

THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO 842 OF 2015

OKELLO OKIDI SIMMONS}APPLICANT

VS

ACACIA FINANCE LTD}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicants application commenced under Order 36 rule 11 of the Civil Procedure Rules as well as the procedural rule under Order 52 rule 1 and 3 of the Civil Procedure Rules and section 98 of the Civil Procedure Act for the default judgment entered in the main suit HCCS 522 of 2015 to be set aside and for the Applicant to be granted unconditional leave to appear and defend the summary suit. Finally the Applicant also prays for costs of the application.

The grounds of the application are detailed in the Notice of Motion and affidavit of the Applicant attached to the notice of motion. Briefly the Applicant avers that his failure to apply for leave to appear and defend was due to the mistake of his Counsel whom he duly instructed to represent him in the matter. Secondly the Respondents claim against him as presented in the plaint is res judicata. Thirdly the Respondents claim against him is fraudulent or illegal as it intends to recover a sum of Uganda shillings 308,584,883/= from him as a guarantor and principal borrower which sum was never advanced under the loan agreement. Lastly that it would be in the interest of justice for the default judgment to be set aside and the Applicant given unconditional leave to defend the main suit.

The facts in the deposition of the Applicant in support of the application are that by personal guarantee dated 13th of November 2014, he guaranteed payment to the Respondent of a sum of Uganda shillings 123,500,000/= if the principal borrower Rusoke Margaret defaulted on paying

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the sum guaranteed according to a copy of the agreement attached. Sometime in April 2015 he was arrested under a warrant of arrest issued jointly against him and the principal borrower by the High Court Execution and Bailiffs Division according to a warrant of arrest dated 4th of April 2015 for the sum of Uganda shillings 145,624,883/=. Upon his arrest he was informed that judgment in default had been entered against him and the said principal borrower by the High Court (commercial division) for the balance of the loan advanced and guaranteed by him which had become due. He later discovered that the Respondent had sued Rusoke Margaret claiming for the money advanced under the loan agreement in HCCS 520 14 and judgment was entered in its favour. He considered it an anomaly to be arrested under a decree in the suit to which he is not a party. He brought this anomaly to the attention of the registrar of the High Court (Execution Division) who in turn duly discharged him from paying the decretal sum and cancelled the warrant of arrest against him. Subsequently in August 2014 he was notified of a suit filed against him by the Respondent and he instructed his former lawyers Messieurs Tumusiime Irumba and Company Advocates to defend the action.

The Applicant deposes that at all material times he believed that his former advocates filed all necessary papers in court and he was only shocked when he read an advertisement in the Daily Monitor of 14 October 2015 where a notice to show cause had been issued against him by the registrar of the High Court (Execution and Bailiffs Division). In the premises he deposes that his failure to appear to defend the action was due to the mistake or negligence of his advocates who omitted to indicate any date on the copy of the summons and failed to file an application for leave to appear and defend the action in time. On the basis of information from his current lawyers Messrs Tumwebaze, Kasirye and Company Advocates, he believes the information that judgment against the principal debtor ordering her to pay the loan amount barred the Respondent from instituting another suit against him to recover the same loan amount and therefore the suit against him is res judicata. Secondly the Respondents claim is illegal and intended to have the Respondent receive a total of Uganda shillings 308,584,883/= from him as a guarantor when that amount was never advanced to the principal debtor under the loan agreement. Lastly he contends that it is in the interest of justice for the default judgment to be set aside and for him to be granted unconditional leave to appear and defend the action.

The affidavit in reply and opposition to the application is that of Karungi Susan, the manager of the Respondent. Upon reading the application and affidavit in support of the application her deposition is that the Applicant acknowledges that he guaranteed the loan granted to Rusoke Margaret personally. Secondly HCCS 500 of 2014 filed in this court was only against Rusoke Margaret and not the Applicant. She confirms that the Applicant was never a party to the said suit. On the basis of information of the advocates, she deposes that the Applicant's advocates were duly served and did not bother to make any application until 26 August 2015 after judgment in default had been entered by this court. The guarantee agreement that the Applicant has with the Respondent is an independent agreement different from the one the Respondent has with Rusoke Margaret. Rusoke Margaret pledged as security her land title comprised in Kibuga Block 33 Plot 335 land at Mutundwe. At execution it was discovered that the land title securing the loan was encumbered with squatters and third-party interest and as such could not be sold to recover monies owing hence the suit against the Applicant. The Applicant was not a party to HCCS 520 of 2014 between the Respondent and Rusoke Margaret and therefore the current suit cannot be res judicata. The Applicant even paid Uganda shillings 5,000,000/= towards settlement of the money owed to the Respondent according to paragraph 4 (d) of the summary plaint. The only money which is said to be recovered from the Applicant has a break down in annexure "B" to the affidavit. The Applicant has an unlimited guarantee, guaranteeing the principal debtor's repayment to the bank. In the premises she deposes that the application was brought to waste the time of the court and delay the Respondent from receiving the fruits of its judgment. Alternatively should the court deem it fit to grant the application, it should be on condition that the Applicant deposits a sum of Uganda shillings 170,230,300/= being the interest and costs with this honourable court.

