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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
[COMMERCIAL DIVISION]
MISC. APPLICATION No.246 OF 2017
(Arising Out of No.623 of 2015)

10 **MULIRA NABUNYA SARAH ::: APPLICANT**

VERSUS

CASH FLOW SOLUTIONS LIMITED ::: RESPONENT

BEFORE: HON. MR. JUSTICE B. KAINAMURA

RULING

15 The applicant brought this application seeking orders that an exparte judgment and decree vide Civil Suit No. 263 of 2016 be set aside, the applicant be granted leave to appear file her defence and the suit be fixed for hearing. The application is based on the following grounds:

1. That the applicant has never been served with summons nor mediation summaries or any documents by the respondents agents.
- 20 2. That the applicant heard of the suit and decree upon her arrest and detention in a civil prison.
3. That the applicant’s main application for stay of execution has a high chance of success
4. That there is likely to be substantial delay to hear the main application for stay in the High Court Execution Division.
- 25 5. That the application is not intended to delay justice
6. That it is just and equitable that the application be granted as prayed.

The application was supported by the affidavit of the applicant who deponed;

1. That she was arrested by court bailiff from her home at Mengo Bakuli Mulira Zone on the 10th day of March 2017 and committed to civil prison in Luzira on that day;
2. That she has never been served with court papers prior to the arrest and only learned of the suit upon her arrest;
- 5 3. That she is aware that the respondent's agents knew her home address very well in Mengo for effective service of court documents.
4. That she believes that if her defence is allowed to be filed in court, and her main application for stay of execution in the High Court Execution Division both have merit and a high chance of success.
- 10 5. That the application is not intended to delay justice.
6. And that it is just and equitable that the application be granted.

In reply, Mrs. Matsanga Racheal, the Director of the respondents company deponed that the applicant was served through substituted means having obtained an order from the Honourable Court on the 29th day of June 2016 as service in the ordinary manner had failed.

15 The parties agreed on the following issues;

1. Whether the applicant was effectively served with summons in the summary suit in the High Court Civil Suit No.623 of 2015
2. Whether the applicant has a good cause of action for setting aside the exparte judgment in High Court Civil Suit No 623 of 2015
- 20 3. What remedies are available to the parties

Issue One;

Counsel for the applicant averred that the applicant was not effectively served with sermons. He relied on the case of **Geoffrey Gatete & Anor Vs William Kyobe, Supreme Court Civil Appeal No. 07 of 2005**. Where court held that;

5 *“Although the service on the agent or the substituted service would be deemed good service on the defendant entitling the plaintiff to a decree under **Order 36 rule 3 of the Civil Procedure Rules**, if it shown that the service did not lead to the defendant becoming aware of summons, the service is not effective within the meaning of **Order 36 Rule 11**...the expression service that is supposed to be good service is so broad that it includes service that might not produce the intended result which therefore is not*
10 *effective.”*

Counsel for the applicant stated that the applicant has a permanent place of residence that was well known to the respondents and yet they served her through substituted service in Daily Monitor dated 1st July 2016 at page 51. Counsel submitted that the service did not serve the intended purpose of making the applicant herein aware of the existence of High Court Civil Suit
15 No.623 of 2015.

Counsel further relied on the case of **MAHAD SSENTONGO Vs ASIA RIZO NABISERE MISCELLANEOUS APPLICATION No. 843 OF 2013** where it was held that;

“In the circumstances, it is the finding of this court that the purported service on the applicant was irregular and therefore not effective because it did not serve the desired
20 *intention of making him aware of the suit so that he could take the necessary action to defend himself”.*

Counsel for the respondents argued that under **O.5 Rule 18 of Civil Procedure Rules SI 71-1** provides that where court is satisfied that service cannot be effected in the ordinary way, the court may order service to be effected by substituted means.

Counsel argued that in the instant case, court deemed it prudent to grant leave to file substituted
5 service premised on the fact that the applicant upon obtaining loan from the respondent became
elusive as the applicant's known telephone which she gave to the plaintiff was off. The applicant
never disclosed to the respondent her true place of residence and the only way the respondents
could serve the applicant was to reach the applicants address where the land pledged for security
is located and as that did not work out, the next option was to advertise the summons in Daily
10 Monitor which is a paper of wide circulation. Counsel thus averred that the applicant was dully
served with summons.

I have carefully considered the parties submissions and evidence on the file.

Under **Order 9 r 27 of the CPR**, court can set aside an exparte judgment only when it's
convinced by the applicant that there was sufficient ground for not filing the defence in time or
15 that service was not affected upon him or her.

