

**THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)  
MISCELLANEOUS APPLICATION NO 505 OF 2015  
(ARISING OUT OF CIVIL SUIT NO 362 OF 2015)**

**MUGOYA MAWAZI}.....APPLICANT**

**VERSUS**

**ABC CAPITAL BANK LTD}.....RESPONDENT**

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

**RULING**

The Applicant brought an application under the provisions of Order 36 rule 4 of the Civil Procedure Rules and section 98 of the Civil Procedure Act for unconditional leave to appear and defend Civil Suit Number 362 of 2015. It is also for costs of the application to be provided for.

The application however faced two preliminary setbacks. Initially default judgment had been entered against the Applicant. The application for extension of time was dismissed namely in Miscellaneous Application Number 516 of 2015. The application was dismissed on the 20<sup>th</sup> of April 2016 with costs for want of appearance. I have carefully considered the court record and it shows that on the 2<sup>nd</sup> July, 2015 judgment was entered against the defendant/Applicant pursuant to Order 36 rule 3 (2) of the Civil Procedure Rules in default of an application for leave to defend the suit. Subsequently in Miscellaneous Application Number 516 of 2015 the Applicant filed an application for extension of time within which to lodge an application for leave to appear and defend the suit. Miscellaneous Application Number 516 of 2015 came for hearing on 20<sup>th</sup> April, 2016. The Applicants Counsel was absent and the application was dismissed under Order 9 Rule 22 of the Civil Procedure Rules for want of appearance of the Applicant with costs. The application had been filed on 3<sup>rd</sup> July, 2015. Subsequently in April 2016, the Applicant filed another application to set aside the dismissal of Miscellaneous Application Number 0516 of 2015 and it was fixed for hearing. The application was opposed but later on by consent of the parties through the Counsel, the order dismissing Miscellaneous Application Number 516 of 2015 for want of appearance was set aside with costs in the cause. The court directed Counsel to file written submissions.

The record also shows that Miscellaneous Application Number 505 of 2015 for unconditional leave to appear and defend Civil Suit Number 362 of 2015 was filed on the 1<sup>st</sup> July, 2015. The

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application to set aside the dismissal of Miscellaneous Application Number 516 of 2015 was filed on 22<sup>nd</sup> April, 2016. While the application for extension of time, within which to file an application for leave to file a defence was filed on 13<sup>th</sup> October, 2015. This was after the application for leave to defend the suit had been filed on 1<sup>st</sup> July, 2015. When the Respondent's Counsel conceded to the application to set aside the dismissal of Miscellaneous Application Number 516 of 2015, the court asked the parties to file written submissions and erroneously wrote that they should file submissions for leave to defend the suit when the above stated application clearly was an application for extension of time within which to file the application for leave to defend the suit.

The Applicant was represented at the proceedings by Counsel Mpiima Jamil while the Respondent was represented by Counsel Steven Zimula. The written submissions of the Applicant's Counsel dealt with the merits of an application for leave to file a defence and not the reinstated Miscellaneous Application Number 516 of 2015. As noted above HCMA No. 516 of 2015 was an application for leave to file an application for leave to defend the suit out of time. That is the application which was reinstated by consent of Counsels. The application itself recognises the fact that the Applicant's application for leave in Miscellaneous Application Number 505 of 2015 had been filed out of time and was time barred. Strangely the Applicants Counsel never submitted on the application for leave to file the application for leave to defend out of time. On the other hand Counsel Steven Zimula in his submissions in reply submitted that the Applicant was required to apply for leave to defend Civil Suit Number 362 of 2015 within 10 days but no application for leave to defend was filed within the prescribed period. He prayed that the application ought to fail.

In rejoinder the Applicant's Counsel submitted that the Respondent does not indicate how it would be prejudiced if the court allows the application which was filed out of time. He further submitted that the Applicant conceded to the hearing of the application and abandoned defending all other applications and therefore cannot come to challenge the same grounds that it was filed out of time. It was a mere technicality that cannot be allowed to block the hearing of the party to the case.

The record does not bear out the Applicant's submissions. The Respondent conceded to the application for leave to file an application out of time. It was erroneous to submit on the main application without extension of time through validation of the earlier application which had been filed out of time. The question is whether this is the right time to consider the Applicants application for extension of time. Order 36 rule 3 (2) of the Civil Procedure Rules is mandatory. It provides that "In default of the application by the defendant within the period fixed by the summons served upon him or her, the plaintiff shall be entitled to a decree for an amount not exceeding the sum claimed in the plaint, together with interest, if any, or for the recovery of land..." In accordance with the above rules a default judgment was entered by the Registrar on 29<sup>th</sup> June, 2015 and a decree extracted. Subsequently Miscellaneous Application Number 516 of 2015 was dismissed. *Decision of Hon. Mr. Justice Christopher Madrama Izama* \*^\*~ \*&\$\$#\$ xtra+ maximum735securityx 2017 style

2015 was filed on 3<sup>rd</sup> July, 2015 for extension of time within which to lodge an application for leave to defend. Secondly, it is for the default judgment and decree to be set aside and the application for leave to appear and defend to be heard on its merits. This application was dismissed on 20<sup>th</sup> April, 2016 for want of appearance under Order 9 rule 22 of the Civil Procedure Rules. Pursuant to the dismissal the Applicant filed Miscellaneous Application Number 289 of 2016 on 22<sup>nd</sup> April 2016. The application was issued by the registrar on 27<sup>th</sup> April, 2016. Subsequently, there were protracted negotiations between the parties while this application was pending. Subsequently in March 2017 the Respondents Counsel conceded to an order to set aside the dismissal of Miscellaneous Application Number 516 of 2015.

