THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO 941 OF 2015

(ARISING FROM CIVIL SUIT NO 514 OF 2014)

1. **KYEWUSA ROBERT}**
2. **DAMIANO KATO}.....APPLICANTS**

VERSUS

CASHFLOW SOLUTIONS LTD}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicants filed this application inter alia under the provisions of Order 36 rule 11 of the Civil Procedure Rules for the decree in the summary suit civil suit number 514 of 2014 to be set aside. Secondly, the application is for leave to be granted to defend the suit and lastly for costs of the application to be provided for.

The grounds of the application are that the Applicant is not indebted to the Respondent. Secondly, the Applicants were never served with summons in the summary suit. Thirdly, the Applicants paid the Respondent all its monies. Fourthly, it is in the interest of justice and equity that the application is allowed.

The application is supported by the affidavit of the first Applicant Mr Kyewusa Robert who deposed as follows:

He was made aware of the warrant to attach and sell his property in EMA No. 2161 of 2015 comprised in Kyaggwe Block 111 and plots 1112 through the High Court Execution Division arising out of a decree in Civil Suit No. 514 of 2014 from the commercial court division. He tried to find out what the case was against him was and discovered that it arose out of a summary suit for the payment of Uganda shillings 80,500,000 alleged to be a debt due and owing to the Respondent. He contends that he was never served with summons in the suit and has consulted the second Applicant who informed him that he has also never been served as well. He has a permanent place of abode at Seeta Ntindo Zone LC 1 in Mukono district and at his office and the Amnesty Commission Kampala which is well known to the Respondent. The first and second Applicants are not indebted to the Respondent as they paid all the monies and even overpaid

according to receipts of payment attached as annexure "X" jointly. The Respondent did not serve the summons for fears that the Applicants have a good defence to its claim and the decree should be set aside to enable them defend themselves against the debt.

The affidavit in opposition is that of Diana Kenyangi Beijuka, a director in the Respondent Company conversant with the facts. She deposed as follows:

The Respondent filed a Summary Suit No. 514 of 2014 against the Applicant in the commercial division of the High Court. For reasons that the summons could not be served personally on the Applicants, the court ordered for the summons to be served by way of substituted service and the Applicants were accordingly served through the weekly Observer Newspaper of 19th - 21st September, 2014 according annexure "A" which is a copy of the Observer Newspaper. However despite being served, no application for leave to appear and defend was ever filed leading to the default judgment against the Applicants. She further deposed that the Applicants are truly indebted to the Respondent in the sum of Uganda shillings 80,500,000/= having borrowed the sums which were duly disbursed against a loan agreement of 25th August, 2013. The principal debtor with regard to the debt in issue is the first Applicant, with the second Applicant being the guarantor thereof. Prior to the loan agreement of 25th August, 2013, the Applicants had borrowed monies from the Respondent pursuant to other loan agreements of 17th, 19th February 2013, 24th March, 2013 and 10th June, 2013 and the receipts attached by the Respondents are in respect to these loan agreements. All the receipts relate to the previous loans because the first payment date for the loan in issue was 25th September, 2013. The second Applicant acted as a guarantor and made all the repayments for parallel loans taken among others by Susan Bwete and Peter Ssemuddu, being his daughter and son respectively. All the receipts concerning attached do not relate to the matter in issue and is an unscrupulous attempt to mislead the court. This leaves the receipt number 016 and two written acknowledgements totalling to Uganda shillings 17,000,000/= which relate to a loan of 10th June, 2013.

The second Applicant issued the cheques drawn on the fifth and fourth of November 2013 of these and other outstanding loans all of which bounced leading to the opening of police files on 7th February, 2014. Thereafter the Applicant could not be traced and Civil Suit No. 514 of 2014 was commenced. In any event the Applicant's deposited land titles for plots 1112 block 241 and plot 112 and plot 877 to be returned on repayment of the loan. The titles are still in possession of the Respondent for over two years following the default of the Applicants. The Respondent has suffered immeasurable loss and distress following loss of business on the said amount remaining unpaid for over two years now.

