

**THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)  
MISCELLANEOUS APPLICATION NO 328 OF 2016  
(ARISING FROM CIVIL SUIT NO 998 OF 2015)**

**LIFE PHARMA AFRICA LTD} .....APPLICANT**

**VS**

- 1. PAUL G M MATOVU}**
- 2. ABBEZ LOGISTICS (U) LTD}.....RESPONDENTS**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**RULING**

The Applicant moved brought this application under section 96 and 98 of the Civil Procedure Act, Order 9 rule 12 and 27 and Order 52 Rules 1 and 3, of the Civil Procedure Rules for an ex parte decree entered against the Applicants in HCCS No. 788 of 2015 to be set aside. The Applicant further prays for leave to be granted to file a written statement of defence out of time. The Applicant also prays for stay of execution of the decree in Civil Suit No. 788 of 2015 and for costs of the application to be provided for.

The grounds of the application are that the Applicant was prevented by sufficient cause from filing a defence in Civil Suit No. 788 of 2015. Secondly, the Applicant has a highly meritorious defence to the suit with a high chance of success. Thirdly, the Applicant stands to suffer irreparable damage if the Respondent is not restrained from executing the decree. Finally the Applicant averred that it is in the interest of justice that the application is granted.

The application is supported by the affirmation of Syed Salhuddin, a director of the Applicant. He deposed that he got to discover that the Applicant Company was sued in High Court Civil Suit No. 788 of 2015 when on 20<sup>th</sup> April, 2016 he was served with a ‘notice to show cause why execution should not issue’. Subsequently he contacted his lawyers Messieurs Fides Legal advocates who perused the court file and established that the court which issued the decree relied on an affidavit of service of one Christine Mwebe to enter a default judgment against the Applicant on 1<sup>st</sup> February, 2016 on the ground that the Applicant failed to file a written statement of defence within the prescribed time. Furthermore, he deposed that the affidavit of service on the court record contains falsehoods with regard to service of summons as it shows that there was service of summons to file a defence on one of the Applicant’s staff who is not a Director of the

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Company who allegedly received summons but never forwarded them to the Directors or responsible officers for action. He deposed that on the basis of the above there was no effective service of summons on the Applicant in the main suit.

The Applicant's case is that it was prevented by sufficient cause from appearing in Civil Suit No. 778 of 2015 and having read the Respondent's plaint the Company has formidable defences to the allegations therein. The Respondent's claim involves a colossal amount of over US\$ 80,000 and it is in the interest of justice that the Applicant is granted leave to defend itself by setting aside the default judgment and staying execution of the decree.

The affidavit in reply of the Respondent is deposed to by the director of the 2<sup>nd</sup> Respondent Mr. Paul G.M. Matovu. He deposes that the Applicant's affidavit in support contains falsehoods because the Respondent was advised by his lawyers OARS & BT Advocates that the Applicant had been properly served with summons to file a defence on 12<sup>th</sup> December, 2015. The Applicant's authorized agent with full authority appended his signature and stamp to the summons, a fact that is not denied but the Applicant chose not to file a written statement of defence. There is therefore no sufficient cause that prevented the Applicant from filing its written statement of defence. Furthermore, it is a falsehood in the Applicant's affirmation and a waste of court's time.

The Applicant is represented by Counsel Anthony Wabwire while the Respondent was represented by Counsel Brian Tendo.

The court was addressed in written submissions.

The gist of the Applicant's submission is that the Applicant was not served because the affidavit of service on the court record demonstrates that service was effected through one of the Applicant's staff but who is not a Director of the Company. The staff allegedly received the summons but never forwarded them to the Directors or responsible officers for action. Counsel relied on Order 9 rules 12 and 27 of the Civil Procedure Rules which gives the court wide discretion to set aside default judgments passed pursuant to any of the preceding rules of Order 9 and also empowers court to set aside an *ex parte* judgment when it is satisfied that the Applicant was prevented by sufficient cause from filing a defence to the suit. The Applicant's Counsel relies on the decision of the High Court in **Emiru Angose versus Jas Projects Limited HCMA No. 429 of 2005** where The Hon. Justice Geoffrey Kiryabwire (judge of the High Court as he then was) cited the case of **Henry Kawalya vs. J. Kinyakwanzi (1975) HCB 372** where Ssekandi Ag. J (as he then was) held that *an ex parte judgment obtained by default of defence is by its nature not a judgment on merit and is only entered because the party concerned failed to comply with certain requirements of the law. The court has power to dissolve such judgment which is not pronounced on the merits of the case or by consent but entered especially on failure to follow procedural requirements of the law.*

He submitted that the perusal of Mr. Salhuddin's affirmation in support of the application discloses that the Respondents obtained the default judgment upon the Applicant's failure to comply with a procedural requirement of filing its defence within the stipulated time and that fact brings it within the ambit of the holding cited above. There is sufficient cause to set aside the ex parte judgment in HCCS No. 778 of 2015.

