

**THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)  
MISCELLANEOUS APPLICATION NO. 937 OF 2016  
(ARISING FROM CIVIL SUIT NO 131 OF 2016)**

**GGINGO MUJJE  
CHARLES}.....APPLICANT/DEFENDANT**

**VS**

**DIAMOND TRUST BANK UGANDA LTD}.....RESPONDENT/PLAINTIFF**

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

**RULING**

The Applicant lodged this application by Notice of Motion under the provisions of section 33 of the Judicature Act cap 13, section 98 of the Civil Procedure Act cap 71, Order 36 rule 11 and Order 52 rules 1 & 3 of the Civil Procedure Rules for an order that judgment, decree and orders entered against the Applicant/Defendant in H.C.C.S No. 132 of 2016 is set aside and any intended execution of the decree stayed. Secondly, it is for an order that the Applicant/Defendant is granted leave to appear to the summons and to defend the main suit out of time and time is enlarged within which the Applicant/Defendant can file his written statement of defence. Thirdly, it is for costs of the application to be provided for.

The grounds of the application are that at all material times, the Applicant/Defendant has been available and in touch with the Respondent/Plaintiff. Despite his availability, the Applicant was not aware of the proceedings in Civil Suit No. 131 of 2016 and had never been served with any court documents. Owing to the failure to apply for leave and to file a written statement of defence against the claims in the main suit, judgment was entered in favour of the Respondent/Plaintiff and execution of the decree there from has been applied for and granted. The judgment and orders/awards made therein are erroneous and contrary to the duly established law and procedure. The Applicant/Defendant has a good defence to the claims made in the main suit. The Applicant acted without undue

delay in making the application to set aside the judgment/decreed and execution sought to be enforced by the Respondent/Plaintiff. Finally the Applicant avers that it is in the interest of justice and the right to a fair hearing that the orders sought in the application are granted on the ground that the Applicant has a meritorious defence to the Respondent's claim in the main suit.

The application is supported by the affidavit of the Applicant who affirmed the grounds in the Notice of Motion and adds that on 21<sup>st</sup> September, 2016 he received a call from a lady who identified herself as a court clerk working with the execution division of the High Court of Uganda. She informed him that there was a document she wanted to bring to his attention and he instructed her to leave it at his shop. The lady did not explain the document or its urgency and he was not aware of the timelines stipulated in the document. He obtained the document from his offices on 26<sup>th</sup> September, 2016 around 2.00 PM and he later on came to learn that it was a "Notice to Show Cause" why execution should not issue against him.

He established through his lawyers whom he instructed that there was a suit against him for recovery of Uganda shillings 2,896,645,023/=. The Respondent had applied for extension of time in Miscellaneous Application No 262 of 2016 within which to serve summons in the main suit and the application was granted. The Respondent also applied for and was granted an order to effect service of summons by way of substituted service. On 30<sup>th</sup> June 2016 default judgment was entered against the Applicant for failure to file a defence.

The Applicant deposes that he was never aware about the existence of the suit and summons and had no knowledge whatsoever of any court documents in the main suit save for the notice to show cause. He did not read the relevant newspaper in which the advertisement was made.

Additionally he has a meritorious defence to the main suit which has a good chance of success if he is permitted to file a written statement of defence and have the suit heard and determined on the merits according to the draft copy of the written statement of defence attached to the affidavit. The application was brought without any delay.

The affidavit in reply is that of David Semakula Mukiibi, an advocate of the High Court practising with MMAKS advocates and Counsel for the Respondent. David Semakula deposed that the Respondent filed H.C.C.S. No.

131 of 2016 seeking to recover the decreed amount. The basis of the outstanding amount is a facility letter dated 21<sup>st</sup> September, 2012 in the sum of Uganda shillings 1,880,000,000/= granted to the Applicant. The Applicant failed to settle the sums advanced by the Respondent and it prompted the Respondent to file a summary suit to recover the sum of Uganda shillings 2,896,645,023/=. He further deposed that the Applicant was served with summons in the suit but refused to acknowledge service. Subsequently, the Respondent applied for substituted service which application was granted. However, the Applicant did not take the necessary steps as required by the rules. He only took the whole process seriously when execution proceedings were issued. Furthermore, the Applicant has no defence whatsoever against the claim because he received the money from the bank and has not paid back the money. Furthermore, no draft defence was attached to the Applicants application for consideration by the court.

In rejoinder the Applicant reiterated the grounds in the Notice of Motion and the contents of the affidavit in support of the application. He reiterated the deposition that he has never refused to acknowledge receipt of the summons because the same has never been presented to him as provided for by the law. Secondly, substituted service was not an effective mode of service as he was available and could have been served personally. He further attached a copy of the draft written statement of defence.

