

THE REPUBLIC OF UGANDA  
THE HIGH COURT OF UGANDA AT KAMPALA  
[COMMERCIAL COURT]  
M.A.No. 482 of 2020  
(Arising from Civil Suit No. 980 of 2011)

LYDIA NAIGA:.....:APPLICANT

VERSUS

ASK SERVICES LIMITED:.....:RESPONDENT

RULING

BEFORE: HON. JUSTICE DUNCAN GASWAGA

- [1] This is an application brought under, Section 98 CPA and Orders 36 r 11 and 52 r1,2 &3 CPR for orders that; the default judgment/decree in Civil Suit No. 980 and any attendant execution orders be set aside; that the applicant be allowed or be granted leave to file her written statement of defense so that the matter is heard interparte and the dispute is determined on the merits and that the costs of this application be in cause.
- [2] The grounds of this application are set out in the affidavit of **Lydia Naiga** and are that; *the applicant is not indebted to the respondent at all and she duly paid up and extinguished all liability by virtue of the acknowledgement dated 20/12/2019; that the applicant first learnt about the judgment on 15/07/2020 when she received a call from High Court informing her that there is imminent execution against her; that the trial court entered default judgment in error having been misled by the*

*respondent's lawyers that the applicant could not be served in the ordinary manner whereas not because the applicant and respondent's managing director Mr. Andrew Kavuma are relatives known to each other and he knows the applicant's permanent home address; that the applicant has a good defence having paid up all the debt which payment was acknowledged as full and final payment in writing; that the respondent is in illegal possession of the certificate of title, log book and cheques the same having been reported stolen and the applicant has a criminal case pending against the director's respondent; that the applicant has never had a contractual relationship with the respondent and the cheques in possession of the respondent have no variable consideration to be relied upon in maintaining an action in court; that this application has been brought without unreasonable delay and the applicant has the right to be heard ; that it is in the interest of justice that this honourable court sets aside the falsely applied for execution, and allows the applicant to file her written statement of defence so that the matter is heard and determined on its own merits*

- [3] This application raises one issue;
- (i) Whether this application raises sufficient cause to set aside judgment/decreed in Civil Suit No. 980 of 2019**
  - (ii) Whether the application raises triable issues for which the applicant should be granted leave to appear and defend Civil Suit 980 of 2018**
- [4] At the time of hearing this application, the applicant's lawyer sought leave from court to proceed ex-parte considering that the respondents had not appeared even after today's date was given in their presence

at the previous sitting. Leave was granted and the applicant proceeded ex parte.

[5] Counsel prayed that the default judgment entered vide Civil Suit No.980 of 2019 be set aside. He further prayed for leave to file a written statement of defence and have the matter heard interpartes. It was submitted that the applicant is not indebted to the respondent. That as per Order 5 rule 15 CPR the procedure of service of court process onto a party that cannot be found is given. That according to Order 5 rule 18 CPR, no due diligence was carried out before effecting service through the newspaper of Saturday 29/02/2020 Daily Monitor. That the case that was dismissed is Civil Suit 465 of 2018 does not exist. That they have Civil Suit 980 of 2020. It was argued that improper service of court process is a ground for setting aside ex-parte judgment as per Order 36 rule 11. Counsel further submitted that the applicant has a plausible defence having paid up the debt. There are therefore triable issues. Counsel concluded with prayers that the default judgment illegally entered is set aside and that the written statement of defence is filed and the matter determined interpartes on its merit.

