THE REPUBLIC OF UGANDA

IN THE HIGH COUT AT KAMPALA

[COMMERCIAL DIVISION]

MISCELLENEOUS APPLICATION No. 936 OF 2016

(Arising Out Of Hct Emma No. 172 of 2016)

(Arising Out Of Cml Civil No. 190 of 2014)

NSAMO AMIR :: APPLICANT

VERSUS

EQUITY BANK (U) LTD :: RESPONDENT

BEFORE: HON. JUSTICE B. KAINAMURA

RULING

This application was brought by way of Notice of Motion under ***Order* 36 *Rule* 8, 11 *of the Civil Procedure Rules*** for orders that; the default judgment in Civil Suit No. 190 of 2014 be set aside and the applicant be granted unconditional leave to appear and defend as well as costs of this application be provided for.

The grounds of this application are contained in the affidavit of NSAMO AMIR and briefly are;

- *that the applicant herein was never served with the summons and plaint in Civil Suit No. 110 of 2015.*
- *that the applicant was not aware of the suit against him.*
- *that the applicant has a good defense to the suit in as far as the sums claimed in the loan facility by the respondent vide Civil Suit No. 190 of 2014 is disputed and that the loan facility was itself frustrated by an act beyond the applicant's control.*

- *that in the circumstances it is only fair, just and proper and in the interest of justice that this application to be granted.*

The back ground to this application is that the parties entered into a credit facility agreement dated **27thApril 2012** wherein the respondent advanced the applicant a sum of UG SHS 90,000,0000 and the applicant pledged his motor vehicle Isuzu Giga Chassis No. CYM50V2-3000447 which he was yet to acquire and Motor Vehicle Reg No. UAN 2010 as security. Motor Vehicle Reg No. UAN 2010 later got involved in an accident and the other Motor vehicle Isuzu Giga with a new Registration No. UAR 617E which was meant for commercial transport to repay the said facility got lost. The respondent filed a summary suit against the applicant Civil Suit No. 190 of 2014 for a liquidated sum wherein a default judgment for a sum of UGX 77, 468,000/= and interest at the rate of 27% p.a from the date of filing (10th March 2014) till payment in full and costs of the suit were entered against the applicant since the applicant failed to file an application for leave to appear and defend. However the applicant swears in his affidavit that he was never served with the summons and plaint in the said civil suit and was not in any way aware of the suit and only got to know of its existence when a warrant of arrest in execution was issued against him vide EMA No. 172 of 2016.

Samson Kakooza the respondent's Recoveries Manager Debt Recovery Unit deponed a reply to the Notice of Motion and briefly stated that;-

The applicant obtained a credit facility of UGX 90, 000,000/= (Ninety Million Shillings only) from the respondent for the purchase of a truck. the applicant was contractually obliged to settle the above credit in 36 equally monthly installments comprising of both principal and interest, due to failure by the applicant to make monthly remittances on their due dates, the loan facility was recalled and **HCCSNO.190 of 2014** was instituted for recovery of the entire loan balance,

interest and cost of the suit thereof. However due to the respondent's failure to effect personal service upon the applicant, court ordered for substituted service.

Court summons were published in the Daily Monitor News Paper of **18th June 2014**, at page 29. On the **21st day of August 2014** the applicant through his lawyers Setimba &Co. Advocates filed a Notice of Joint Instructions which was served upon the respondent's lawyers on the **22nd day of August 2014**.Subsequently, the applicant through his above mentioned lawyers made a payment proposal which was never honored.

That following the applicant's failure to apply for leave to appear and defend the main suit, judgment was entered in favour of the respondent on the **17th day of November 2014**. Further that this application therefore does not disclose sufficient cause upon which court can set aside judgment entered **under 0.36** of the Civil Procedure Rules since the entire decretal sum is still due and owing and has continued to attract interest on a daily basis. Further that granting this application will lead to a miscarriage of justice to the respondent under the circumstances. And that it is therefore in the interest of justice that this application be dismissed with costs.

At the trial Roger Olyang appeared for the applicant and Kirunda Henry appeared for the respondent.

Two issues were identified for resolution and these are;

Whether there was effective service of summons in a summary suit upon the applicant?

Whether the applicant has a plausible defense to warrant grant of an unconditional leave to appear and defend?

Whether there was effective service of summons in a summary suit upon the applicant?