With reference to remedies available to the parties, the Applicant's Counsel prayed that leave is granted for the Applicant to file its written statement of defence out of time. The Applicant only became aware of HCCS No. 778 of 2015 when it was served with execution proceedings. He also prayed that the Respondents should be restrained from executing their decree to prevent the court's orders in this matter being rendered nugatory and for costs to be granted.

In reply the Respondent's Counsel reproduced Order 9 rule 27 which the Applicant cited in their submissions and submitted that the Applicant acknowledged that it was duly and properly served as per paragraph 4, 7 and 8 of their application and the Applicant was served with a Notice to show cause why execution should not issue for recovery of \$80,000 and Uganda shillings 5,453,500/- from the Execution and Bailiff Division of the High Court.

He submitted that the latter part of the rule cited presupposes a position when the Applicant is already on court record but upon the suit being called on for hearing the Applicant is not present for whatever reason which must be sufficient which is not the case here because the Applicant is alleging that the failure by an employee to forward the court summons to the responsible officers as a sufficient cause. As far as the grounds of the application are concerned on the question of service of summons on the Applicant, the Respondent's Counsel sought to distinguish the cases of **Emiru Angose versus Jas Projects Limited HCMA No. 429 of 2005** and **Africana Clays Limited vs. Harriet Arinaitwe HCMA No. 367 of 2013** which were cited by the Applicant in their submissions. In **Emiru Angose versus Jas Projects Limited HCMA No. 429 of 2005**, Justice Kiryabwire noted that the matter was not helped by the affidavit of the process server who failed to name the receptionist and also stated that service was effected but not acknowledged by the receptionist signing summons to which he ruled that there was no effective service of summons and ordered that the judgment in default be set aside. In **Africana Clays Limited vs. Harriet Arinaitwe HCMA No. 367 of 2013**, this court noted that Mr. Patrick Kizito had not acted innocently when he received summons and failed to pass them to the Applicant in time when the suit concerned a loan whose proceeds he had received and there was evidence that if the directors had received the summons in time they would have taken steps to defend the suit. He submitted that having distinguished the two cases there is nothing in fact akin to the matter at hand for court to set aside the default judgment as the Applicant does not describe the position of the officer who received the summons.

The Respondent's Counsel relied on Order 29 rule 1 of the Civil Procedure Rules applicable to service on corporations and submitted that any principal officer other than a director or secretary

with authority to receive process must be recognised by courts as capable of binding the corporation once service has been properly done. The facts at hand demonstrate that the summons were acknowledged on behalf of the Applicant by one Saleem who not only signed but also placed a company stamp with a date thereon indicating that he had authority to receive process. He also invited court to consider the indoor management rule and prayed that the default judgment entered against the Applicant be upheld.

With reference to remedies Counsel for the Respondent cited Order 9 rule 6 and submitted that it is very instructive as Civil Suit No. 778 of 2015 is for a liquidated sum of \$80,000 being money received by the Applicant for which no consideration was ever given, interest at 27% and costs taxed at Uganda shillings 5,453,500 which he prayed that court grants.

Counsel further submitted that in the event court chooses to exercise its wide discretion under Section 98 of the Civil Procedure Act Cap. 71 and sets aside the decree the court should order the Applicant to immediately pay \$20,040 to the Respondents being sums admitted as owing, pay the taxed costs, the Respondents file and serve a reply to the written statement of defence within 3 days from the date of the ruling and the matter is set for hearing within one month.

In rejoinder on the question of service of summons, the Applicant's Counsel reiterated that the application duly discloses grounds for setting aside the ex parte judgment in issue under rule 12 and also on grounds of sufficient cause under rule 27. The Applicant's Counsel submitted that the Applicant's case is not grounded solely on lack of effective service of summons on the Applicant as Respondent alleges but also on the fact that has not been rebutted that the summons did not achieve their purpose which resulted into a default judgment whose effect was to deny the Applicant and court an opportunity of traversing the merits of the Plaintiff's claim.

Furthermore the Respondent made statements from the bar in responding to the Applicant's defences and there is no affidavit evidence rebutting the defences raised by the Applicant. The Applicant's Counsel relied on the decision of **Livingstone Nsumba Membe versus Fibiano Mayoga HCCA 632 of 2007** which is to the effect that Advocates averments and attachments from the bar are inadmissible as evidence. He prayed that the same be rejected by the court.