In rejoinder the Applicant deposes that the payment of Uganda shillings 5,000,000/= was never paid in settlement of any money owed under the guarantee but paid under a forged warrant of arrest wrongly enforced against him. Secondly he reiterates that the money the Respondent seeks to recover is intended to foster an illegality and unjust enrichment. By obtaining a decree against Rusoke Margaret for the balance of the loan agreement, the Respondent entered into a new binding arrangement which discharged him from the unlimited guarantee executed with the

Respondent. The application was filed without any delay and therefore, that the said to be a waste of courts time.

The court was addressed in written submissions and Counsel for the Applicant addressed the court on the facts as summarised above in support of the application.

On the first ground is that the Applicant's advocates did not file an application as instructed within the time limited in the summons in the summary suit, the Applicants Counsel relies on the case of captain **Philip Ongom versus Catherine Nyero Owota Civil Appeal Number 14 of 2001** where Mulenga JSC (as he then was) held that a litigant ought not to bear the consequences of the advocate's default unless the litigant is privy to the default or the default results from failure on the part of the litigant to give to the advocate due instructions. It has not been suggested that the Applicant was privy to the default or late filing of the application for leave to appear and defend the suit. His former lawyers despite being served did not file the necessary court papers until 26th of August 2015. On that ground alone the default judgment ought to be set aside.

Secondly the Applicant's Counsel submitted that Order 36 rule 11 of the Civil Procedure Rules allows the court to set aside the default decree and grant the Defendant leave to appear to the summons and defend the suit if the service of summons was not effective or for any good cause. For interpretation of rule 11 of Order 36 of the Civil Procedure Rules Counsel relies on the case of **Geoffrey Gatete and Another versus William Kyobe Civil Appeal Number 7 of 2005** per Mulenga JSC for the submission that in an application for leave to defend a summary suit, the court does not consider the merits of the defence but whether the Defendant has shown a good cause for leave to defend. Secondly apart from ineffective service of summons, what the court considers apart from ineffective service of summons is that to amount to good cause the Defendant has a triable defence to the suit.

The Applicants Counsel further reiterated the grounds of the application that the decree obtained by the Respondent against the Applicant is an illegality and unjust enrichment. According to the previous suit in which a warrant of arrest had been issued the Respondent had claimed and obtained a decree of Uganda shillings 135,850,000/= against the principal borrower. In the summary suit however the Respondent's suit against the Applicant is for Uganda shillings

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162,960,000/= upon which a default decree was entered. He relied on **Makula International Ltd versus His Eminence Cardinal Nsubuga and Another [1982] HCB 11** for the holding that a court of law cannot sanction what is illegal and illegality once brought to the attention of the court, overrides all questions of pleading including any admissions made.

Counsel further submitted that the Applicant could only be liable upon default of the principal debtor Rusoke Margaret in HCCS 500 of 2014 to pay the principal debt. The principal debtor was only liable to pay the Respondent Uganda shillings 135,850,000/=. In Halsbury's laws of England fourth edition volume 2 at paragraph 193 the liability of a guarantor arises only upon default of the principal debtor. In fact the Respondent seeks to enforce payment of Uganda shillings 170,230,300/=.

Counsel further submitted that the decree against Rusoke Margaret was property which discharged the guarantor from his obligations under the guarantee agreement. Furthermore he submitted that pursuant to the decree in HCCS 500 of 2014, the suit against the Applicant/guarantor for the same amount is barred by the doctrine of res judicata.

In reply the Respondent's Counsel opposed the application. The Respondents Counsel contest the fact that the Applicant's Counsel did not indicate the date on which they received the summons. He contended that the Applicant was privy to the default of his lawyers because the affidavit in support of the application was deposed to by the Applicant on 26 August 2015 the same date of filing of the application out of time. If the Applicant had deposed to the affidavit on an earlier date, there may be an inference that the lawyers delayed filing the application.