The default judgment is still in force. Without setting it aside, the application for leave to defend cannot be heard. The court was not addressed on the merits of the application for leave to file an application for leave to defend out of time. The Respondent is within its rights to insist on the mandatory provisions of Order 36 rule 3 (2) of the Civil Procedure Rules. I do not think that the notes of the court could have caused any confusion by writing that the application for leave to file a defence would be addressed in written submissions. What was clearly set aside was dismissal of Miscellaneous Application Number 516 of 2015 and therefore the court cannot make any pronouncement in the application for leave to defend without dealing with it. The application was filed in 2015. It is now about two years since the application for reinstatement of Miscellaneous Application Number 516 of 2015 was filed. The application itself was filed in July 2015.

Judgment in default can only be set aside under Order 36 rule 11 of the Civil Procedure Rules whose wording is specific and provides as follows:

"After the decree the court may, if satisfied that the service of the summons was not effective, or for any other 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 and on such terms as the court thinks fit."

It was up to the Applicant's Counsel to argue any good cause to set aside the decree. None was argued. It was incumbent upon Counsel to argue the grounds for leave to file an application out of time. No reasons whatsoever were advanced by the Applicant's Counsel. None of the grounds in the application were argued. The Applicant's Counsel only argued that the Respondent was not prejudiced if the application for leave was granted. The question was whether service of summons was not effective. No such ground was argued. The other is whether there was any other good cause for setting aside the decree. The "any other good cause" for setting aside the decree is specified as the Applicant's lawyers mistake to file Miscellaneous Application Number 505 of 2015 out of time.

In the affidavit in support of the application by the Applicant, he deposed that there was a two days' delay to file the application and it was a mistake of his lawyers which did not cause any prejudice to the Respondent. That he should not be penalised for the mistake of his lawyers. It also deposed that he believed that he had a bona fide defence and it was unfair to permanently deprive him of a right to put forward his bona fide defence by reason of the default of his professional adviser. In paragraph 9 of the affidavit in support of the application, he deposed that he was ready to compensate the Respondent for any inconveniences and costs occasioned by the delay.

I have carefully considered the submissions and one glaring fact is that this matter is delayed from 2015 in July. It is now May 2017 close to 2 years. A summary suit is supposed to be decided expeditiously. The purpose of summary suits was considered under the UK Order 14 of the UK which is the equivalent of the Ugandan Order 36 of the Civil Procedure Rules by Parker L.J. in **Home and Overseas Insurance Co Ltd vs. Mentor Insurance Co (UK) Ltd (In Liquidation)** [1989] 3 All ER 74. At page 77 he held that a summary suit was meant:

*“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 Order 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 Order 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.”*  
(Emphasis added).

There has been no quick proceeding in the suit. To make matters worse about two years passed by without further proceedings being taken. By the time the Respondents Counsel conceded to an application to set aside the dismissal, more than one year and several months had elapsed. This cannot be a summary procedure proceeding. It has already left the purview and the purpose of Order 36 of the Civil Procedure Rules. It cannot be called a summary procedure having taken more than one year. Summary procedure leads to a default judgment unless there is an application for leave to defend the summary suit which should be disposed of expeditiously. The flipside is that if summary proceedings do not terminate within a few months or within a few weeks, then, it ceases to fulfil the purpose of Order 36 of the Civil Procedure Rules. Article 126 (2) (c) of the Constitution of the Republic of Uganda provides that justice shall not be delayed. However where justice was meant to proceed by way of summary procedure, the period of the trial should significantly be very short otherwise the purpose of getting the quick judgment would have been frustrated. In this case the common law adage that justice delayed is justice denied would apply in terms of the purpose of Order 36 for a quick judgment which has been

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frustrated and therefore denied. There would be no purpose served in determining the application for leave to defend on the merits without further action because summary judgment in the application for leave has been delayed by an unacceptable period and judgment in default had been issued in 2015. It would be absurd to further seek a default judgment on the ground that the Applicant's application was filed out of time. There is already a default judgment. For that reason alone, the default judgment issued by the registrar on the 29<sup>th</sup> of June 2015 is hereby set aside.

For the same reasons, there is no further justification to deny the Applicant opportunity to proceed in an ordinary suit. It would be extraordinary to consider these proceedings as summary proceedings.

I have accordingly considered the Applicant's defence that there is an ongoing Civil Suit Number 88 of 2014 between the Applicant and the Respondent where the Applicant is contesting the Respondent's right to recover the loan facility. The Applicant attached a copy of the plaint which was filed on 19<sup>th</sup> March, 2014. What is the outcome of the suit? This is contained in ground two of the notice of motion and paragraph 3 of the affidavit in support of the application for leave to defend.

Ordinarily, it would be sufficient for a defendant to show that there is a prior suit on the same subject matter between the same parties which had been filed in court. Section 6 of the Civil Procedure Act bars the court from hearing any suit between the same parties if there is a prior filed suit between the same parties on the same subject matter which is still pending. If it has been decided, the suit will be res judicata under section 7 of the Civil Procedure Act.

In the premises, the Applicant has leave to present the point of law by way of a written statement of defence. The Applicant has leave to file a written statement of defence for purposes of defending the summary suit to substantiate the plausible defence to a summary suit that there is a pending suit between the same parties before this court filed prior in time to the summary suit. The Applicant has unconditional leave to file the defence within 14 days from the date of this order with costs of all the applications to the Respondent.

Ruling delivered in open court on 23<sup>rd</sup> of May 2017

**Christopher Madrama Izama**

**Judge**

Ruling delivered in the presence of:

Counsel Steven Zimula for the Respondent

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Company Secretary of the Respondent Carol Kiiza in Court

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

**23<sup>rd</sup> May 2017**