He reiterated that the Applicant was prevented by sufficient cause from entering appearance in Civil Suit No. 778 of 2015 and it is in the interest of justice that judgment is set aside under Order 9 rule 27. Counsel relied on the decision of **Nicholas Roussos versus Gulamhussein Viran SCCA No. 9 of 1993** where sufficient cause was defined to mean the inability to take a particular step as by law required. Ignorance of proceedings by an unrepresented litigant was held to be sufficient cause. In the premises he reiterated that the Applicant was prevented by sufficient cause from filing its written statement of defence and prayed that the judgment be set aside.

## **Ruling**

*Decision of Hon. Mr. Justice Christopher Madrama Izama* \*^\*~ \*&\*\$\$#\$# xtra+  
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I have carefully considered the Applicant's application to set aside the default judgment and for leave to file its written statement of defence out of time. I have also considered the corollary prayer for stay of execution pending disposal of the application.

This application was fixed for ruling on 20<sup>th</sup> January, 2017. Submissions were completed and the matter came on 14<sup>th</sup> November, 2016 when I was proceeding for my annual leave on 15<sup>th</sup> November, 2016 up to 15<sup>th</sup> December, 2016. It consequently was fixed for ruling in January 2017 after the Christmas holiday. In the circumstances the application for stay of execution pending disposal of the application will not be handled. I would therefore deal only with the application to set aside the default judgment and whether leave should be granted to file a written statement of defence out of time.

I have duly taken into account the written submissions of Counsels which have been summarised above. The main controversy is whether the default judgment issued on 1<sup>st</sup> February, 2016 pursuant to failure to file a written statement of defence in which the Applicant was ordered to pay US\$80,000 together with interest at commercial rate from the date of filing the suit until payment in full and costs should be set aside. The bone of contention of the Applicant is embodied in the affidavit of service of Christine Namwebe the process server with the Respondent's Counsel Messieurs OARS & BT advocates. She deposed that on 25<sup>th</sup> November, 2015 she received summons to file a defence for service upon the Applicant/Defendant in the main suit. On 12<sup>th</sup> December, 2015 she went to the Applicant's premises and registered place of business. She met one of the Defendant company directors and tendered copies of the summons to file a defence. The name of the director is not mentioned. She deposed that the director endorsed on her copy and has proved that service was effected on the Defendant. The attached return of summons has the seal of the Applicant with a date of 12<sup>th</sup> of December 2015 written in it and showing that summons was received by one Saleem.

In the affidavit in support of the application to set aside the default judgment, Mr Syed Salhuddin deposed that on 20<sup>th</sup> April, 2016 he was served with notice to show cause as to why execution should not issue and that is when he discovered that the Applicant had been sued in the main suit. With the aid of his Counsel, they established the facts of the default judgment from the court record. Specifically he deposed that the affidavit of service contains falsehoods in that the person who allegedly acknowledged receipt of the summons is not a director of the Applicant Company. He however admitted that Mr. Saleem is a member of staff and that he never forwarded the summons to the responsible officers of the company to take appropriate action. His other depositions deal with whether the Applicant has a defence to the Plaintiff's action.

In the affidavit in reply, the Respondent and Mr Paul GM Matovu deposed that the Applicant was properly served with summons. This is because the Applicant has not disclosed the name or the job description of the person who received the summons and used the stamp. He further relied on another affirmation of the Applicant's director attached to his affidavit. The affirmation

was in the Execution and Bailiffs Division of the High Court in opposition to a notice to show cause as to why execution should not issue. He deposed that the Applicant paid a total of US\$59,960 out of the decretal sum of US\$80,000 according to copies of receipts. The attached receipts are included in the draft written statement of defence. US\$4500 was by the receipt paid on 6<sup>th</sup> February, 2014. US\$9000 was paid on 30<sup>th</sup> January, 2014. US\$20,000 was according to the receipt paid on 29<sup>th</sup> January 2014. US\$10,000 is indicated as having been paid on 30<sup>th</sup> January 2014. Uganda shillings 5,000,000/= was paid on 29<sup>th</sup> April, 2014.

The Applicant is a limited liability company and service on the Applicant is governed by Order 29 of the Civil Procedure Rules. Under Order 29 rule 2 of the Civil Procedure Rules service on a corporation is to be effected:

"Subject to any statutory provision regulating service of process, where the suit is against a Corporation, the summons may be served –

- (a) on a secretary, or on any director or other principal officer of the Corporation; or
- (b) by leaving it or sending it by post address to the Corporation at the registered office, or if there is no registered office, then at the place where the Corporation carries on business."

