

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]

MISC. APP No. 334 OF 419

(Arising From Civil Suit No.419 of 2014)

1. RM MARKET LINKS (U) LTD

2. RWEHABURA BRIAN

3. MUGISHA ALLAN

4. HERBERT MUCUNGUZI ::::::::::::::::::::::::::::::: APPLICANTS / DEFENDANTS

VERSUS

UGAFIN (U) LTD ::::::::::::::::::::::::::::::::::::::: RESPONDENT/PLAINTIFF

BEFORE: HON. MR. JUSTICE B. KAINAMURA

RULING

The applicant brought this application by Notice of Motion under Section 9 of the CPA, Order 9 rule 12, Order 36 rule 4 & 11, Order 51 rule 6, Order 52 rule 1, 2 and 3 of the CPR. the applicant seeks orders that; (a) the default judgment granted against the 2nd applicant on 17th of March 2015 and decree in Civil Suit No. 419 of 2014 be set aside, (b) the 2nd applicant be granted unconditional leave to appear and defend Civil Suit No. 419 of 2014, (c) the costs of this application be provided for.

The application was supported by the affidavit of Rwehabura Brian the 2nd applicant.

The respondent filed an affidavit to oppose the application deponed by Mr. Muheebwa Henry Owanzoire, the Chief Executive Officer of the respondent.

The brief grounds as set out in the Notice of Motion are that the respondent served the 2nd applicant with expired summons in the month of February 2015, the 2nd applicant after being served with expired summons filed for leave to appear and defend, judgment was entered based on a false affidavit, the 2nd applicant denies being indebted to the respondent in the sum alleged, the respondent's suit is not properly brought before court and is premature and an abuse of court

process, the respondent was not a licensed Money Lender at the time, the 2nd applicant has a good defence to Civil Suit No. 419 of 2014 and it is in the interest of justice that this application is granted.

The respondent filed an affidavit in reply in which Mr. Muheebwa Henry Owanzoire stated that; 5 the summons and pleadings were served unto the defendants and in particular the 2nd applicant on 5th November 2014 and was served as per the affidavit of service of John Owor filed on 17.03.2015, after the service of summons the 2nd, 3rd, and 4th defendants approached him for an out of court settlement and were engaged in series of meetings until in March, the 3rd and 4th defendants did not apply to set aside the judgment save for the 2nd defendant who made an 10 application to defeat justice, the 2nd applicant guaranteed the UGX 65,000,000/= loan in his capacity and being a Director of the 1st applicant/defendant, at the time the loans were advanced the respondent was legally registered Money Lender and as such there is no illegality as claimed by the 2nd applicant, the suit was properly before court and the sums are due and payable by the defendants.

15 In rejoinder, Mr. Rwehabura Brian deposed that; the affidavit in reply is bad in law and incompetent, the service of summons to him were defective and so was the affidavit of service by one John Owor, he has not engaged in meetings with the respondent over the matter, he did not know the 3rd and 4th defendants' intentions to settle the matter in the head suit, the loan of 12th March 2012 was advanced to the 1st applicant and not himself as the deponent falsely alleges and 20 the Court irregularly entered judgment against him and the same ought to be vacated in order to meet the ends of justice.

2nd Applicant's Submissions

Counsel for the applicant submitted that under **Order 36 rule 11 of the CPR** court may after entering a decree set aside the decree if satisfied that service of summons was not effective, or 25 for any other good cause and may give leave to the defendant to appear and defend the suit. Counsel submitted on distinctive elements as follows;

Non-effective summons

Counsel submitted that the summons were served way after 21 days contrary to the provisions of **Order 5 rule 1 of the CPR**. Counsel thus argued that the default judgment was entered on the 30 basis of expired summons was erroneous and ought to be set aside. Counsel added that there is

no evidence of service that can be seen even on the summons themselves but the Court went ahead to issue a default judgment against the 2nd applicant and the rest jointly and severally.

Good Cause

5 Counsel submitted that the suit has grave irregularities and illegalities such as; a harsh and unconscionable interest of 2.5% per month which transforms to 30% per annum and thus contravenes **Section 12 of the Money Lenders' Act**. Counsel also stated that the respondent has no cause of action whatsoever against the 2nd applicant because the 2nd applicant only acted on behalf of the 1st applicant which was borrowing monies.

No Guarantee

10 Counsel argued that the 2nd applicant did not guarantee the 1st applicant's loans and they did not show what loans the 2nd applicant and his fellow Directors were allegedly guaranteeing to pay.

1st Applicant is not indebted to that tune

15 Counsel submitted that the 2nd applicant attached cheques but the respondent does not make mention of the said cheque values in reduction of the alleged debt. Counsel argued that this can therefore be sorted out as a matter of evidence at the hearing between both parties.

The Application Raises Triable Issues

20 Counsel argued that the 2nd applicant has a plausible defence to the head suit with a high likelihood of success. Counsel relied on **Order 36 rule 3 & 4 of the CPR**, and the case of **Maluku Interglobal Trade Agency Vs Bank of Uganda [1985] HCB 63** and submitted that the defendant is not bound to show a good defence on the merits but should satisfy court that there was an issue or question in dispute which ought to be tried. Counsel submitted that there are a number of triable issues which cannot be decided upon in a summary manner but at a full trial. Counsel invited court to follow its earlier decision of **Zebra Telecom & 2 others Vs Stanbic Bank (U) Ltd Misc App. No.184/2014** and invited the court to grant the application with costs.

