that the 4th Applicant was not a guarantor to the loan and she never signed the document. With the greatest respect the 4th Applicant herself told Court sitted in the Execution Division on 29th April 2014 that she was a guarantor.
She said:

> *"I am a wife to Eng. Mubiru the 2nd Judgment Debtor. I was one of the guarantors. I know the debt."*

The 4th Applicant could not have said so if she had not guaranteed the loan. Her statement before the Court totally agrees with Annexture B3 to the affidavit in reply to the notice of motion. Her denial therefore that she was a guarantor cannot be sustained and it is my finding that she indeed guaranteed the loan.

Lastly, Counsel for the Applicant submitted that since the overdraft was fully secured, the Respondents should simply have foreclosed.

In reply, Counsel for the Respondent submitted that the security could not be realized because it was occupied by *bibanja* holders. In short, the security was no security at all.

Section 21 of the Mortgage Act 2009 provides some of the circumstances under which a mortgagee may sue for the money secured by the mortgage.
Section 21(1) provides:

> *"The mortgagee may sue for the money secured by the mortgage only in the following case –*

> *(d) where the mortgagee is deprived of the whole or a part of his or her security or the security is rendered insufficient through or in consequence of the wrongful act or default of the mortgagor.*

In the instant case, the security provided by the Applicants was occupied by *bibanja* holders with the permission of the Applicant. This therefore brought the facility within the bracket of those cases where the Respondent could sue before foreclosure.

I therefore find that the Respondents did not breach any of the provisions of the Mortgage Act when they proceeded to sue without foreclosure.

In conclusion, the Applicants have failed to provide sufficient reasons as would lead this Court to set aside the judgment and decree earlier entered by the Registrar.

This application is therefore dismissed with costs.

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David K. Wangutusi
JUDGE

Date: 16/03/2015