

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
MISC. APPLICATION NO. 465 OF 2017
(ARISING FROM HCMA NO. 1109 OF 2016)
(ARISING FROM CIVIL SUIT NO. 824 OF 2016)**

**ROBERT BYARUHANGA:.....APPLICANT
VERSUS
HERBERT A. KANYEIHAMBA:.....RESPONDENT**

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

Robert Byaruhanga the Applicant herein filed this Application against Herbert A. Kanyeihamba herein referred to as the Respondent seeking orders that;

- a) the default judgment ,decree and or orders of court against the Applicant arising from HCCS. No. 824 of 2016 be set aside
- b) the execution of the default judgment, decree and or orders against the Applicant/ Defendant be stayed and or set aside and;
- c) the time within which the Applicant ought to have filed the Application for leave to appear and defend and or grant leave to file the same out of time be enlarged.

The Application as supported by the affidavits of the Applicant as well as his advocate Mark Bara Shyaka practicing with M/s Maxim Advocates is premised on a number of grounds. Firstly, that the Applicant has a plausible defence to the suit and intends to appear and defend the aforesaid suit. That on or about the 28th October 2016, a copy of summons in a specially endorsed Plaint together with the Summary plaint in Civil Suit No. 824 of 2016; Herbert .A. Kanyeihamba vs Robert Byaruhanga were served on the Applicant/Defendant requiring the Applicant to file an application for leave to appear and defend the suit within 10 days.

Thirdly, upon receipt of the court process, the Applicant immediately contacted his lawyer Mr Bara Mark Shyaka of M/s Maxim Advocates, who being a Friday advised that they meet on Monday the 31st October 2016, since he was already out of town.

Fourthly, the Applicant duly instructed the said Mark Bara Shyaka of M/s Maxim Advocates on 31st October 2016 and left him with the copy of the summons and plaint in Civil Suit No. 824/2016 for further management. That at all material time the Applicant was under the belief that the matter was being handled and indeed on the 9th of November 2016; Miscellaneous Application No. 1109 of 2016 for leave to appear and defend was filed before court.

Fifthly, the Applicant had not indicated the date he had received the summons in a specially endorsed plaint, Mr Mark Bara Shyaka was under the belief that service of the same had been effected on the 31st October 2016, the same day the plaint was left with him.

Lastly, the Application for leave to appear and defend was filed two days past the 10 days within which the Application ought to have been filed thus a default judgment was entered against the Applicant on the 25th November 2016. That the learned Registrar fixed Misc. Application No. 1109/2016 for hearing however on 1st February 2017 when the matter was called out for hearing neither the Applicant nor his advocate were in court. Court proceeded to dismiss the same for want of prosecution.

The background of this Application as discerned from the pleadings is that the Respondent filed Civil Suit No. 824 of 2016 against the Applicant for recovery of UGX. 239,000,000/= for breach of an agreement, interest thereon, general damages and costs of the suit.

The Respondent's claim originates from business transaction between the parties wherein the Applicant borrowed a sum of UGX. 158,000,000/= from the Respondent on 5th April 2016. This sum was to facilitate the Applicant's business and the parties reduced it into a memorandum of understanding. The UGX. 158,000,000/= that was loaned to the Applicant was collectively syndicated from other individuals namely; Arthur Tukahirwa, Jackie Kesiime Muhangi and Diana Nkunda Origariraho with the active acknowledge of the Applicant. The Respondent also proceeded to execute memoranda of understanding with each of the parties herein.

The syndicated loan was pooled from the persons stated herein above and handed over to the Respondent who formally executed a loan agreement with the Applicant. As early as 5th May

2016, the Applicant started to face challenges in servicing the loan. On 5th May 2016 he notified the Respondent that the agreed monthly installment was not going to come on time since the anticipated payment from his customers had been delayed . The Applicant then requested for an additional sum of UGX. 6,500,000/= at an interest of 10% per month. This made the total principal outstanding UGX. 164,800,000/=.

When the Respondent contacted the Applicant to recover the outstanding sum, he instead wrote terminating the contract between the parties stating that he would clear the outstanding sums. This he failed to do and so the Respondent filed the suit.

That on 9th November 2016 the Advocate thought he was still within time. This was not true because in **paragraph d** of the Affidavit in support of the Application, the Applicant told court that he notified the Advocate on 28th October 2016. The Applicant was aware of the time spans because in **paragraph c** he stated that he was required to file the Application for leave to appear and defend the suit within 10 days.

So on Monday 31st October 2016 when he went to the Advocate's chamber he knew that the days remaining were no longer **10**. Furthermore, since the Advocate had been notified of the summons on 28th October 2016 he also knew that the remaining days were no longer **10**. So it is not true as the Applicant states in **paragraph "h"** of his affidavit that the Advocate was "under the mistaken belief that service of the same had been effected on 31st October 2016." It is also not true to say that "indeed as at 9th November 2016 when Misc. Application No. 1109 of 2016 was filed in court, Mr Mark Bara Shyaka honestly believed the same was still within the 10 days prescribed."

The foregoing averment in **paragraph (i)** is also therefore untrue. To compound the falsehood in the Applicant's affidavit, his advocate also deposed in paragraph 2 that on 28th October 2016 at 4:00pm the Applicant informed him that he had been served with summons in Summary suit. Further that he told the Applicant to see him on 31st October 2016 which the Applicant did.

He then in paragraph 7 stated;

"That at all material times, since the Applicant had not indicated the date he had received the summons in a specially endorsed Complaint, I was under a mistaken belief that service of the same had

been effected on 31st October 2016 the same day when the summons and summary Complaint were left with him.”

I find the foregoing paragraph very difficult to believe because, the same advocate in paragraph 3 of the same affidavit deposed that his client on the 28th of October 2016 informed him that he had been served with court process. In fact it is because of that reason that he told the Applicant to go and see him on 31st October 2016.

This Application is supported by the affidavit of the Applicant and that of his Advocate. Both affidavits are froth with falsehood. The ground for filing as given in the affidavit is false and cannot stand since both the advocate and his client were well aware of the date service of process was effected on the Applicant.

Inconsistencies and falsehood in affidavits cannot be ignored however minor since a sworn affidavit is not a document to be treated lightly. If it contains an obvious falsehood, then it naturally becomes suspect, *Bitaitana vs Kananura [1977] HCB 37*. The two affidavits supporting the Application in this instant case did not only contain obvious falsehood, but also that the falsehood was deliberate.

It is natural that under those circumstances, the Application those affidavits support is bound to fail, *Jetha Brothers Ltd vs Mbarara Municipal Council & 4 Others HCMA NO.31/2004*.

Since the affidavits in support of the Application are froth with falsehood, they are struck off the record.

The Application now without evidence cannot stand and is hereby dismissed with costs.

Dated at Kampala this 3rd day of September 2019

HON. JUSTICE DAVID. K. WANGUTUSI

JUDGE