Counsel for the applicant in his submission relied on **Order 36 Rule 11** which provides that the court set aside a decree if it is satisfied that service of summons wasn't effective or for any other good cause. That paragraph 3 of the affidavit of the applicant states that he was never aware of the suit and got to know of its existence when a warrant of arrest in execution was issued against him.

Counsel cited **Order 5 rule 18** of the CPR, which provides that substituted service can be ordered by court if it is satisfied that service can't be done in the ordinary way.

Counsel submitted that since the respondent knew the address and residence of the applicant having granted him a loan facility; it ought to have personally served the applicant in the ordinary way since his address was known.

In addition counsel cited the case of ***Proline Soccer Academy Ltd Vs Lawrence Mulindwa & 50rs, HCCS NO. 459 OF 2009,*** where court stated that matters of procedure are not normally of a fundamental nature and rules as to service of summons are matters of procedure.

Counsel for the applicant submitted that court be pleased to find that even if there was substituted service, the same didn't serve its purpose since the applicant was never aware and that he be given a chance to file his defense.

In his submission in reply, Counsel for the respondent relying on **Order 36 rule 11** CPR submitted that the applicant in the instant case has failed to prove any of the grounds for setting aside a decree.

Counsel for the respondent further submitted that the applicant was served by way of substituted service in accordance with **Order 5 rule 18** CPR after taking all reasonable steps to effect personal service upon the applicant. Further that

substituted service was ordered by court on the **16th day of June 2014** in **Misc. Application No.441 of 2014.**

Furthermore, that the applicant indeed responded to the summons by appointing two firms of lawyers on the **21st day of August 2014** to represent him, **M\s Ssetimba & Co. Advocates** together with **Mugenyi & Co. Advocates.** However, the said lawyers did not take the necessary steps by filing an application for leave to appear and defend the suit within the time prescribed by the Rules.

Further that the applicant's lawyers also proposed to amicably settle the case vide a letter dated **22nd August 2014** but no payment ever came through. Further that it is baseless and unfounded for the applicant's counsel to argue that substituted service did not attain the intended objective under the circumstances and that these facts are not disputed and/ or controverted by the applicant whatsoever.

Counsel further cited the case of ***Franco Mugumya Vs Total (U) Ltd*** **Misc. application** ***No.28/*** **13** (unreported) where court held that;

> *"Substituted service is a recognized mode of service of process in accordance with* ***Order 5 rules 18(1)*** *of the Civil Procedure Rules. It is specifically provided in* ***sub rule (2) of rule 18*** *that substituted service under an order of court shall be effectual as if it had been made on the defendant personally".*

Counsel for the respondent further cited the case of ***East Mengo Growers Cooperative Union ltd Vs The Registrar of Titles MA. 48 of 2009*** where court held that it is now clear that where certain facts are sworn in an affidavit, the burden

to deny them is on the other party and if he does not, they are presumed to have been accepted. Counsel argued that since it was on record that the applicant had previously instructed **M/S. Ssetimba & Co. Advocate** and **Mugenyi & Co. Advocates** to jointly represent him in the suit that that is sufficient evidence of effective service of summons upon the applicant.

Whether the applicant has a plausible defense to warrant grant of an unconditional leave to appear and defend?

Counsel for the applicant referred to o**rder 36 Rule 3(1)** CPR stated that a defendant has to seek for leave to appear and defend from court before appearing to defend the suit against him.

In the affidavit in support, the applicant at paragraph 6states that the facility was secured by a caveat on a Motor Vehicle and on the vehicle that was to be purchased. In paragraph 10, the applicant states that Lubega Augustine disappeared with Motor Vehicle Reg No. UAR 617 and criminal investigations have since commenced on the said disappearance. In paragraph 11 he states that another security for the said loan, Motor Vehicle Reg No. UAN 201D was involved in an accident.

Counsel for the applicant submitted that accordingly the contract was frustrated by unforeseen circumstance. ***Section* 66(1)** of the ***Contracts Act 2010*** provides that where a contract becomes impossible to perform or frustrated and where a party can't show that the other party assumed the risk of impossibility; the parties shall be discharged from their obligations under the arrangements. This principle of law is stated in ***Hodgin; Law of Contract in East Africa*** page **178** that it is an implied term in every contract that should the performance become impossible, then the parties should be relieved from their obligation.

Further that it is the applicant's submission that although there was no clause as to frustration in the credit facility and the 2nd loan facility, it should be implied as provided in the laws above and since the respondent has rejected the assumption of responsibility of the impossibility of the contract, then the applicant has a plausible defense that the contract was frustrated and all the parties should be relieved from their obligations.