Service has to be made on a secretary, any director or other principal officer. Secondly summons may be served by sending it by post addressed to the corporation at the registered office. A principal officer was defined by Pennycuik J in **Re: Vic Groves & Co Ltd [1964] 2 All ER 839** by considering the term 'principal Officer' under rule 30 of the Companies (Winding Up) Rules 1949 which provided that in case a petition is presented by a corporation it shall be verified by an affidavit of a director, secretary, or other principal officer of the corporation. At page 840 he held that:

"That expression is not necessarily limited to directors. Various other officials of corporations have from time to time been accepted as principal officers. For example, I imagine, a general manager would be, but I do not find it possible to say that all these thirty-two gentlemen are principal officers of the company."

In the case of **Kampala City Council vs. Apollo Hotel Corporation [1985] HCB at page 77**, Justice Odoki a judge of the High Court then, held that summons had to be served on the Secretary to the Board, the Chairman of the Board or any Director or other Principal Officer which officers are in a position to take legal action on behalf of the corporation. Not any other officer of the corporation may be served with process. He found that the person served was a principal officer of the corporation competent to accept service of process. Similarly in **Remco Ltd v Mistry Jadva Parbat and Co Ltd and others [2002] 1 EA 233**, Justice Ringera of the Kenyan High Court Commercial Division held that service on a receptionist of a company in that

suit was not proper service. In **Augustine Okurut vs. Gerald Lwasa and Produce Marketing Board [1988 – 1990] HCB at 164** service of court process on the secretary to the Managing Director was held not to be proper service under Order 29 rule 2 of the Civil Procedure Rules.

I agree with the Respondent's Counsel that the Applicant never disclosed who the officer served was. This simply means that the court cannot determine from the evidence on record whether the person served was a principal officer of the Applicant. On the other hand Order 5 rule 16 of the Civil Procedure Rules requires the serving officer to give particulars of the person served in the following words:

"The serving officer shall, in all cases in which the summons has been served under rule 14 of this Order, make or annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which the summons was served, and the name and address of the person, if any, identifying the person served and witnessing the delivery or tender of the summons."

The rule makes it necessary to identify the person served in the corporation sufficiently to fulfil the requirements for service on a corporation. Order 5 rule 16 of the Civil Procedure Rules has to be read in conjunction with Order 29 rule 2 of the Civil Procedure Rules. To the extent that the provision for identifying the person served, should indicate the calibre of the person served if it is a Corporation. The burden is on the process server to indicate whether a principle officer or director or secretary of the Corporation has been served or to indicate whether he or she was unable to establish who was being served. The serving officer was simply quiet about who was served notwithstanding that there is a stamp of the Applicant on the signature of the person served. In my opinion, the provisions as to service support a fundamental rule of justice which is that of fair trial. Fair trial includes due notice of the summons on the Defendant or persons sought to be summoned to appear in court. The court should be able to establish from the affidavit of service whether there was effective service on the person sought to be served.

I have also considered the Applicant's contention that it has a formidable defence to the default decree. I have noted that the Plaintiff's suit was filed in November 2015. On the other hand the intended defence attaches receipts of January 2014. The decree was issued on 1<sup>st</sup> February, 2016. There is an obvious error in the decree which is described as having been issued on 1<sup>st</sup> of February, 2015. That is not possible. Payment of the decretal sum after the issuance of a decree would have amounted to a set-off to be notified to the court executing the decree. However it is not clear whether the payments made by the Applicant were made pursuant to the memorandum of understanding as a refund or as part of another transaction between the parties.

In the premises, the import of the receipts that the Applicant intends to adduce in evidence, in part acknowledges indebtedness to the Respondent to the amount paid. If it is true the Applicant would not be liable to pay those amounts receipted. It is a matter in controversy for trial. In the

premises, due to the fundamental requirements of service of process on the secretary, director or other principal officer of the company, the default decree and judgment entered on 1<sup>st</sup> February, 2016 is hereby set aside on the ground that there is no evidence that the authorised officer of the Applicant capable of receiving court process had been served.

Secondly, the Applicant claims to have paid the Respondent US\$ 59,960 while the decree is for US\$ 80,000. In the premises the Applicant shall deposit in court a sum of US\$20,040 as security for payment of the Respondent pending the hearing of the suit. The deposit shall be made within 30 days from the date of this order. The Applicant shall file a defence within 14 days from the date of this order and serve the Respondents. Because the default decree has been set aside, it is not necessary to issue an order for stay of execution.

Costs of the application shall abide the outcome of the main suit.

Ruling delivered on the 20<sup>th</sup> of January 2017

**Christopher Madrama Izama**

**Judge**

Ruling delivered in the presence of:

Counsel Brian Tendo for the Respondent

Paul Matovu in court

Counsel Anthony Wabwire for the Applicant

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

**Christopher Madrama Izama**

**Judge**

20<sup>th</sup> January 2017