At the hearing of the application the Applicant was represented by Counsel Hawa Bukenya while the Respondent was represented by Counsel Stephen Zimula. The court was addressed in written submissions.

I have carefully perused the written submissions and the court record. The Respondent's suit against the Applicant was filed on 2<sup>nd</sup> March, 2016 and there was a summary suit under Order 36 rules 1 and 2 of the Civil Procedure Rules.

The affidavit of service is that of Yusuf Cocoga of Masembe, Makubuya, Adriko Karugaba & Ssekatawa Advocates (MMAKS advocates), a duly authorised court process server of the High Court. He deposed that on 2<sup>nd</sup> June, 2016 he received summons in a summary suit with a plaint in the above suit from this court issued on the same day for service upon the Defendant. On 17<sup>th</sup> June, 2016 summons were advertised in the New Vision newspaper as ordered by the court. He therefore affirmed the affidavit as

evidence that the Defendant was duly served with summons in the suit together with the plaint by way of substituted service.

The record does not have any other affidavit of service. There is no evidence that attempts were made by the Plaintiff to serve summons on the Defendant personally. It is imperative that summons is served on the Defendant personally. Order 5 rule 10 of the Civil Procedure Rules provides 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.

The Applicant has proved that he never received any summons commending him to apply for leave. The affidavit in reply to the application does not contain any facts such as reference to an affidavit of service where the Applicant refused to acknowledge service. In the premises the ground that the Applicant was never served with summons succeeds on the basis of the evidence. Where no attempt was made to serve the Defendant personally or through an agent as provided for by Order 5 rule 10 of the Civil Procedure Rules, substituted service cannot be ordered. Substituted service is ordered under Order 5 rule 18 of the Civil Procedure Rules where the court is satisfied that for any reasons the summons could not be served in the ordinary way. In any case, refusal to acknowledge service of summons does not mean that there was no service. An affidavit of service indicating what happened could be sufficient if summons together with the plaint are left with the Defendant even if he refuses to acknowledge service.

In the premises, the default judgment entered against the Applicant cannot stand and is hereby set aside on the ground that the only legitimate basis for the entry of a default judgment is effective service of summons and plaint on a Defendant and failure of the Defendant to apply for leave to defend within time.

The question left for consideration is whether the Applicant has raised any plausible defence in the application for leave to defend which merits judicial consideration.

The Respondent's contention is that the Applicant has no defence to the suit. The Respondent further contended that no draft written statement of defence was filed together with the application. This is true and the only draft written statement of defence was attached to the affidavit in rejoinder.

However, no attachments, which were pleaded in the draft written statement of defence, were attached or referred to.

As far as the application is concerned ground 5 of the grounds in the Notice of Motion is that the Applicant/Defendant has a good defence to the claim made in the main suit. The question therefore is what that good defence is. Paragraphs 2 to 11 of the affidavit in support of the application deal with the issue of whether there was service of summons on the Applicant and are only relevant to the question of whether there was effective service which issue has been dealt with the above. The second leg of the application is whether the Applicant has a plausible defence to the Plaintiff's suit and the grounds thereof in support of the application is paragraph 12 of the affidavit in support of the application where the Applicant deposed as follows:

"THAT, I have a meritorious defence to the main suit which has a good chance of succeeding if permitted to file a written statement of defence and have the suit heard and determined on its merits. A draft copy of my defence is attached as "B".

Just like the Respondent's Counsel submitted, the draft written statement of defence was not attached. On the other hand the Respondent's Counsel relied on the affidavit in reply of Counsel David Semakula Mukiibi. The basis of this suit is that the Applicant failed to settle the sums advanced by the Respondent and therefore the Respondent filed a summary suit seeking to recover the sum of Uganda shillings 2,896,645,025/=. It is deposed that according to the facility letter dated 21<sup>st</sup> September, 2012, the Applicant was advanced a sum of Uganda shillings 1,880,000,000/=. Secondly, the Applicant failed to settle the outstanding sum of Uganda shillings 2,896,645,023/=.

The question for consideration therefore is whether it is true as alleged in the plaint and the affidavit in reply that the Applicant failed to settle a sum of Uganda shillings 2,896,645,023/=. In the Applicant's affidavit in rejoinder the Applicant deposed that he was never aware of any demand notice or notice of intention to sue and was not even aware of any claim or demand for the alleged outstanding sums. Secondly, in paragraph 10 of the affidavit in rejoinder he deposes that he has a good defence to the claims made in the main suit which will be rendered nugatory if the application is not granted. He attached a copy of the draft written statement of defence.