Counsel for the respondent submitted that the applicant's defence to the claim cannot justify granting leave to appear and defend the main suit. Considering the fact that the applicant does not deny the fact that he obtained a sum of UGX 90, 000,000/= from the respondent which is now due and owing.

Counsel for the respondent further submitted that the applicant avers in paragraph 10 of his affidavit that on the **1st day of May 2014,** a one Lubega Augustine disappeared with Motor Reg. No.UAR 617 E which was used as security for the loan, and he further states in paragraph 11 of his affidavit that on the **8th day of May 2014,** another Motor Vehicle which was also security was involved in an accident. However according to Counsel Civil Suit **No.190 of 2014** which is the subject of this application was filed in court on **19th March 2014,** which was two months before the alleged loss of vehicles took place.

Counsel to the respondent further submitted relying on the case of ***Vincent Mukasa Vs Nile Safaris Ltd Civil Appeal No.50 of 1997***, where Court of Appeal while dealing with a similar issue held,

> *"Be that as it may, even in contract the respondent could not successfully plead frustration where like in this case, the vehicle was stolen long after it was in breach of the contract."*

In addition, Counsel for the respondent submitted that the alleged loss of the two vehicles if any, but which fact is disputed by the respondent, happened on **1st May 2014**and **8thMay 2014**respectively long after the applicant was in breach of the contract and the current suit had been filed in this court on the **19th March 2014**for recovery of the outstanding loan balances. Counsel submitted that the allegation by the applicant that the contract was frustrated is misconceived in light of the above undisputed facts and that it was important to note that the loss of the Motor Vehicles in issue happened long after the applicant was in breach of his loan obligations and the respondent had since instituted a summary suit for recovery of the outstanding loan balances. Further that the defence of frustration is therefore not available to the applicant under the circumstances.

Counsel for the respondent further submitted that according to Edwin Peel in the book, "**TREITEL LAW OF CONTRACT" 12th Ed. at pg 931, par 19-016,** the author writes as follows;-

> *"A contract may be frustrated if its subject matter, or thing or person essential for the purpose of its performance, though not ceasing to exist or suffering permanent incapacity, becomes unavailable for that purpose".*

Counsel argued that the doctrine of frustration would not apply since these vehicles were not essential to the loan repayment but were mere securities that would be resorted to by the respondent in the event of default. **Clause 3 lines 3-6** of the Facility Letter, attached to the Notice of Motion as **annexure "C"** clearly states, that;-

"The advance will be repaid directly from the borrower's savings/ current account by 36 equal monthly installments comprising of both principal and interest in the sum of ***UGX 3,820,650*** *each".*

Counsel further relied on the case of ***Denny Mott &Dickson Vs James B. Fraser & Co. [1944] AC at page 505*** where court stated,

"It is now I think settled that .... where one party claims that there has been frustration and the other party contests it, the court decides the issue and decides it ***ex post facto*** *on the actual circumstances of the case between the parties, it is the court which has to decide what is the true position".*

Counsel in conclusion prayed that the application be dismissed with costs.

Ruling

With regard to the first issue, it is clear from the record that upon failure by the respondent/plaintiff to effect personal service upon the applicant/1st defendant, court by its order dated 16th June 2014 ordered for substituted service which from the record was done through a notice published in the Daily Monitor Newspaper of 18th June 2014.

Again from the record, the respondent/plaintiff on 17th August 2014 applied for judgment to be entered against the 1st defendant/ applicant under O 36 r 3 CPR and Judgment was indeed entered against the 1st defendant/applicant on 17th November 2014.

The applicant alleges in para 3 of his affidavit in support of the Notice of Motion dated 23rd September 2016 that he was never served with the Summons and Plaint in the Civil Suit and got to know of its existence when a warrant of arrest in execution was issued against him. However

from the narrative above on the steps leading to the entering of judgment against the applicant/1st defendant it's on record that the respondent/ plaintiff upon failing to effect personal service on the applicant was granted an order for substituted service which was done through a notice prescribed in the Monitor Newspaper.

In his submission, Counsel for the respondent relied on the holding in ***Franco Mugunya*** case (supra) which is to the effect that substituted service under an order of court shall be effectual as if it had been made on the defendant personally and I see no reason advanced by the applicant to hold otherwise.

Since my holding above effectively disposes of the application I will not delve any further in considering the second issue raised by the applicant.

In the result this application is dismissed with costs.

B. Kainamura
Judge
21.06.2017