25 Respondent's Submissions

Counsel for the respondent submitted that the default judgment was entered after the court ordered summons to be served on the 2nd, 3rd and 4th defendants and fresh summons were issued on 4th November 2014 and the 2nd and 4th defendants were served on 5th November 2014. Counsel

added that the 2nd defendant waited for the prescribed time to expire and then filed for leave. Counsel argued that there is no sufficient reason advanced for setting aside of the default judgment as summons were properly served unto the applicant and no other sufficient cause advanced to the satisfaction of the Court. Counsel submitted that regarding good cause, there are
5 no illegalities or irregularities as alleged. Counsel added that the interest the 2.5% is a contractual obligation of the applicant and the other defendants and the interest cannot be a cause for the applicant's refusal to file for leave in time. Counsel submitted that the applicant guaranteed the loan of UGX 65,000,000/=. Counsel additionally stated that the applicant is gambling with facts and did not apply to set aside the judgment but only waited till taxation was
10 concluded. Counsel in conclusion prayed that if Court is to grant the applicant leave let it be conditional by him depositing the sum of UGX 133,700,000/= in court within 10 days. Counsel submitted that it is the respondent's prayer that this application be dismissed with costs.

Decision of Court

I have read all the pertinent documents relating to this application. A default judgment was
15 entered against the defendants jointly and severally for an outstanding loan balance of UGX 133,405,250/= owed to the respondent. The parties attempted an out of court settlement which failed. The respondent/plaintiff went ahead with the summary suit and a default judgment was entered for UGX 133,405,250/=. A decree was extracted as well and the matter taxed. The 2nd applicant then filed this application to have the judgment and decree under **Order 36 rule 11 of**
20 **the CPR** set aside on grounds that there is sufficient cause and also be granted leave to appear and defend the suit seeing that the matter has triable issues.

Order 36 rule 11 of the CPR provides that;

*“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
25 if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and defend the suit, if it seems reasonable or necessary to the court so to do, and on such terms as the court thinks fit.”*

According the duty of the applicant is to satisfy the court that service was not effective, nor show any other good cause in order to have the decree set aside and grant leave to appear and defend
30 the suit.

I will first address the ground of service of summons.

Counsel for the applicant submitted that the service of summons was not effective as they were served after they had expired. The evidence on record shows that the defendants were served twice. The first date of service was **24th June 2014** and an affidavit of service deposed by
5 Kijjambu Ramathan. The respondent then applied for fresh summons in a letter dated **3.11.2014** which was addressed to the Registrar to issue fresh summons which was granted on **4.11.2014**. The second service was done by John Owor who deposed that the service was done on the 5th day of November 2014 on the defendants including the 2nd applicant who was present at the Company's (1st defendant's) premises.

10 This therefore proves that there was effective service done on the applicants including the 2nd defendant who now seeks leave to appear and defend the suit. In the case of **David Ssesanga Vs Greenland Bank Ltd (In liquidation) HCMA No.406 of 2006** it was held that effective service must produce the desired effect, which is to make the defendant aware of the suit.

From the facts before court it is clear that the 2nd applicant was effectively served.

15 I will address the ground of good cause.

In the case of **Pinnacle Projects Limited Vs Business in Motion HCMA No.362 of 2010** court held that;

20 *“The phrase “good cause” is not defined under the rules but is defined in Black’s Law Dictionary, 7th Edition as “a legally sufficient reason”.....However the phrase “good cause” has been explained in a number of authorities. In the case of Mugo Vs Wanjiri [1970] EA 481 at pg 483it was held that sufficient reason must relate to the inability or failure to take the particular step in time.”*

Counsel for the 2nd applicant submitted that the 2nd applicant denied being indebted to the respondent to that tune and also contended that the interest charged was unconscionable. With all
25 due respect to his submissions, these in my opinion do not constitute a valid reason that could have stopped the 2nd defendant from acting in time to apply for leave to appear and defend the suit. Never the less, on court record is a letter by the 2nd applicant dated February 24, 2014 in which the 2nd applicant wrote;

“Re: Indebtedness of UGX 94,127,700 and UGX 39,278,250

This is to inform you that we incurred setbacks that derailed the operations of our milk business, hence rendering us incapable to meet our outstanding obligations.”

This does not appear like a denial of indebtedness but an outright admission.

- 5 In the case of ***Jubilee Insurance Co. Ltd Vs Fifi Transporters Ltd HCMA No. 0211 of 2008*** court held that;

10 *“In an application for leave to defend a suit under summary procedure the law is that the applicant must show that there is a bonafide triable issue of fact or law. Any defence raised should be stated with sufficient particulars as to appear genuine and not vague statements denying liability.”*

Accordingly, it is my considered opinion that the 2nd applicant has failed to prove to the satisfaction of court that the service was not effective, nor show any other good cause why the decree should be set aside and for him to be granted leave to appear and defend the suit.

In the result the application is hereby dismissed with costs.

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B. Kainamura
Judge
26.06.2018