On whether there was a triable issue for unconditional leave to defend the summary suit. Counsel relies on the holding of Honourable Justice Masalu Musene in the **Bunjo Jonathan versus KCB Bank Ltd** for the holding that an application cannot be granted merely because there are several allegations. The allegations have to be investigated and even if a single defence is found to be bona fide, unconditional leave should be granted to the Defendant. In the premises the Respondents Counsel submitted on the following grounds.

Whether the Respondents claim against the Applicant is res judicata and whether the Respondents claim against the Applicant is illegal because the Respondent seeks to recover Uganda shillings 308,584,883/=.

On the claim of res judicata the Respondent's Counsel relies on the definition of res judicata under section 7 of the Civil Procedure Act and contended that none of the explanations made under the section apply to the case at all. The gist of this submission is that the guarantee agreement guaranteeing a loan of Uganda shillings 123,500,000/= is a separate agreement from the loan agreement. The Applicant signed an unlimited personal guarantee undertaking to pay the Respondent upon the default of the principal borrower. He relied on authorities for the proposition that a guarantee is a secondary agreement making a guarantor liable for the debt or default of the principal debtor who is the party primarily responsible for the debt. Secondly the principal debtor is not privy to the guarantee agreement (See **Shell (U) Ltd vs. Capt Naeem Chaudry Civil Suit No 179 of 2004**). Lastly he submitted that because the principal debtor defaulted on her obligations, the guarantor who is the Applicant became liable for the debt.

On the question of legality of the claim, the affidavit in reply is that the security pledged by the principal borrower is encumbered by squatters and therefore the Respondent was unable to sell the property. Counsel reiterated submissions about the secondary nature of the liability of the guarantor. He further demonstrated that the principal sum was Uganda shillings 123,500,000/= and interest at 2% per month from March 2014 to August 2015 brought to the total amount to Uganda shillings 162,960,000/= after subtracting Uganda shillings 5,000,000/= which the Applicant had paid pursuant to the warrant of arrest in the former suit. The suit against the Applicant is for all outstanding dues at the date of filing the suit. Furthermore the only way to discharge their liability is to settle the loan and there is no evidence the Applicant has adduced showing that the loan had been offset.

In rejoinder the Applicant reiterated submissions on the ground of negligence or mistake of his Counsel. He further contended that the facts in support of the application on the ground of the error or mistake of Counsel were not rebutted. Secondly the submission that the Applicant's affidavit was made on 26 August 2015 is not based on any affidavit evidence in reply and is inadmissible as a submission from the bar. In any case the Applicant deposes that he instructed

his advocates Tumusiime Irumba and company advocates to defend the suit and it cannot be said that he is associated with any dilatory conduct of his lawyers by merely signing an affidavit.

I have further considered the rest of the submissions in rejoinder and they are primarily an amplification of earlier submissions.

I have carefully considered the application for setting aside the judgment in default. It is clear that the lawyers of the Applicant were served with summons according to the affidavit of service on court record of Mwebesa Julius, a court process server. He states that he received copies of summons together with the plaint from the Respondent's lawyers and on 14 August 2015 proceeded to Tumusiime, Irumba and company advocates for purposes of service of the summons. Summons was acknowledged according to a copy of the summons attached by the said firm on 14 August 2015. Subsequently on 26 August 2015 which is about 12 days later, a default decree was entered against the Applicant.

On the same day of the decree the Applicant had filed Miscellaneous Application number 655 of 2015 through Messieurs Tumusiime, Irumba and company advocates. The application was filed about two days late. There is no evidence of when the Applicant himself was served or notified by his lawyers.

The court was moved 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 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 question for consideration is whether service of the summons was not effective or whether there is any good cause to set aside the decree. In case any of the above questions is answered in the affirmative and the decree is set aside, the court may grant leave to the Defendant to appear to the summons to defend the suit if it seems reasonable to the court so to do.