While this application was filed on 12th November, 2015, it was fixed for hearing and proceeded on 8th May 2017. Counsel Babu Rashid appeared for the Applicants while Counsel Mukiibi David appeared for the Respondents. The court was addressed in written submissions.

Ruling

I have carefully considered the submissions of the Applicants Counsel as well as that of the Respondents Counsel. I have further perused the application and the affidavit in support thereof as well as the affidavit in reply which I have set out above.

The submissions of the Applicants Counsel are to the effect that the Applicants were not served according to the affidavit evidence. In fact, there was no service in person on the Applicants as there was a substituted service ordered by the court according to annexure "A" to the affidavit in reply showing that the summons were advertised in the Observer Newspaper dated Friday, September 19th – 21st 2014.

The Applicants Counsel relied on the mode of service on a Defendant under Order 5 rule 15 of the Civil Procedure Rules that service on the Defendant must be done in person. He further relied on the case of **Geoffrey Gatete & Angela Nakigonya vs. William Kyobe SCCA No 7 of 2005** (Mulenga JSC) on whether service by substituted service was effective service. He also relied on **Kisawuzi Henry vs. Moses Kayondo HCMA No. 45 of 2011**. He submitted that a Defendant should not be condemned unheard.

Secondly he relied on **Emiru Angose vs. Jas Projects Ltd HCMA No. 429 of 2005** also citing therein **Henry Kawalya vs. J. Kinyankwanzi [1975] HCB 372** a decision of Ssekandi Ag. J. The principle in the case is 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 a judgment which is not pronounced on the merit of the case or by consent but entered especially upon failure to follow procedural requirements of the law. He submitted that the court has wide powers and discretion under section 33 of the Judicature Act and section 98 Civil Procedure Act to set aside the ex parte judgment to avoid multiplicity of suits.

In reply the Respondents Counsel submitted that service was effected by substituted service ordered by the court according to annexure "A" to the affidavit in reply. He submitted that service by substituted service was effective but the Applicants failed to file an application for leave to appear and defend hence the decree of the court. He contended that there was no good cause for setting aside the decree under Order 36 rule 11 of the Civil Procedure Rules. In any event the court has wide discretion under Order 36 rule 11 of the Civil Procedure Rules to dismiss an application for setting aside the judgment under Order 36 even when there is sufficient cause or ineffective service of summons. In the case of Geoffrey Gatete and another versus William Kyobe (supra) Mulenga JSC held that under the said rule 11 of Order 36 of the Civil Procedure Rules, in either case, the court should grant leave only if it seems to be reasonable to do so.

Furthermore Counsel submitted that even if the court was to find that service was ineffective, it should go ahead to use its wide discretion under rule 11 to consider whether it is reasonable in the circumstances to set aside the judgment considering whether there is additional plausible defence which has been shown in the affidavit in support of the application.

The Respondent's Counsel contended that there was no sufficient cause shown by the Applicants because the suit is for the recovery of 80,500,000/= borrowed by the Applicants and secured by the title deeds of the Respondent on plot 1112 block 241 plot 112 and plot 877 block 116 which titles are retained by the Respondent up to date. Secondly, the money was borrowed pursuant to an agreement dated 25th of August 2013 annexure "C" and all the receipts relied on by the Applicants predated the loan agreement and could not have been issued with regard to the loan agreement. They were issued with regard to earlier transactions between the parties. In the premises, he prayed that the application is dismissed with costs.

In the submissions in rejoinder, the Applicants Counsel submitted that the Respondent according to the loan agreement annexed to the affidavit in reply knew the address for service of the Applicants but the process server does not state that he contacted the Applicants even on the phone numbers which are listed. The gist of the service is that substituted service was not necessary because the office of the Amnesty Commission of Uganda is a public office open to the general public and the process server could have served the Applicants there.