I have carefully considered the above state of affairs and with reference to Order 36 rule 4 of the Civil Procedure Rules. An application by a Defendant served with summons for leave to appear and defend a suit shall be supported by affidavit. Specifically as far as an affidavit required to support the application is concerned it provides that the application:

"shall be supported by affidavit, which shall state whether the defence alleged goes to the whole or part only, and if so, to what part of the Applicant's claim..."

I must say that the Applicant did not include in the affidavit any averment as to whether the intended defence goes to the whole or part of the claim. It is not sufficient to aver or depose that there is a good defence to the claim in the main suit. What is that defence? The draft written statement of defence is just an averment. Last but not least the Applicant claims to have attached to the draft written statement of defence a copy of the loan account statement which shows that it continuously made deposits on his loan account with the Plaintiff and by 2010 he had cleared all his outstanding balance to zero. However, there is no bank statement attached. Secondly, the averment relates to a loan of the year 2007. The draft written statement of defence also alludes to a new facility whose documents are not in the Applicant's possession. The facilities were secured by certain properties which are listed in paragraph 4 (e) of the draft written statement of defence. Due to financial distress, the Applicant went into severe depression and was advised to have a bed rest of six months. He was advised by Mr Ravi the Head of Credit of the Respondent bank to allow the Plaintiff to sell off all his mortgaged property and have the proceeds thereof applied to the principal loan amount. Consequently, the Applicant agreed to have the properties valued and proceeded as agreed with the Plaintiff and had the properties sold. From the sale of the properties the Plaintiff obtained over and above Uganda shillings 1,000,000,000/=. Most of the properties were sold at a giveaway price contrary to the Applicant's advice to the Respondent. The Applicant was shocked to be served a notice to show cause dated 13<sup>th</sup> of September, 2016 claiming a balance of Uganda shillings 3,524,251,444/=

The only evidence attached, other than the averments in the written statement of defence, is a letter dated 20<sup>th</sup> of January 2016 from AF Mpanga and Company advocates seeking for copies of the sale agreements for the purchase of the Applicant's properties, copies of mortgage deeds executed by the Applicant securing the loan, copies of the original facility letter written

prior to the consolidation of the loan granted to the Applicant, copies of the account statement for the period January 2010 up to date,

The clear allegation that emerges is whether the Applicant owes the Respondent all the money it demanded in the main suit. In the main suit the claim is for Uganda shillings 2,896,644,023/=. In the warrant of arrest the execution is for Uganda shillings 3,524,251,444/= with Uganda shillings 627,606,421/= being interest.

The only question raised by the Applicant is whether the amount claimed by the Respondent is his entire outstanding loan amount. The loan schedule and that the summary plaint shows that the Applicant settled only Uganda shillings 339,750,854/= leaving an outstanding amount of 2,896,645,023/=. The Applicant claims to have realised about Uganda shillings 1,000,000,000/= from the sale of the mortgaged property in the draft written statement of defence which forms part of the affidavit in rejoinder. Secondly, the Applicant's lawyers wrote seeking for clarification by way of a request for the relevant documents to establish the liability of the Applicant. The Applicant was sick for a period of six months due to his financial situation according to the averments in the draft written statement of defence. This was not raised as a defence to the claim.

In the premises, I cannot proceed without further evidence as there was non-compliance with Order 36 rule 4 of the Civil Procedure Rules. In accordance with the provisions of Order 36 rule 4 of the Civil Procedure Rules, which allows the court to examine the Defendant on oath, a final decision on this application is stayed. The Respondent shall furnish the Applicant the information sought by the Applicants lawyers by the letter dated 20<sup>th</sup> January, 2016 addressed to the Respondent's lawyers namely Masembe, Makubuya, Adriko, Karugaba & Ssekatawa Advocates within one week from the date of this order. Secondly, the Applicant shall file an affidavit to clarify how much money is owed to the Respondent pursuant to the information sought having been obtained from the Respondent within a further one week. Thereafter, the court shall make the appropriate order. Final ruling on the application is accordingly stayed and will be fixed for final decision after the parties have complied with the directions of this court issued above.

Ruling signed by me for delivery by the Registrar on the 31<sup>st</sup> of March 2017

**Christopher Madrama Izama**

**Judge**

Ruling delivered in the presence of:

Steven Zimula for the Respondent

Ms Hawa Bukenya for the Applicant

Mr. Okuni Charles: Court Clerk

**Signed: Thaddeus Opesen**

**ASSISTANT REGISTRAR**

**31<sup>st</sup> March 2017**