In the instant case, the applicant argues that she were not effectively served by the respondents.
The respondent argued on the other hand that service by substituted service was effective.

Under **O.5 r.18 (2)**;

“Substituted service shall be as effectual as if it had been done on defendant personally.”

20 In **UTC Vs Katongole & Anor. (1975) HCB 336** it was held that;

“Proper effort must be made to effect personal service, but if it is not possible service may be on an agent.”

The underlined principle then is that proper effort must have been made to effect personal service before resorting to substituted service.

5 The plaintiff’s bill of costs Item 2 states that Counsel for the plaintiff/ respondent drafted a demand notice and item 6 states that the clerk served a copy of the demand notice to the defendant who is the Applicant in this case.

In the affidavit of service sworn on the 26th October 2015 by Achilles Kazibwe a Law Clerk of Counsel for the respondents Law Firm he stated in paragraph 3 that the whereabouts and contacts
10 of the respondents were unknown to him. Yet he goes ahead in paragraph 4 and states that he tried to reach and the serve the defendant at Mengo Block 17, plot 1 Kabumba but in vain. Further in para 6 that he tried calling the respondents known telephone number 0702761516 but it was permanently switched off. These are all contradictions in the affidavit of service because if he stated that he did not know the address of the applicant and that her phone was switched off
15 yet he goes ahead and says he tried to serve her at Block 17 plot 1 Kabumba. This is a clear contradiction.

Further, the clerk does not state in his affidavit of service what exactly he found at Block 17, plot 1 Kabumba that made his service to the respondent impossible.

In her affidavit in rejoinder, the applicant deponed that she has a permanent place of abode at
20 Mulira Village, Namirembe, Bakuli Parish, Rubaga Divison, Kampala where she has been living for over 40 years.

Further that the respondents employee and agent Daniel Mbazira while carrying out the purported loan transaction and prior to the filling the suit had visited the applicant's place of abode with the applicant's agents and is well aware of her place of abode.

From the above circumstances, I fail to see any efforts undertaken by the respondents to effect service of sermons on the applicant in the ordinary way, the respondents have not proved that the applicant was not at her place of residence or why they failed to serve her at her place of residence.

In the circumstances, it cannot be said that the service on the respondent served its purpose of making the applicant aware of the suit so as to make her take the necessary steps to defend herself.

Issue Two:

The applicant averred that she has a good cause why the decree in High Court Civil Suit No. 623 of 2015 should be set aside. Counsel for the applicant stated that the applicant is illiterate and was led to sign a loan agreement of UGX 72,000,000/= when in fact she received UGX 5,000,000/= as a commission for allowing her title to be used as a security for the loan. The applicant relies on the Protection of the Illiterates Persons Act Cap 78. Counsel for the respondents stated that the applicant is not an Illiterate person and cannot rely on the protection of the Illiterates Protection Act, that she dully understood all the contents of the said loan agreement before signing.

In the case of *Abubakar Kato Vs Tomson Muhwezi [1992-1993] HCB 212* it was held that;

“Under **O. 33 rule 4** (the current Order 36 rule 4) a defendant who seeks leave to appear and defend is required to show by affidavit or otherwise that there is a bonafide triable issue of fact or law. The applicant is not bound at this stage to show that he has a good defence on the merits of the case, but ought to satisfy court that there is a prima facie triable issue in dispute which the court ought to determine between the parties.”

I have read the applicants affidavit in rejoinder where she deponed that Mbazira Daniel an employee and agent of the respondents with the aid of a one Bakaluba came to her home while the transaction, the subject of the suit, was being executed and before the suit was filed. That the said Mbazira Daniel made her sign a loan agreement whose contents were in English and she did not understand at the time of signing.

The applicant further deponed that she has never received the alleged UGX 72,000,000/= from the respondent as alleged and there is no evidence acknowledging receipt of the purported UGX 72, 000,000/=.

That the respondent instead gave the money to a one Mrs. Teopista Mubiru using her title Kyaggwe Block 17, plot 1 Land at Kabumba as security. That she was only given UGX 5,000,000/= as commission for having given her title to help Teopista Mubiru borrow the money from the respondent.

It appears to me that the applicant raises triable issues, the fact that she says that she does not understand English and that she did not receive the alleged UGX 72,000,000/= raises a prima facie defence and I find that the matter should go to trial for adjudication.

Under the circumstances, the default judgment entered in HCCS No. 623 of 2015 is set aside and leave is granted to the applicant to appear and defend the suit. The applicant shall file and a WSD within 10 days from the date of this ruling.

Costs shall be in the cause.

5 I so order

B. Kainamura
Judge
11.07.2017