[6] **Order 9 rule 6** of the Civil Procedure Rules stipulates *thus 'where the plaint is drawn claiming a liquidated demand and the defendant fails to file a defense, the court may, subject to rule 5 of this Order, pass judgment for any sum not exceeding the sum claimed in the plaint together with interest at the rate specified, if any, or if no rate is specified, at the rate of 8 percent per year to the date of judgment and costs.'* A default judgment may be entered under **Order 36** where the defendant fails to file a defense upon effective service or where the defendant fails to file an application for leave to appear and defend the

suit. Therefore, a judgment made under **Order 36** can be set aside under **Order 36 rule 11** which states 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 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.'*

- [7] **Order 5 rule 1(1)** of the Civil Procedure Rules is to the effect that *"when a suit has been duly instituted a summons may be issued to the defendant ordering him or her to file a defense within a time to be specified in the summons; or ordering him or her to appear and answer the claim on a day to be specified in the summons."* **Order 5 rule 10** of the Civil Procedure Rules provides for the fundamental rule of service of summons which is that *"wherever it is practicable, service shall be made on the defendant in person, unless he or she has an agent empowered to accept service, in which case service on the agent shall be sufficient."*
- [8] **Order 5 rule 15** is to the effect that; *"where the serving officer, after using all due and reasonable diligence, cannot find the defendant, or any person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued with a report endorsed on it or annexed to it stating that he or she has so affixed the copy, the circumstances in which he or she did so, and the name and address of*

*the person, if any, by whom the house was identified and in whose presence the copy was affixed. This should afterward be followed by an affidavit of service. However, **Order 5 rule 18** provides for the exception which stipulates that “where the court is satisfied that for any reason the summons cannot be served in the ordinary way, the court shall order substituted service in such a manner as it deems fit, the service can take the form of advertisement in newspapers or affixing a copy in some conspicuous place in court or part of his house or residence.”*

- [9] In the instant application, the applicant states in her affidavit that there were no attempts by the respondent to serve her with the court summons. That the respondent is well aware of the applicant’s permanent residence but that she is unaware of any attempts made to effect service of court process on her. In the case of **Omuchilo Vs Machiwa (1966) EA 229**, it was held that;

*“before service can be effected under order 5 rule 15, the process server must first use all and due reasonable diligence to find the defendant or any of the persons mentioned in rules 12 and 13 who include family members and if none can be found, then one can affix a copy of the summons on the premises.”*

- [10] What appears on the court record in the instant case is an affidavit of service for the substituted service. The respondent therein does not speak to earlier attempts to contact the applicant which would essentially amount to the due diligence required in matters of this nature. This therefore leaves court with one conclusion, that service

was not effectively done on the applicant which would warrant setting aside the judgment entered in Civil Suit No. 980 of 2020.

[11] **Order 36 rule 8 of the Civil Procedure Rules** provides for leave to appear and defend the suit which may be given conditionally or unconditionally, or subject to such terms as to the payment of money into court, giving security, or time or mode of trial or otherwise, as the court may think fit. In the case of **Miter Investments Ltd Vs. East African Portland Cement Co. Ltd, M.A No. 0336 of 2012** it was held that;

*“in order to avoid judgment being entered for the plaintiff, the defendant must show that there is a triable issue or that for some other reason, there ought to be a trial. Where the defendant raises a triable issue on his affidavit, he must not at this stage be shut out, and must have leave to defend, although his case may appear to be a weak one. On the other hand, mere denials of the plaintiff's case are insufficient. The defendant must clearly disclose the nature and extent of his defense in a clear language.”*

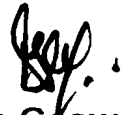
[12] From the facts stated above it is important to note that the applicant disputes the sums claimed in the specially endorsed plaint i.e Ugx 120,000,000/=. She on the other hand asserts that she cleared all her debt obligations with the respondent and presents evidence to support that. **(See Annexure ‘A’ to the affidavit in support of the application)** This then stands out as a triable issue that warrants the applicant being given a chance to file a written statement of defence so that the matter can be heard on its merits.

[13] In the circumstances therefore, this application is hereby allowed with the following orders;

- (i) the default judgment entered in Civil Suit No. 980 of 2019 is hereby set aside and the matter re-instated.
- (ii) the applicant is ordered to file a written statement of defence within fifteen days from now and serve the respondent as prescribed by law.
- (iii) costs shall be provided for.

I so order

Dated, signed and delivered this 03<sup>rd</sup> day of February 2021



Duncan Gaswaga

JUDGE