

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

(Arising From Hccs No.371 Of 2016)

VERSU

BEFORE: HON. MR. JUSTICE B. KAINAMURA

RULING

a). Court set aside a default judgment and decree that was entered against the applicant herein on the 7th day of September 2016.

c). Costs of this application be accordingly provided for.

a) The default judgement entered on the 7th of September 2016 was based on the fact that the applicant did not file for leave to defend and was erroneously entered.

c) It is in the interest of justice that this application be allowed and the matter proceeds inter parties.

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371 of 2016 seeking for recovery of a liquidated sum of USD 77,639 arising from the applicant's default on a loan agreement executed between the respondent and the applicant. The respondent obtained summons in a summary suit and purportedly served them on the applicant. However the applicant did not file an application for leave to appear and defend and thereby judgment was entered in favor of the respondent.

The applicant contends he filed Misc. Appl No. 597 of 2016 on the 18th of July 2016 26 days after receipt of a second summons of 22nd of June 2016. The application was fixed for hearing on the 1st of February 2017. On the 1st of February 2017, the applicant did not turn up in court and the application was equally dismissed. The applicant then filed the current Misc. Appl No. 98 of 2017 on the 8th of February 2017 seeking to set aside the default judgment, and an order for rehearing Misc. Appl No. 597 of 2016. The respondent filed an affidavit opposing the application contending that the applicants were neglected in pursuing the case.

Counsel for the applicant submitted that the default judgment was erroneously entered on the 7th September 2016 as it was based on the fact that the applicant did not apply for leave to defend and yet the applicant was never served with court documents.

That the affidavits of service dated 1st June 2016 and that of 21st June 2016 are defective and full of lies and falsehood because court had directed the summons to be served afresh personally on the applicant which was never done.

Further still, that by the time the default judgment was entered on 7th September 2016, there was an application for leave to appear and defend vide Misc. Appl No. 597 of 2016 which had been filed on court record on the 18th July 2016 yet the application for judgment stated that there was none.

Counsel cited **Article 28 (1) of the Constitution** and argued that it guarantees every person the right to a fair hearing in determination of civil rights and obligations. That the right to be heard in defence of one's right and protection against deprivation of property is a fundamental human right.

Counsel further cited *Kifamba Musoke Vs Kiwalabye Steven Misc. Appl No. 576 of 2013*, arising out of **HCCS. No. 458 of 2012** where in its ruling on page 7 court held *inter alia* that it

was the view of court that protection of the fundamental human rights has supremacy over all other consideration and the ex parte judgment in Civil Suit No. 458 of 2012 was set aside.

In addition counsel cited the case of *M.B. Automobiles Vs Kampala Bus Service [1966] E.A* where court was satisfied that the summons were never served on Shaban, the Manager and the proprietor of the defendant firm. The ex parte judgment and decree was set aside accordingly. Counsel argued that it is not indicated anywhere in the affidavit of service that the applicant herein has ever received personally court papers and non-service renders the entire procedures *null and void*.

In reply Counsel for the respondent gave the chronology of the events surrounding the suit. He stated that on the 1st of June 2016, the respondent herein filed Civil Suit No. 371 of 2016 seeking for recovery of a liquidated sum of USD 77,639 arising from the applicant's default of a loan agreement executed between the respondent and the applicant. The respondent obtained summons in a summary suit and served it on the applicant who failed to file an application for leave to appear and defend.

Thereafter, on the 7th day of September 2016, judgment was entered in favour of the respondent. The applicant had filed Misc. Appl No. 597 of 2016 on the 18th of July 2016 but failed to turn up for hearing in court and that application was equally dismissed. Further still, the applicant filed the current miscellaneous application on the 8th of February 2017 seeking to set aside the default judgment, and orders for rehearing Misc. Appl No. 597 of 2016.

Counsel for the respondent submitted that **Order 36 rule 11** of the **CPR** provides that court can only set aside a decree if satisfied that service of the summons was not effective or for any good cause. In this case, Counsel contended that service of summons was duly effected on the applicant as provided in **Order 5 rule 13** of the **CPR**. That rule provides that where in any suit the defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on an adult member of the family of the defendant who is residing with him or her.

Furthermore, Counsel for the respondent relying on **Order 5 rule 14** of the **CPR** said the service of summons was made to the wife of the applicant who refused to endorse them.

In addition Counsel argued that the applicant did not apply for extension of time within which to file his application for leave to appear and defend and cited the case of ***Pinnacle Projects Ltd Vs Business in Motion HCMA 362 of 2010*** where it was held that where an application was said to have been filed out of time, the decree that the applicant sought to set aside was properly passed since there was no pending competent application for leave to appear and defend the summary suit.

In conclusion, Counsel for the respondent prayed that Court finds that there was effective service of summons and that there is no just cause for setting aside the default judgment entered on the 7th September 2016.

- 10 Further that the applicant ought to have applied for extension of time within which to file his application for leave to appear and defend.

Resolution

I have gone through the arguments and pleadings by both applicant and respondent. It is my opinion that service was effective.

- 15 I note that on the 29th June 2017 as per affidavit of service of a one Namboozee Leaticia a court clerk and process server, the applicants wife a one Deborah Kissa who was identified by the L.C.1 official Kibuka James for Kawooto “B” Kitende Parish was approached by the process serve in company of the L.C.1 official and upon explaining the purpose of the visit the wife informed them that the applicant was in the house resting and that the summons would be taken to the family lawyer. That in fact the L.C.1 official entered the house and talked to the applicant who informed the official that the matter would be taken up by the family lawyer. The question arising is, was this effective service?

Counsel for the respondent cited **O 5 r 13 of CPR** and submitted that from the circumstances set out above, service was indeed effective on the applicant.

- 25 **O. 5 r 13 CPR** provides;-

“Where in any suit the defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or an adult member of the family of the defendant who is residing with him or her”.

Further Counsel argued that in as far as the applicant or his wife refused to sign the summons,
5 court may and should declare the summons dully served.

O.5 rule 14 of CPR provides;-

*“Where a duplicate of the summons is duly delivered it tendered to the defendant personally or to an agent or other person on his or her behalf, the defence or the agent or other person shall be required to enclose an acknowledgment of service on the original
10 summon except that **if the court is satisfied that the defendant or his or her agent or other person on his or her behalf has refused so to endorse, the court may declare the summons to have been duly served”.** (emphasis mine)*

It is evident that from the affidavit of service of Namboze Leaticia that both the applicant/defendant and his wife refused to endorse on the sermons the applicant insisting and
15 communicating through his wife and the L.C.1 official that the matter will be handled by his lawyer.

What needs to be determined in this case is whether the service notwithstanding the refusal by the applicant/defendant to endorse it as required by law had the desired effect so as to declare the summons dully served under **O. 5 r 14 of CPR**.

20 I am persuaded that taking into consideration the circumstances set out in Nambozoze Leaticia’s affidavit of 29th June 2016 the defendant was duly served with summons and having failed to follow through as required by law the default judgment and decree issued by court on 7th September 2016 are in order and there is no just cause for setting aside the said judgment.

In the result the application is dismissed with costs.

25 I so order.

B. Kainamura

Judge

24.07.2018

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