In rejoinder to the issue of receipts pre-dating the loan agreements and the Respondent's contention that the Respondent still holds titles of the Applicants, the Applicants Counsel submitted that these arguments pre-empt the court's decision on the application. Over 20 receipts of payment are attached to the application for setting aside and only four are talked about by the Respondent. The question is what the fate of the other receipts is. He submitted that the net result is that if the court does not investigate what was paid or outstanding on the loan, the Applicant's stand to suffer double payment and to be condemned unheard.

I have carefully considered the above submissions. Default judgment issued under Order 36 of the Civil Procedure Rules maybe be set aside under rule 11 thereof. Rule 11 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 so to do, and on such terms as the court thinks fit."

The rule is very explicit about the fact that the court may if it is satisfied that summons was not effective, set aside the decree. Secondly, it also provides that the court may set aside the decree for any other good cause. Discretionary power is vested in the court to exercise its powers under rule 11. It follows that even if the court is satisfied that service of summons was not effective, it

may or may not set aside the decree. The rationale for this is obvious and is that if the court goes ahead to consider the merits of the application as to whether leave should be granted and finds that the intended defence does not disclose a plausible or arguable case or defence for the defence, it would be futile to set aside the decree and then refuse leave to appear and defend the effect of which is to get a default decree upon refusal of leave to file a defence. It is therefore good practice and logical to further consider the application for leave itself together with that for setting aside the decree. On the same premises, even if there was no effective service and the court finds that the reasonable cause such as an arguable defence exists, the court has the discretionary power to set aside the decree and grant leave to the Defendant to file a defence against the summary suit. From the premises, the best cause of action is to consider whether there is a reasonable cause such as a plausible defence raised in the application in order to exercise the discretionary power of the court in case service by substituted service was not effective service as contended by the Applicants. It would not be sufficient merely to establish that service was not effective. It is quite necessary to further establish that there is good cause to set aside the decree to give an opportunity to the Defendants to file a defence. In each case the decree should be set aside after the court has further established that the Applicant has an arguable defence or a plausible defence to the summary suit.

I further agree with the Applicants submissions that the default decree is not on the merits. However a default decree proceeds on the premises that the Defendant had been served and by not filing a defence is deemed to have admitted the claim.

I have carefully considered the evidence adduced by the Applicants by way of receipts in light of the affidavit evidence in reply that the receipts relate to earlier transactions and not to the transaction in the summary suit.

The summary plaint is dated 25th July, 2014 and is for a claim of 80,500,000/= being an outstanding liquidated sum due to the Plaintiff plus costs of the suit. It is averred in paragraph 4 which gives the Plaintiff's cause of action that by agreement dated 25th August, 2013 the Plaintiff advanced a sum of Uganda shillings 80,500,000/= to the first Defendant. The loan was guaranteed by the second Defendant. As security for the borrowing, the first Defendant pledged a certificate of title of land comprised in Kyaggwe block 111 plot 1112 registered in the names of the first Applicant. It is also contended that the first Defendant ignored, neglected or failed to service the loan in accordance with the agreement and despite demands on both the first Defendant as principal debtor and the second Defendant as guarantor, no remittances have been made. In support of the summary suit is annexure "A" which is a loan agreement dated 25th of August 2013.

In clause 2 of the loan agreement it is provided that the borrower requested the lender to advance in a loan of Uganda shillings 80,500,000/=. In clause 5 it is provided as follows:

"The lender has, at or before execution of this agreement, advanced a loan of Uganda shillings 80,500,000/= only to the borrower, receipt of which the borrower unequivocally acknowledges by signing this agreement, and that the signed agreement is complete proof of the borrower receiving the money."

Clause 5 is followed by clause 6 which gives the period within which the loan should be paid and provides as follows:

"The loan aforesaid of Uganda shillings 80,500,000/= only shall be paid in full on September 25, 2013."

