

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISC. APPLICATION NO. 148 of 2017

(ARISING FROM HCCS NO. 651 of 2014)

1. KENCOM (U) LIMITED

2. ERNEST KAYIIRA

3. WETASE FROBISHER BIFAKI:.....APPLICANTS

VERSUS

ECO BANK (U) LTD:.....RESPONDENT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

Kencom (U) Ltd, Ernest Kayiira and Wetase Frobisher Bifaki the Applicants filed this Application against Ecobank Limited, Respondent seeking the orders;

- 1) That the Exparte Judgment and Decree in HCCS No. 651 of 2014 be set aside.
- 2) Execution of decree be set aside.
- 3) Applicants be given leave to appear and defend the suit on the merits.

The Application is grounded on the following;

- 1) The Applicants were not effectively served with summons.
- 2) The Applicants are not indebted to the Respondents in the sums claimed or at all.

3) The Applicants have a good defence to the suit.

The background to the Application is that the 1st Applicant borrowed UGX. 395,445,176/= from the Respondent on 24th February 2012 at an agreed interest rate of 30.5%.

On the 25th April 2012 a top up was extended to the 1st Applicant bringing total borrowed to UGX. 508,420,567/=. By way of another facility letter of 2nd May 2012 the Applicant was given an additional sum of money bringing the total loan amount to UGX. 634,371,527/=.

A mortgage was taken out comprised in Block 121 Plot 53 Land at Senyi Mutuba but the same turned out to be a subject of a suit with injunctive orders that could not allow the Respondent to foreclose.

The Respondent sued the 1st Applicant and the 2nd, 3rd contending that the latter two had guaranteed the loan advanced to the 1st Applicant.

On the 2nd November 2015 the Respondent applied for judgment in default which She obtained on 14th December 2015.

The Execution proceedings commenced and the Applicants filed this Application asking court to set the exparte judgment aside.

The Applicants contended that they were not served. In paragraph 18 of the 2nd Applicant's affidavit he deposed that he was not schooled in the English language and so he did not read the Monitor News paper.

First dealing with the 2nd Applicant's averment to his illiteracy, he filed an affidavit in support of the Notice of Motion. The affidavit was not subjected to verification as provided for in sections 2 and 3 of the Illiterates Protection Act. Failure to do so was fatal and rendered the affidavit incurably inadmissible; **Kasaala Growers Co-operative Society vs Kakooza Jonathan & Kalemera Edson SCCA No. 19 of 2007.**

That being the case, the affidavit of Ernest Kayiira is struck out. This in my view leaves the 2nd Applicant's Application with no supporting evidence.

As for the 3rd Applicant, he claimed he was not served because he only got to know of the suit when he was informed by the 2nd Applicant that he had been confronted by bailiffs. That is when he discovered that service had been effected by substituted service on the 17th July 2015.

I have perused the affidavit of the process server Kikomeko John who in the first place looked for the Applicants so as to serve them with the plaint. He deposed that he went to the address of the 1st Applicant as given to the Respondent namely Nakikiga Road Kawempe but could not locate the office. That he then on perusal of the bank file in which he got the 2nd and 3rd Applicants' cell phone numbers called but got no response. He deposed in Paragraphs 5 to 7 as follows;

5) That in the alternative, I perused the file one more time and managed to get the 2nd and 3rd Defendants' cell phone contacts 0752698275 and 0773598872 respectively;

6) That I called the 2nd and 3rd Defendants who are directors, on the said cell phone numbers several times but they were off.

7) That I tried to contact the Defendants again on several occasions on his cell phone contact(in paragraph 5) above, however the same was constantly off, hence I could not be able to trace him and effect service of the summons.

The foregoing explains why the Respondents went ahead for substituted service.

In his affidavit in support, the 3rd Applicant does not state anywhere that they were available for service. He does not state that the office location they had given the Respondent was the correct one. Because of the foregoing reasons it is safe to say that the Applicants made it difficult to serve them. That being the position, failure to serve them was occasioned by themselves .

Where the Applicants made themselves unavailable for service, the service through the paper was reasonable and effective. The 3rd Applicant also contended that he was not a guarantor because his name did not appear at the beginning of the Personal Guarantee and Indemnity document. I agree that the name was not there at the beginning and in the absence of a second person being named, the words I/We would have meant only one person. What however makes

it mean “We” is the signature of the 2nd Guarantor. The signature of the 2nd Guarantor puts into effect and gives meaning to “We”.

The 3rd Applicant concedes that the signature of the 2nd Guarantor was his. Under a situation where the 2nd signatory denies being a guarantor, the court considers the intention of the parties. In this case, the words of the 3rd Applicant in paragraph 9 of his affidavit speaks tons. He deposed;

“That from the perusal of the personal guarantee and the indemnity, I discovered that although I had signed on it, the guarantee was only made by the 2nd Applicant.”

The foregoing paragraph is clear that he only discovered his name was not at the beginning of the guarantee, much later. It also shows that at the time he signed it, he did so as a guarantor.

This is buttressed by the fact that his signature is where a guarantor signs with the word GUARANTOR clearly spelt and in capital letters.

Since it was the intention to guarantee and both parties acted upon it, it is my finding that the 3rd Applicant was a guarantee and viewing him as such was in order.

In paragraph 18 the 3rd Applicant contends that since the facility was secured by his land title Block 121 Plot 53 it should first have been realised instead of proceeding with the suit. The Respondent in an affidavit in reply responded in paragraph 12 of Mugisha Martin that they had attempted to sell the mortgaged property in recovery of the outstanding sum but found that the property was a subject Civil Suit 240 of 2009.

I believe the Respondent because a perusal of the record shows that the same property was a subject of contention in Miscellaneous Application No.1062 of 2013 arising out of Civil Suit No.240 of 2009.

In the Application before the Learned Assistant Registrar, he issued an order restraining the auctioning of the same. In my view the Respondents had no alternative but to proceed with a suit as they did.

Lastly, in matters such as these where the Applicant claims he had a defence to the suit, it is a well known principal to attach a copy of the defence to the Application. Doing so is the best way

for the court to decide whether there is a defence to justify setting aside the default judgment. The Applicant did not attach a defence.

The sum total is that the Applicants have failed to give sufficient reasons as to why they did not respond to this suit within the given time, and to show that they have a good defence to the suit.

That being the case, this Application is dismissed with costs.

Dated at Kampala this 26th day of October 2017

**HON. JUSTICE DAVID WANGUTUSI
JUDGE**