I have duly considered the submission that summons was served on the Defendants lawyers. There is no explanation as to why summons was not served on the Applicant/Defendant himself. The affidavit of service clearly indicates that the Applicant's lawyers were served direct. It is unknown when the Applicant who is the Defendant was even notified. It is a rule under Order 5 rule 10 of the Civil Procedure Rules that wherever it is practicable, service shall be made on the Defendant in person, unless he or she has an agent empowered to accept service, in which case service on the agent shall be sufficient. I see nothing in the affidavit of service to suggest that the Applicant's former lawyers were his agents for purposes of service of court process in a fresh suit. In any case I do not agree that the delayed filing of the application on 26 August 2015 about two days later can be imputed on the Applicant and his lawyers alike because the Applicant also had an affidavit in support of the application on the same date in the absence of information of when the Defendant/Applicant received the summons which ought to be the effective day of service of summons. I agree that the defaults of the Applicant's lawyers should not be visited on a litigant who is clearly interested in defending the action. The application had been filed just two days late. The assertion that the Applicant was not aware about the delay has not been challenged by the affidavit in reply. Because the Applicant has challenged the default decree his application for leave to defend the suit having been filed two days late, there is a clear indication that the Applicant was diligent enough to make an attempt to defend a summary suit by filing an application for leave to defend the action albeit two days later. The subsequent application to set aside the default judgment/decree was made about one and a half months later. In paragraph 8 of the affidavit in support of the application the Applicant had a reasonable believe that his former lawyers had filed the necessary papers in court in time. This assertion has not been rebutted. In the premises there are reasonable grounds to set aside the decree and the decree in default of filing an application for leave to defend the summary suit is hereby set aside. The Applicant therefore has opportunity to prosecute his application for leave. In this application, the question is whether it is reasonable to give the Defendant leave to defend the action in the circumstances of this case.

In the case of **Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd (In Liquidation) [1989] 3 All ER 74** Parker LJ held at page 77 that on the purpose of a summary suit under the UK rules that:

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“it is to enable a Plaintiff to obtain a quick judgment where there is plainly no defence to the claim. If the Defendant’s only suggested defence is a point of law and the court can see at once that the point is misconceived the Plaintiff is entitled to judgment. If at first sight the point appears to be arguable but with a relatively short argument can be shown to be plainly unsustainable the Plaintiff is also entitled to judgment. But Ord 14 proceedings should not in my view be allowed to become a means for obtaining, in effect, an immediate trial of an action, which will be the case if the court lends itself to determining on Ord 14 applications points of law which may take hours or even days and the citation of many authorities before the court is in a position to arrive at a final decision.”

The question to be considered is whether the Defendant plainly has no defence. If there is an alleged defence is it plainly misconceived or is it an arguable ground of defence? Whenever a genuine defence, either in fact or law, sufficiently appears, the Defendant is entitled to unconditional leave to defend. The Defendant is not required to show a good defence on the merits. Where the court is satisfied that there is an issue or question in dispute which ought to be tried, it should grant leave to defend. The defence should be bona fide and stated with sufficient particularity, as appear to be genuine These principles are spelt out in **Odgers’ Principles of Pleading and Practice in Civil Actions in the High Court of Justice 22nd edition** at pages 75 and 76, and **Maluku Interglobal Agency Ltd. v. Bank of Uganda [1985] HCB 65**.

The Applicant has raised several contentions inter alia that the principal debtor was sued by the Respondent for a lesser amount. Both parties have submitted that the liability of the Applicant as a guarantor is a secondary liability. It is therefore a triable issue as to whether in a suit where the principal debtor’s liability has been determined, a subsequent suit against the guarantor can be filed to claim a higher amount than that established against the principal borrower under a decree of the court. I cannot at a glance determine that the matter as a preliminary question.

At first blush it may be argued that the subsequent suit is res judicata. However according to the wording of section 7 of the Civil Procedure Act referred to by the Respondent’s Counsel the question is whether a guarantor is a party deriving title or liability from the principal debtor and Defendant in a former suit. The Applicant’s Counsel argued strongly that the suit was res

judicata. I cannot determine that assertion as a frivolous and vexatious assertion without merit. Furthermore the amount claimed is over and above that decreed against the principal debtor. It is a triable issue which may be determined on the merits after hearing full submissions on the question even if it is to determine the extent of res judicata.

In the premises the Applicant's application raises triable issues of fact and law. Issues of fact relate to what his actual liability ought to be in light of the previous suit. Issues of law relate to both that the first issue above as well as that of res judicata.

In the premises the Applicant's application is allowed. The Applicant is granted unconditional leave to appear by filing a defence to the summary 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 on 29 January 2016 in open court.

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Kizito Kasirye for the Applicant

Applicant is not in court

Mamawi Bill for the Respondent

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

29th January 2016

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