Both Applicants rely on annexure "X" which is a batch of receipts ranging from the last quarter of the year 2012 and parts of 2013. There are specific receipts and acknowledgement of payment issued after 25th August, 2013. They are as follows:

- Receipt number 015 dated 19th September, 2013 for Uganda shillings 1,000,000/=.
- Receipt number 016 dated 25th October, 2013 for Uganda shillings 4,000,000/=.
- Acknowledgement by Matsanga Rachel (on behalf of the Respondent) dated 19th November, 2013 for Uganda shillings 5,000,000/=.
- Acknowledgement by Mr Mbazira (on behalf of the Respondent) for Uganda shillings 8,000,000/= dated 5th December, 2013

I have further noted that the suit was filed on 25th July, 2014 claiming the entire amount of Uganda shillings 80,500,000/= and is based on the agreement of 25th August, 2013. The Respondent attached several other agreements which predated the agreement of 25th August 2013, between the parties wherein the Applicant borrowed monies and kept on paying. In paragraph 3 of the grounds in the Notice of Motion it is contended that the Applicants paid the Respondent all its monies. The assumption is that the Applicant had evidence that they had paid the Respondent all its monies. This evidence is attached to the affidavit of Mr Kyewusa Robert filed in support of the Notice of Motion and particularly paragraph 6. Paragraph 6 of the affidavit reads as follows:

"THAT I and the second Applicant are not indebted to the Respondent as we paid it all its monies and even overpaid it. (*Receipts of payment are hereto attached as annexure "X" jointly*).

In paragraph 7 he contended that the Respondent did not serve them with summons for fear that they had a good defence to the claim and the decree should be set aside to enable them to defend themselves against the debt. A copy of the proposed written statement of defence was attached as annexure "W". The second Applicant repeats the same averments in his affidavit in support of the application. I have further considered the proposed defence and in paragraph 4 (a) it is indicated that the Defendants did not know of or are not aware of the loan or loan agreement of

Uganda shillings 80,500,000/= attributed to them in the year 2013. Furthermore, it is indicated that the Defendants shall contend that the loan agreement is a forgery and strict proof of its authenticity shall be demanded from the Plaintiff. In paragraph C it is contended that the Defendants contend that the loans he took out with the Plaintiffs were two in the month of September 2012 on 17th and 25th totalling to Uganda shillings 89,000,000/= only. They further contended that they paid off the loan and did pay to the Plaintiff Uganda shillings 218,300,000/=. In paragraph 4 (h) of the proposed written statement of defence it is contended that the police investigated the case and they intend to produce copies of the complaint and file.

The WSD appears to be at variance with paragraph 3 of the Notice of Motion. In paragraph 3 of the affidavit in support of the application the first Applicant averred that there was an alleged debt due and owing of Uganda shillings 80,500,000/=. So paragraph 6 of the first Applicant's affidavit when put in context does not admit the agreement of 25th August, 2013. There is no express admission that the parties executed an agreement dated 25th August, 2013. In other words the agreement of 25th of August 2013 is contested.

The wording of the agreement which is part of the summary plaint and particularly paragraphs 5 and 6 thereof leave a lot to be desired. The loan was according to the agreement acknowledged by the Applicants on 25th of August 2013. They undertook to pay it in full on September 25th, 2013 exactly one month later.

Considering the rate of payments in the receipts, there is a reasonable doubt as to whether this was a reasonable term. I agree with the Respondents Counsel that the receipts attached by the Applicants relates to earlier transactions. In the proposed written statement of defence, the Applicants do not deny these earlier transactions but denied the loan of 25th August, 2013.

In the premises, the Applicant has established a reasonable ground for setting aside the decree issued in default of a defence and also raised a plausible defence to the effect that it is not aware of the loan signed on 25th August 2013 and alleges that the matter was reported to the police.

In the premises, the following orders shall issue namely:

1. The default judgment and decree dated 30th October, 2014 is hereby set aside.

2. Any execution of the decree is hereby set aside.

3. The Applicants have unconditional leave to file a defence to the action as proposed in the written statement of defence within 14 days from the date of this order.

4. The costs of this application shall abide the outcome of the main suit.

Ruling delivered in open Court on 30th June, 2017

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Babu Rashid for the Applicants

Applicants are not present

Applicants Counsel is absent

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

Christopher Madrama Izama

Judge

30th June, 2017